Quisumbing Torres.

Member Firm of Baker & McKenzie International

# Doing Business in the Philippines

2018

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# About Quisumbing Torres

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Established in 1963, Quisumbing Torres has been advising many of the most dynamic and successful business organizations in the Philippines and overseas for more than 50 years.

With a team of more than 50 Philippine lawyers, we are a full-service firm, advising clients in the Banking & Finance, Corporate & Commercial, Dispute Resolution, Employment, Immigration, Intellectual Property, and Tax practice areas.

Our lawyers specialize not only from the standpoint of the above practice areas but also from the perspective of industries, including:

- Consumer Goods & Retail
- Energy, Mining & Infrastructure
- Financial Institutions
- Healthcare
- Industrials, Manufacturing & Transportation
- Technology, Media & Telecommunications

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# I. Foreign investments in the Philippines

## 1. Doing business in the Philippines

The law that governs the participation of foreign entities in economic and commercial activities in the Philippines is Republic Act No. 7042 (**RA 7042**), as amended, otherwise known as the Foreign Investments Act of 1991 (**FIA**). Under the FIA, a foreign corporation that is doing business in the Philippines must obtain a license for this purpose from the Philippine Securities and Exchange Commission (**SEC**). The license must be obtained by registering a Philippine branch office or representative office of the foreign corporation with the SEC. In the alternative, the foreign corporation may incorporate a Philippine corporation and engage in business in the Philippines through the Philippine corporation.

A foreign corporation that is found to be doing business in the Philippines without a license or without setting up the appropriate local entity may be subject to the following consequences:

- It cannot sue or maintain suits to enforce its rights in Philippine courts but can be sued on any valid cause of action.
- It may be subject to a fine of not less than PHP 1,000 but not more than PHP 10,000, and/or imprisonment for not less than 30 days but not more than five years, in the discretion of the court. In the case of foreign corporations, the penalties are imposed on the directors and officers responsible for the violation, although we have rarely seen these fines imposed.

### 1.1. Acts that constitute “doing business”

The FIA includes the following activities among those that would constitute “doing business” in the Philippines:

- Soliciting orders, service contracts
- Opening offices, whether called “liaison” offices or branches
- Appointing representatives or distributors domiciled in the Philippines or who in any calendar year stay in the Philippines for a period or periods totaling 180 days or more
- Participating in the management, supervision or control of any domestic business, firm, entity or corporation in the Philippines
- Any other act or acts that imply a continuity of commercial dealings or arrangements, and contemplate to that extent the performance of acts or works, or the exercise of some of the functions normally incident to, and in progressive prosecution of, commercial gain or of the purpose and object of the business organization

### 1.2. Exceptions to “doing business”

The implementing rules and regulations of the FIA (**FIA IRR**) also provides for exceptions from the scope of the definition of “doing business.” Under the FIA IRR, “doing business” shall not be deemed to include the following:

- Mere investment as a shareholder by a foreign entity in domestic corporations duly registered to do business, and/or the exercise of rights as such investor
- Having a nominee director or officer to represent its interest in such corporation
- Appointing a representative or distributor domiciled in the Philippines who transacts business in the representative’s or distributor’s own name and account

- The publication of a general advertisement through any print or broadcast media
- Maintaining a stock of goods in the Philippines solely for the purpose of having the same processed by another entity in the Philippines
- Consignment by a foreign entity of equipment with a local company to be used in the processing of products for export
- Collecting information in the Philippines
- Performing services auxiliary to an existing isolated contract of sale that are not on a continuing basis, such as installing in the Philippines machinery it has manufactured or exported to the Philippines, servicing the same, training domestic workers to operate it, and similar incidental services

# 2. Foreign equity restrictions

## 2.1. General rule

The FIA provides the policy of the state to attract, promote and welcome productive investments from foreign individuals, partnerships, corporations and governments, including their political subdivisions, in activities that significantly contribute to national industrialization and socioeconomic development, to the extent that foreign investment is allowed in such activity by the Constitution and relevant laws.

To encourage foreign investments, Philippine laws expressly recognize various rights of foreign investors in the Philippines, including the right to repatriation of investments, the right to remittance of earnings and freedom from expropriation (except for public use or in the interest of national welfare or defense, and upon payment of just compensation).

Foreigners may hold interests in corporations, partnerships and other entities in the Philippines, provided that such corporations, partnerships and other entities are not engaged in an activity that is reserved by law only to Philippine citizens or to entities that are wholly owned by Philippine citizens. The maximum amount of foreign equity that is allowed in a company depends on the type of activity that the company is engaged in.

## 2.2. Extent of foreign equity in general enterprises

The FIA provides for the formulation of a Foreign Investment Negative List (**Negative List**), which is a list of economic activities where foreign equity is either prohibited or limited to a certain percentage. The Negative List has two component lists: List A and List B. List A contains areas of investment where foreign ownership is limited by mandate of the Philippine Constitution or by specific laws. List B contains areas of investment where foreign ownership is limited for reasons of security, defense, risk to health and morals, or protection of local small and medium-sized enterprises. A new Negative List is prospective in application and will not affect foreign investment that already exists on the date of its publication. Except with respect to activities where restrictions on foreign equity are imposed under the Philippine Constitution or statutes, the president of the Philippines may amend the Negative List. Such amendments may not be made more often than once every two years.

A non-Philippine national (please see the definition of Philippine national below) may invest in a domestic enterprise or an export enterprise (as these terms are defined below) in the Philippines up to the extent of 100% of the capital of the domestic enterprise or the export enterprise, provided that the following conditions are complied with:

(a) It is investing in a domestic market enterprise or an export enterprise that is engaged in an activity that is not on the Negative List.

A domestic market enterprise is an enterprise that produces goods for sale or renders services to the domestic market entirely, or if exporting a portion of its output, fails to consistently export at least 60% thereof. An export enterprise is a manufacturing, processing or service (including tourism) enterprise that exports 60% or more of its output, or a trader that purchases products domestically and exports 60% or more of such purchases.

(b) The country or state of the non-Philippine national must also allow Filipino citizens and corporations to do business therein.

(c) If the non-Philippine national is investing in a domestic market enterprise, the domestic enterprise must have a paid-in capital of the peso equivalent of at least USD 200,000. The capitalization requirements of a domestic market enterprise may be reduced to the peso equivalent of USD 100,000: (i) if its activity involves advanced technology as determined and certified by the Department of Science and Technology (**DOST**); or (ii) if it employs at least 50 direct employees as certified by the appropriate regional office of the Department of Labor and Employment (**DOLE**).

The FIA defines the term "Philippine national" as a citizen of the Philippines; or a domestic partnership or association wholly owned by citizens of the Philippines; or a corporation organized under the laws of the Philippines, of which at least 60% of the capital stock outstanding and entitled to vote is owned and held by citizens of the Philippines; or a corporation organized abroad and registered as doing business in the Philippines under the Corporation Code, of which 100% of the capital stock outstanding and entitled to vote is wholly owned by Filipinos; or a trustee of funds for pension or other employee retirement or separation benefits where the trustee is a Philippine national and at least 60% of the fund will accrue to the benefit of Philippine nationals. Where a stockholder-corporation and its non-Filipino stockholders own stocks in an enterprise registered with the SEC, at least 60% of the capital stock outstanding and entitled to vote of the stockholder-corporation and the enterprise registered with the SEC must be owned and held by citizens of the Philippines, and at least 60% of the members of the board of directors of both corporations must be citizens of the Philippines, in order that the enterprise registered with the SEC shall be considered a Philippine national.

## 2.3. Extent of foreign equity for particular activities

The Tenth Negative List, which is the current list and which took effect on 20 June 2015, provides for the list of activities that are subject to foreign equity restrictions, as follows:

No foreign equity

- Mass media, except recording
- The practice of the following professions: (a) pharmacy; (b) radiologic and x-ray technology; (c) criminology; (d) forestry; and (e) law[1]

[1] In previous Negative Lists, it was expressly provided that the practice of all professions was reserved exclusively to Filipinos. However, the current Negative List contains a footnote that provides as follows: "Foreigners are allowed to practice their professions in the Philippines provided their country allows Filipinos to be admitted to the practice of these professions: aeronautical engineering, agricultural engineering, chemical engineering, civil engineering, electrical engineering, electronics engineering, electronics technician, geodetic engineering, mechanical engineering, metallurgical engineering, mining engineering, naval architecture and marine engineering, sanitary engineering, medicine, medical technology, dentistry, midwifery, nursing, nutrition and dietetics, optometry, physical and occupational therapy, veterinary medicine, accountancy, architecture, chemistry, customs brokerage, environmental planning, geology, landscape architecture, librarianship, marine deck officers, marine engine officers, master plumbing, sugar technology, social work, teaching, agriculture, fisheries, guidance counseling, real estate service (real estate consultant, real estate appraiser, real estate assessor, real estate broker and real estate salesperson), respiratory therapy, psychology and interior design."
As of this writing, however, the Professional Regulation Commission (**PRC**), which is the Philippine government agency mandated by law with the regulation of a total of 43 professions, has yet to formalize its official position with respect to the aforementioned modification in the Negative List. Under very limited circumstances, the PRC allows foreigners to practice

- Retail trade enterprises with a paid-up capital of less than USD 2.5 million
- Cooperatives
- Private security agencies
- Small-scale mining
- Utilization of marine resources in archipelagic waters, territorial sea and exclusive economic zones, as well as small-scale utilization of natural resources in rivers, lakes, bays and lagoons
- Ownership, operation and management of cockpits
- Manufacture, repair, stockpiling and/or distribution of nuclear weapons, biological, chemical, and radiological weapons and anti-personnel mines
- Manufacture of firecrackers and other pyrotechnic devices

Up to 20% foreign equity

- Private radio communications network

Up to 25% foreign equity

- Private recruitment companies, whether for local or overseas employment
- Contracts for the construction and repair of locally funded public works, except infrastructure/development projects covered by Republic Act No. 7718 (**RA 7718**) and projects that are foreign-funded or assisted and required to undergo international competitive bidding
- Contracts for the construction of defense-related structures

Up to 30% foreign equity

- Advertising

Up to 40% foreign equity

- Exploration, development and utilization of natural resources
- Ownership of private lands
- Operation of public utilities
- Educational institutions other than those established by religious groups and mission boards
- Contracts for the supply of materials, goods and commodities to government-owned or controlled corporations, companies, agencies or municipal corporations
- Culture, production, milling, processing, trading (except retailing) and acquisition of rice and corn and the byproducts thereof
- Acting as facility operator of an infrastructure or a development facility requiring a public utility franchise

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certain professions in the Philippines, subject to securing a Special Temporary Permit also from the PRC. Such permits are normally valid for a limited period of only six months to one year.

- Ownership of condominium units where the common areas of the condominium project are co-owned by owners of the separate units or owned by a corporation
- Operation of deep-sea commercial fishing vessels
- Adjustment companies[2]
- Domestic market enterprises (i.e., entities that do not export 60% or more of their output) with a paid-in equity capital of less than the equivalent of USD 200,000
- Domestic market enterprises that involve advanced technology or employ at least 50 direct employees with paid-in equity capital of less than the equivalent of USD 100,000
- Manufacture, repair, storage, and/or distribution of products and/or ingredients requiring Philippine National Police (**PNP**) clearance, as follows: (a) firearms (handguns to shotguns), parts of firearms and ammunition therefor, instruments or implements used or intended to be used in the manufacture of firearms; (b) gunpowder; (c) dynamite; (d) blasting supplies; (e) ingredients used in making explosives; and (f) telescopic sights, sniper scope and other similar devices
- Manufacture, repair, storage and/or distribution of products requiring Department of National Defense (**DND**) clearance, as follows: (a) guns and ammunition for warfare; (b) military ordnance and parts thereof (e.g., torpedoes, depth charges, bombs, grenades, missiles); (c) gunnery, bombing and fire control systems and components; (d) guided missiles / missile systems and components; (e) tactical aircraft (fixed and rotary-winged), parts and components thereof; (f) space vehicles and component systems; (g) combat vessels (air, land and naval) and auxiliaries; (h) weapons repair and maintenance equipment; (i) military communications equipment; (j) night vision equipment; (k) stimulated coherent radiation devices, components and accessories; (l) armament training devices; and (m) others as may be determined by the Secretary of the DND
- Manufacture and distribution of dangerous drugs
- Sauna and steam bathhouses, massage clinics and other similar activities regulated by law because of risks posed to public health and morals
- All forms of gambling, except those covered by investment agreements with the Philippine Amusement and Gaming Corporation (**PAGCOR**)

Up to 49% Foreign Equity

- Lending companies regulated by the SEC[4]

Up to 60% Foreign Equity

- Financing companies regulated by the SEC[5]
- Investment houses regulated by the SEC[6]

Persons who will engage in construction activities in the Philippines are also required to obtain a license from the Philippine Contractors Accreditation Board (**PCAB**). Under the rules of the PCAB, as a general rule, the license is reserved for and issued only to Filipino sole proprietorships, partnerships or corporations with at least 60% Filipino equity participation, and duly organized and existing under and by virtue of the laws of the Philippines.

[2] Republic Act No. 10881 (**RA 10881**), which was approved on 17 July 2016, amended Presidential Decree No. 612 and lifted the nationality requirements for adjustment companies in the Philippines.

## 2.4. Recent developments relating to activities that are governed by nationality restrictions

In the landmark case of *Gamboa v. Finance Secretary*[3] (**Gamboa Case**), the Supreme Court ruled on the compliance by a public utility with applicable Filipino ownership requirements. Under the Constitution, a public utility is required to be at least 60% Filipino-owned. In defining the term "capital," the Supreme Court ruled that "the Constitution refers only to shares of stock that can vote in the election of directors" and that "capital refers to the voting stock or controlling interest of a corporation." In addition, the Supreme Court ruled that mere legal title is insufficient to meet the 60% Filipino-owned capital. Full beneficial ownership and voting rights by Filipinos over 60% of the outstanding capital stock must also be present.

Because the Constitution uses similar language in defining the foreign equity restrictions that apply to an operator of a public utility as it does for other activities that are subject to nationality restrictions under the Constitution, the aforementioned ruling in the Gamboa Case may be interpreted as applicable to corporations that are engaged in other activities that are also subject to nationality restrictions under the Constitution.

To implement the ruling and principles laid down in the Gamboa Case, the SEC issued Memorandum Circular No. 8, which provides for the guidelines on compliance with the Filipino-foreign ownership requirements by corporations engaged in nationalized and partly nationalized activities (**SEC Guidelines**).

Under the SEC Guidelines, all covered corporations are required to observe the constitutional or statutory ownership requirement. For purposes of determining compliance therewith, the required percentage of Filipino ownership shall be applied to the following:

(a) The total number of outstanding shares of stock entitled to vote in the election of directors

(b) The total number of outstanding shares of stock, whether or not entitled to vote in the election of directors

The SEC Guidelines apply to all corporations engaged in activities specifically reserved, wholly or partly, to Philippine nationals by existing laws. The SEC Guidelines direct all corporate secretaries to monitor and observe compliance with the provisions on ownership requirements provided in existing laws.

In the case of *Roy v. Herbosa* [4] (**Roy Case**), the Supreme Court, in confirming the rulings in the Gamboa Case and the validity of SEC Guidelines, clarified that there is no requirement to apply the prescribed minimum percentage of Filipino equity on each class of shares of a corporation engaged in a nationalized industry. Nonetheless, in the same case, the Supreme Court considered that such classification of shares should not be a means to give control to foreign nationals of the Philippine portion of the capital of the corporation.

## 2.5. Anti-Dummy Law

The Philippines has an Anti-Dummy Law (**ADL**), which applies to corporations engaged in partially nationalized activities that are subject to Filipino ownership requirement to the extent of at least 60% of the capital of the corporation.

Under the ADL, a person who has, in his or her name or under his or her control a right, franchise, privilege, property or business, the exercise or enjoyment of which is expressly reserved by law to Philippine citizens or to corporations or associations where at least 60% of the capital is owned by such citizens, is prohibited from: (a) permitting or allowing the use, exploitation or enjoyment of such

[3] GR No. 176579, 9 October 2012.
[4] G.R. No. 207246, 22 November 2016.

right, franchise, privilege, property or business by a person, corporation or association not possessing the qualifications prescribed by law; or (b) in any manner permitting or allowing any person not so qualified to intervene in the management, operation, administration or control of such right, franchise, privilege, property or business, whether as an officer, employee or laborer, with or without remuneration (except technical personnel whose employment may be specifically authorized by the Secretary of Justice). However, foreign nationals may serve as members of the board or governing body of corporations engaged in partially nationalized activities in a number proportionate to their actual and allowable equity in the company.

A violation of the ADL is punishable by imprisonment of not less than five but not more than 15 years and by a fine of not less than the value of the right, franchise or privilege, but in no case less than PHP 5,000. A corporation found to have committed a violation of the ADL shall, upon proper court proceedings, be dissolved. A person who knowingly aids, assists or abets in the planning, consummation or perpetration of any of the foregoing acts is also subject to the same penalties.

# II. Private company investments

## 1. Corporate vehicles

There are three general forms of business organizations in the Philippines: sole proprietorship, partnership and corporation (domestic or foreign).

### 1.1. Sole proprietorship

A sole proprietorship is a business owned and operated by a single natural person. The liability of the sole proprietor is unlimited, and the personality of the business enterprise is not distinct and separate from that of the owner.

### 1.2. Partnership

A partnership is created by virtue of a contract whereby two or more persons bind themselves to contribute money, property or industry to a common fund, with the intention of dividing the profits among themselves. The partnership has a juridical personality separate and distinct from that of each of the partners. However, generally, all partners are liable *pro rata*, with all their property and after all the partnership assets have been exhausted, for the contracts that may be entered into in the name and for the account of the partnership.

### 1.3. Domestic/foreign corporation

Subject to nationality requirements that may apply to particular areas of investment in the Philippines, as discussed earlier, Philippine law allows foreign investors to incorporate a domestic corporation, which is organized under Philippine law. It also allows foreign corporations to transact business in the Philippines as a branch or a representative office.

A domestic corporation may be incorporated as a joint venture with a local partner, or a wholly owned subsidiary of the foreign corporation.

Under Philippine law, a branch and a representative office of a foreign corporation are not separate legal entities from, but are mere extensions of, their head offices.

For reasons relating to the exercise of management powers and the extent of liability, among others, the corporation is generally the most preferred vehicle for investments in the Philippines among the various forms of business organizations. Foreign investors who wish to engage in a business that is not subject to nationality restrictions generally choose between establishing either a Philippine subsidiary or a Philippine branch office.

*Domestic corporation vs. branch*

Assuming that the proposed activity is not subject to any foreign equity limitation, a foreign investor may incorporate a domestic corporation, or register a branch of a foreign corporation in the Philippines. These two types of corporate vehicles have their relative advantages and disadvantages relating to, among others, the extent of liability of the parent company / head office, taxation and the administrative costs of maintaining the same.

If the proposed activity is subject to foreign equity limitations, a foreign investor will have to set up a domestic corporation with a Philippine national as a joint venture partner.

As discussed earlier, generally, corporations that are more than 40% foreign-owned, as well as branches of foreign corporations that are considered domestic market enterprises, must have a paid-in capital of at least USD 200,000. The paid-in capital requirement is reduced to USD 100,000 for domestic market enterprises whose activities involve advanced technology or which employ at least 50 direct employees.

Entities that qualify as export enterprises are not subject to any minimum paid-in capital requirement.

### *Representative office*

A foreign corporation may register a representative office in the Philippines for the purpose of dealing directly with the clients of its head office who are in the Philippines, and to undertake information dissemination and promotion of the company's products, including the conduct of quality control. A representative office may not derive income in the Philippines and is fully subsidized by its head office.

A representative office must have an initial inward remittance of USD 30,000 to fund its operations.

### *Regional or area headquarters*

A multinational company engaged in international trade may establish a regional or area headquarters in the Philippines to act as an administrative branch of the multinational company and to serve principally as a supervision, communications and coordination center for its subsidiaries, branches or affiliates in the Asia Pacific region and other foreign markets.

The regional or area headquarters may not earn or derive income in the Philippines. It may not participate, in any manner, in managing any subsidiary or branch office it may have in the Philippines; neither may it solicit or market goods or services, whether on behalf of its parent company or its branches, affiliates, subsidiaries or any other company.

Its expenses must be financed by the head office or parent company from external sources in an acceptable foreign currency. To fund its operations in the Philippines, its head office or parent company must initially remit into the Philippines at least USD 50,000 and thereafter, USD 50,000 annually.

### *Regional operating headquarters*

A multinational company may establish a regional operating headquarters (**ROHQ**) in the Philippines to service its own affiliates, subsidiaries or branches in the Philippines or in the Asia Pacific region and other foreign markets.

An ROHQ is allowed to derive income in the Philippines by performing any of the following qualifying services:

(a) General administration and planning

(b) Business planning and coordination

(c) Sourcing/procurement of raw materials and components

(d) Corporate finance advisory services

(e) Marketing control and sales promotion

(f) Training and personnel management

(g) Logistics services

(h) Research and development services and product development

(i) Technical support and maintenance

(j) Data processing and communication

(k) Business development

An ROHQ is prohibited from offering qualifying services to entities other than its affiliates, branches or subsidiaries, as declared in its registration with the SEC, nor shall it be allowed to solicit or market goods and services directly and indirectly, whether on behalf of its mother company, branches, affiliates, subsidiaries or any other company.

An ROHQ must initially remit into the Philippines at least USD 200,000.

### *Regional warehouses*

A multinational company organized and existing under any laws other than those of the Philippines that is engaged in international trade and supplies spare parts, components, semi-finished products and raw materials to its distributors or markets in the Asia Pacific area and other foreign areas, and which has established or will simultaneously establish a regional or area headquarters and/or regional operating headquarters in the Philippines, may also establish a regional warehouse or warehouses in special economic zones (**Ecozones**) in the Philippines after securing a license from the Philippine Economic Zone Authority (**PEZA**). With respect to regional warehouses located or to be located in Ecozones with special charters, such license shall be secured from the concerned Ecozone authorities (please refer to our discussion below on Ecozones). For existing regional warehouses, said license shall be secured from the Board of Investments (**BOI**), unless they choose to relocate inside Ecozones. The activities of the regional warehouse shall be limited to the following:

(a) Serving as a supply depot for the storage, deposit and safekeeping of its spare parts, components, semi-finished products and raw materials, including packing, covering, putting up, marking, labeling, and cutting or altering to customer's specification, mounting, and/or packaging into kits or marketable lots thereof; and filling up transactions and sales made by its head offices or parent companies

(b) Serving as a storage or warehouse of goods purchased locally by the home office of the multinational for export abroad

In addition to the foregoing, the regional warehouse may not directly engage in trade, directly solicit business, promote any sale, nor enter into any contract for the sale or disposition of goods in the Philippines.

## 2. Other regulatory approvals and registrations

Upon incorporation of a domestic corporation or registration of a foreign corporation with the SEC, it must comply with certain basic registration and licensing requirements with different government agencies. These post-registration requirements include obtaining a local business permit from the local government unit in which the corporation locates its offices, and certain registrations relating to tax, as well as those to be secured and applied from employee-welfare agencies.

In addition to the basic post-registration requirements, certain businesses in highly regulated industries may be subject to special licensing or registration requirements with the government agency having jurisdiction over such industry.

## 3. Corporate structure: Governance, corporate officers, stockholders

The Corporation Code of the Philippines (**Corporation Code**) governs the organization and corporate powers and authorities of a domestic corporation.

Under the Corporation Code, the powers of a stock corporation are generally exercised by the board of directors. Stock corporations must have at least five but not more than 15 directors, who are duly elected by the stockholders. Every director must hold at least one share of the capital of the corporation. A majority of the directors must be resident of the Philippines.

The Corporation Code provides that a stock corporation must have a president (who must be a director), a treasurer and a company secretary. Other officers may be elected, according to the by-laws of the corporation. No person may be president and secretary, or president and treasurer, at the same time.

While the powers of a corporation are vested in the board of directors, the approval of the following corporate acts requires stockholder approval:

- Amendment of the articles of incorporation
- Adoption and amendment of by-laws
- Sale, lease, exchange, mortgage, pledge or other disposition of all or substantially all of the corporate property
- Incurring, creating or increasing bonded indebtedness
- Increase or decrease of capital stock
- Merger or consolidation of the corporation with another corporation or other corporations
- Investment of corporate funds in another corporation or business in accordance with this Code
- Entering into a management contract
- Dissolution of the corporation

Foreign corporations doing business in the Philippines are required to designate a resident agent for the purpose of service of writs and other processes. A resident agent may be an individual or a Philippine corporation.

# III. Public company investments

Investments in public companies are subject to the same foreign equity restrictions as those applicable to private companies. In terms of corporate governance, they are subject to additional or stricter rules that are essentially intended to protect public investors.

## 1. Registration of securities

Under the Securities Regulation Code **(SRC**), as a rule, no securities shall be sold or offered for sale or distribution within the Philippines unless such securities shall have been registered with the SEC. By way of exception, registration of securities with the SEC is not required under any of the following circumstances, notwithstanding that the subject securities are sold or offered for sale or distribution within the Philippines:

- If the securities are of a class of securities that is exempt as listed in Section 9.1 of the SRC, including, among others: (i) any security issued or guaranteed by the government of any country with which the Philippines maintains diplomatic relations, or by any state, province or political subdivision thereof on the basis of reciprocity, provided that the SEC may require compliance with the form and content for disclosures the SEC may prescribe; (ii) any security or its derivatives the sale or transfer of which, by law, is under the supervision and regulation of the Office of the Insurance Commission, the Housing and Land Use Rule Regulatory Board or the Bureau of Internal Revenue; (ii) any security issued by a bank except its own shares of stock

- If the securities are to be offered or sold in a transaction that is exempt as listed in Section 10.1 of the SRC, including, among others: (i) the distribution by a corporation actively engaged in the business authorized by its articles of incorporation, of securities to its stockholders or other security holders as a stock dividend or other distribution out of surplus; (ii) the sale of capital stock of a corporation to its own stockholders exclusively, where no commission or other remuneration is paid or given directly or indirectly in connection with the sale of such capital stock; (iii) the sale of securities by an issuer to fewer than 20 persons in the Philippines during any 12-month period (private placement); and (iv) the sale of securities to any number of qualified buyers (as this term is defined in SRC rules)

- If the securities are to be offered or sold in a transaction that is not an exempt transaction under Section 10.1 but which transaction the SEC, pursuant to its power under Section 10.2 of the SRC, exempts from the registration requirement on the ground that the SEC finds that requiring registration is not necessary in the public interest or for the protection of the investors, such as by reason of the small amount involved or by the limited character of the offering

If the company intends to list the securities on the Philippine Stock Exchange (**PSE**), it must comply with the listing requirements under PSE rules.

## 2. Corporate structure: Governance, officers, stockholders

In addition to the corporate governance requirements that apply generally to all corporations doing business in the Philippines, public listed companies are subject to additional requirements under the Code of Corporate Governance for Publicly Listed Companies.

Below are some of the key features of the corporate governance framework for public companies:

- The board of directors is primarily responsible for governance of the company. It should be composed of a majority of non-executive directors who possess the necessary qualifications to effectively participate and help secure objective, independent judgment on corporate affairs

and to substantiate proper checks and balances. It should have at least two independent directors, or such number as to constitute at least one-third of the members of the board of directors, whichever is higher.

- A public company should have the following committees:
  - Audit Committee
  - Corporate Governance Committee
  - Board Risk Oversight Committee
  - Related Party Transaction Committee
- The board of directors should establish corporate disclosure policies and procedures to ensure a comprehensive, accurate, reliable and timely report to shareholders and other stakeholders that gives a fair and complete picture of a company's financial condition, results and business operations.
- The board must appoint a compliance officer, who shall be responsible for monitoring, reviewing, evaluating and ensuring the compliance by the company, its officers and directors with the relevant laws, rules and regulations, as well as all governance issuances of regulatory agencies and the Code of Corporate Governance for Publicly Listed Companies.
- The company should establish standards for the appropriate selection of an external auditor, and exercise effective oversight of the same to strengthen the external auditor's independence and enhance audit quality.
- The board of directors should oversee that an appropriate internal control system is in place, including setting up a mechanism for monitoring and managing potential conflicts of interest involving management, board members and shareholders.
- The board of directors should ensure that basic shareholder rights are disclosed in the Manual on Corporate Governance and on the company's website. It should encourage active shareholder participation.
- The board of directors should identify the company's various stakeholders and promote cooperation between them and the company in creating wealth, growth and sustainability.

## 3. Disclosure requirements

The SEC imposes disclosure requirements on public companies, as follows:

- Structured/regular continuing disclosure requirements, including submission of: (i) periodic and other reports; and (ii) beneficial ownership report
- Unstructured/current continuing disclosure requirements (relating to every material fact or event that occurs that would reasonably be expected to affect investors' decision in relation to the shares)

Structured disclosures are the periodic reportorial requirements of the SEC and the PSE. The purpose of the structured reports is to assure the public availability of continuing adequate information on publicly listed companies. These structured reports are generally intended to keep the information and documents filed with the SEC for the registration or listing of the securities reasonably current.

Unstructured disclosures are the reports on corporate developments to the investing public as they occur. The purpose of the unstructured disclosures is to update the investing public with any material

fact or event that occurs that would reasonably be expected to affect investors' decisions in relation to trading of the company's shares.

In addition, in the event a news report involving an alleged material event appears in the media, and such report would create public speculation if not officially denied or clarified by the issuer and the issuer has not yet submitted a current report therefor, the SEC may require the issuer to file such a report within the period prescribed in order to clarify the news report.

Public companies are also mandated to include all company disclosures in their company websites. The SRC imposes fines and penalties for public companies that fail to comply with disclosure requirements.

# IV. Incentives under special registrations

Qualified enterprises may register with the BOI under the Omnibus Investments Code (**OIC**) or with PEZA to avail of certain incentives. Investment opportunities in the Philippines have also been created by the Philippine government's conversion plan covering Clark Air Base, Subic Naval Base, Camp John Hay in Baguio City, and other former US military reservations as well as their extensions into Ecozones.

## 1. Omnibus Investments Code / 2017 IPP

The OIC, through tax incentives and other benefits, encourages investments in preferred areas of economic activity in the Investment Priorities Plan (**IPP**).

To qualify for registration and obtain incentives under the OIC, the following qualifications must be met:

(a) The applicant, if a natural person, must be a citizen of the Philippines, or in the case of a partnership or any other association organized under Philippine laws with at least 60% of its capital being owned and controlled by citizens of the Philippines, or in the case of a corporation or a cooperative organized under Philippine laws with at least 60% of its capital stock outstanding and entitled to vote being owned and held by Philippine nationals and at least 60% of its board of directors consisting of citizens of the Philippines. If the applicant does not possess the required degree of ownership by Philippine nationals, the following circumstances must be satisfactorily established:

(i) It proposes to engage in pioneer projects (please refer to the definition below), which, considering the nature and extent of capital requirements, processes, technical skills, and relative business risks involved, are, in the opinion of the BOI, of such a nature that the available measured capacity thereof cannot be readily and adequately filled by Philippine nationals; or where the applicant is exporting at least 70% of its total production.

(ii) It obligates itself to attain the status of a Philippine national within 30 years from the date of registration or within such longer period as the BOI may require, taking into account the export potential of the project. A registered enterprise that exports 100% of its total production need not comply with this requirement.

(iii) The pioneer area it will engage in is one that is not within the activities reserved by the Constitution or other laws of the Philippines to Philippine citizens or corporations owned and controlled by Philippine citizens.

(b) The applicant is proposing to engage in a preferred project listed or authorized in the current IPP within a reasonable time to be fixed by the BOI, or if not so listed, at least 50% of its total production is for export or it is an existing producer that will export part of production under such conditions and/or limited incentives as the BOI may determine; or the enterprise is engaged or proposing to engage in the sale abroad of export products bought by it from one or more export producers; or the enterprise is engaged or proposing to engage in rendering technical, professional or other services, or in exporting television and motion pictures, and musical recordings made or produced in the Philippines, either directly or through a registered trader.

(c) The applicant is capable of operating on a sound and efficient basis of contributing to the national development of the preferred area in particular and of the national economy in general.

An enterprise may apply for registration either as a pioneer or non-pioneer enterprise. A "pioneer enterprise" is a registered enterprise: (i) engaged in the manufacture, processing or production, and not merely in the assembly or packaging of goods, products, commodities or raw materials that have not been or are not being produced in the Philippines on a commercial scale; (ii) using a design, formula, scheme, method, process, or system of production or transformation of any element, substance or raw materials into another raw material or finished goods that are new and untried in the Philippines; (iii) engaged in the pursuit of agricultural, forestry and mining activities and/or services, including the industrial aspects of food processing whenever appropriate, predetermined by the BOI, in consultation with the appropriate department, to be feasible and highly essential to the attainment of the national goal, in relation to a declared specific national food and agricultural program for self-sufficiency and other social benefits of the project; or (iv) producing non-conventional fuels or manufacturing equipment that utilizes non-conventional sources of energy or using or converting to coal or other non-conventional sources of energy in its production, manufacturing or processing operations. Provided that, the final product in any of the foregoing instances involves or will involve substantial use and processing of domestic raw materials, whenever available, taking into account the risks and magnitude of investment.

The 2017 IPP, which took effect on 18 March 2017 and is the current IPP, reflects the current administration's orientation to boost growth in more micro, small and medium enterprises, and in innovation, health and environment-driven activities, while shifting investments to the countryside.

The 2017 IPP provides for the following preferred areas of investments that may be entitled to incentives:

## 1.1. Preferred activities

1.1.1. All qualified manufacturing activities, including agro-processing

1.1.2. Agriculture, fishery and forestry

1.1.3. Strategic services (including integrated circuit design; creative industries / knowledge-based services; maintenance, repair and overhaul (**MRO**) of aircraft; charging/refueling stations for alternative energy vehicles; industrial waste treatment; telecommunications; state-of-the-art engineering, procurement and construction (**EPC**))

1.1.4. Health care services, including drug rehabilitation centers

1.1.5. Mass housing

1.1.6. Infrastructure and logistics, including local government unit public-private partnerships (**LGU-PPPs**)

1.1.7. Innovation drivers (research and development activities; conduct of clinical trials (including drug trials); establishment of centers of excellence; business incubation hubs; fabrication laboratories; commercialization of new and emerging technologies and products of DOST or government-funded research and development)

1.1.8. Inclusive business models (covers business activities of medium and large enterprises in the agribusiness and tourism sectors that provide business opportunities to micro, small and medium enterprise as part of their value chains)

1.1.9. Environment or climate-change-related projects

1.1.10. Energy

## 1.2. Export activities

1.2.1. Production and manufacture of export products

1.2.2. Service exports

1.2.3. Activities in support of exporters

## 1.3. Special Laws

1.3.1. Industrial Tree Plantation (**P.D. 705**)

1.3.2. Mining (**R.A. 7942**) (limited to capital equipment incentive)

1.3.3. Publication or Printing of Books/Textbooks (**R.A. 8047**)

1.3.4. Refining, Storage, Marketing and Distribution of Petroleum Products (**R.A. 8479**)

1.3.5. Rehabilitation, Self-Development and Self-Reliance of Persons with Disability (**R.A. 7277**)

1.3.6. Renewable Energy (**R.A. 9513**)

1.3.7. Tourism (**R.A. 9593**)

## 1.4. Autonomous Region of Muslim Mindanao (**ARMM**) list

1.4.1. Export activities

(a) Export trade and service exporters

(b) Support activities for exporters

1.4.2. Agriculture, agribusiness/aquaculture and fishery

1.4.3. Basic industries

1.4.4. Infrastructure and services

1.4.5. Industrial service facilities

1.4.6. Engineering industries

1.4.7. Logistics

1.4.8. Brunei Darussalam-Indonesia-Malaysia-Philippines East ASEAN Growth Area (**BIMP-EAGA**)-related investment enterprises

1.4.9. Tourism

1.4.10. Health and education services and facilities

1.4.11. *Halal* industry

1.4.12. Banking, non-bank financial institutions and facilities

1.4.13. Energy

## 1.5. Incentives

An enterprise registered with the BOI enjoys the following tax and non-tax special incentives:

1.5.1. Tax incentives

(a) Income tax holiday (**ITH**), consisting of income tax exemption for six years from the start of commercial operations for pioneer firms, and four years for non-pioneer firms (may be

extended in certain instances and upon approval by the BOI, but may not be extended for more than eight years)

(b) For expanding firms, exemption from income taxes proportionate to their expansion for a period of three years from the start of commercial operations of the expansion

(c) Duty free importation of capital equipment, spare parts and accessories, subject to conditions

(d) For registered enterprises with bonded manufacturing warehouses, exemption from taxes and duties on the importation of supplies and spare parts for imported equipment and consigned equipment

(e) For the first five years from registration, an additional deduction from taxable income of 50% of the wages of additional skilled and unskilled workers in the direct labor force (granted only if the registered enterprise meets a prescribed capital-to-labor ratio and shall not be availed of simultaneously with the ITH)

(f) Exemptions from taxes and duties on the importation of breeding stocks and genetic materials within 10 years from the date of registration or commercial operation

(g) Tax credit for taxes and duties on raw materials, supplies and semi-manufactured products used for the manufacture of export products and forming part thereof

(h) Exemption from wharfage duties and any export tax, duty, impost and fees on exports by a registered enterprise of its non-traditional export products

(i) Exemption from local taxes for six years from the date of registration for pioneer enterprises, and four years for non-pioneer enterprises

1.5.2. Non-tax incentives

(a) Simplified customs procedures for the importation of equipment, spare parts, raw materials and supplies, and the export of processed products

(b) No restriction on the use of consigned equipment (re-export bond required)

(c) Employment of foreign nationals in supervisory, technical or advisory positions for five years from registration, extendible for limited periods (the president, general manager and treasurer (or their equivalent) of foreign-owned registered firms are not subject to the foregoing limitations)

(d) Privilege to operate bonded manufacturing/trading warehouses, subject to customs rules and regulations

1.5.3. Additional incentives

The following additional incentives are available to projects (excluding mining, forestry, and processing of minerals and forest products) located in less-developed areas:

(a) Double deduction from taxable income of 50% of the wages corresponding to the increment in the number of direct labor

(b) Deduction of the cost of necessary and major infrastructure works constructed

## 2. PEZA registration

To disperse industry and generate employment in non-urban areas, the government has established several Ecozones.

Enterprises may establish their businesses within an Ecozone and register with the PEZA as any of the following enterprises:

- Export manufacturing enterprise
- Information technology (**IT**) service export enterprise
- Tourism enterprise
- Medical tourism enterprise
- Agro-industrial export manufacturing enterprise
- Agro-industrial biofuel manufacturing enterprise
- Logistics and warehousing services enterprise
- Economic zone development and operation, such as:
    - Manufacturing economic zone
    - IT park
    - Tourism economic zone
    - Medical tourism economic zone
    - Agro-industrial economic zone
    - Retirement economic zone
- Facilities providers, such as:
    - Facilities for manufacturing enterprises
    - Facilities for IT enterprises
    - Retirement facilities
- Establishment, operation, and maintenance of light and power systems, and water supply and distribution systems inside Ecozones

An Ecozone manufacturing enterprise is an entity engaged in the assembly, manufacturing or processing activities resulting in the exportation of at least 70% of its production. “Manufacturing or processing” is the process by which raw materials or semi-finished materials are converted into a new product through a change in their physical, mechanical or electromagnetic characteristics and/or chemical properties. “Assembly” is the process by which semi-finished parts or materials are put together or combined to form a distinct product without substantially changing their physical or mechanical characteristics or electromagnetic and/or chemical properties.

An IT service export enterprise is a company operating or offering IT services, of which 70% of total revenues are derived from clients abroad. “IT Service Activities” are activities that involve the use of any IT software and/or system for value addition. Among the IT Service Activities eligible for incentives are IT-enabled services, such as business process outsourcing, call centers, data encoding, transcribing and processing; software development and application, including programming and adaptation of system software and middleware; and content development for multimedia or internet purposes.

# 3. Tax and other incentives

## 3.1. Enterprises registered with the Subic Bay Metropolitan Authority (**SBMA**)

The Subic Special Economic Zone (**SSEZ**) and Subic Free Port Zone (**SFZ**) were established by the Philippine government with the aim of developing the area into a self-sustaining industrial, commercial, financial and investment center in the Philippines. In addition, the SFZ was established to be operated and managed as a separate customs territory ensuring the free flow or movement of raw materials, capital, equipment and consumer items within, into and exported out of the SFZ.

The territory of the SSEZ includes the city of Olongapo and the municipality of Subic, and the former US Naval Base at Subic Bay as well as its extensions located in the municipalities of Hermosa and Morong in Bataan province. The SFZ is an area within the SSEZ that is fenced in and designated as a Freeport Zone.

A business enterprise may register as an Ecozone Enterprise in the SSEZ or a Freeport Enterprise in the SFZ with the SBMA.

An SSEZ Enterprise is a business entity located within the SSEZ that is duly registered with the SBMA to operate any lawful economic activity within the SSEZ. An SFZ Enterprise is a business entity located within the SFZ that is duly registered with the SBMA.

Registration as an SSEZ/SFZ Enterprise is open to any business enterprise in any area of economic activity, subject only to limitations under the Philippine Constitution.

As provided under the Rules and Regulations to Implement Republic Act No. 9400, an SSEZ Enterprise shall be entitled to the 5% special tax on gross income earned, in lieu of national and local taxes, while an SFZ Enterprise shall be entitled to: (i) tax- and duty-free importation within the SFZ; and (ii) 5% special tax on gross income earned, in lieu of national and local taxes.

## 3.2. Enterprises located in the Clark Special Economic Zone

The Clark Special Economic Zone (**CSEZ**) covers certain areas of Angeles City, the municipalities of Mabalacat and Porac in Pampanga province, and the municipalities of Capas and Bamban in Tarlac province.

In 2007, Republic Act No. 9400 (**RA 9400**) converted a portion of the CSEZ into a freeport zone called the Clark Freeport Zone. The Clark Freeport Zone is operated and managed as a separate customs territory, with the following incentives available to registered business enterprises located therein: (i) tax rate of 5% on gross income earned, in lieu of national and local taxes; and (ii) tax- and duty-free importation of raw materials and capital equipment. The government agency that registers enterprises and grants and administers incentives to those enterprises is the Bases Conversion and Development Authority (**BCDA**), with the Clark Development Corporation (**CDC**) as its implementing arm.

Under the Rules and Regulations to Implement Republic Act No. 9400, PEZA Ecozones may be created within the CSEZ. PEZA-registered enterprises located in PEZA Ecozones within the CSEZ are entitled to the same tax and duty incentives available to PEZA-registered enterprises located in other PEZA Ecozones. The government agency that registers enterprises and grants and administers incentives to those enterprises located in PEZA Ecozones within the CSEZ is the PEZA. The agency in charge of the development, operation, management and maintenance of the infrastructure, facilities and utilities in those PEZA Ecozones is the BCDA, with the CDC as its implementing arm.

# V. Foreign exchange controls

## 1. Foreign direct investments

Under the regulations issued by the Bangko Sentral ng Pilipinas (**BSP**, the Philippines' central bank), registration of foreign direct investments in the Philippines with the BSP is required if the investee firm intends to purchase foreign exchange from the Philippine banking system to fund the repatriation of capital and the remittance of profits, dividends and earnings that may accrue on such investments. The Philippine banking system consists of authorized agent banks and/or their subsidiaries or affiliates authorized to engage in foreign exchange operations.

In general, registration of foreign direct investments in the Philippines is evidenced by a Bangko Sentral Registration Document (**BSRD**). Registration is made by way of an application for such purpose filed with the BSP, accompanied by certain supporting documents, depending on the form of the investments sought to be registered (i.e., whether cash investments, investments in kind or investments of capitalized oil/gas/geothermal exploration expenditures).

Foreign direct investments may be in cash or in kind. To be eligible for registration with the BSP, foreign exchange funding for cash investments must be inwardly remitted to the Philippines (but need not be converted to Philippine peso). Assets eligible for registration as investment in kind include: (a) machinery and equipment; and (b) raw materials, supplies, spare parts and other items, including intangible assets, necessary for the operations of the investee firm.

As a rule, applications for the registration of foreign direct investments must be filed with the BSP within one year from the date of inward remittance of foreign exchange funding the investment (if the foreign direct investment is in cash) or the date of actual transfer of assets to the Philippines (if the foreign direct investment is in kind). If the foreign direct investment involves the transfer BSP-registered investment to another foreign investor and payment is made offshore in foreign exchange, the application for registration must be filed with the BSP within one year from the date of signing of the deed of sale/assignment covering the transfer.

## 2. Outward investments

BSP regulations allow residents to invest in: (a) debt and equity securities issued offshore by non-residents; (b) offshore foreign currency-denominated mutual funds and UITFs; (c) foreign currency-denominated intercompany loans to offshore parent companies/subsidiaries of residents with an original tenor of at least one year; (d) investments in real property abroad; and (e) foreign currency-denominated investment instruments issued onshore by non-residents without BSP approval, if such investments are funded by: (i) the resident's foreign currency deposit account; and/or (ii) foreign exchange of up to USD 60 million purchased from the Philippine banking system, per investor per year.

Qualified investors, such as insurance and pre-need companies, collective/pooled funds, public or private pension, or retirement or provident funds, may apply with the BSP for a higher annual investment limit.

## 3. Foreign loans (including shareholder advances)

Prior BSP approval and/or registration with the BSP of foreign loans is generally required to enable the borrower to purchase foreign exchange from the Philippine banking system to service payment of the principal and interest on foreign loans.

Subject to certain exceptions, private sector foreign loans that are not publicly guaranteed need not be submitted for BSP's prior approval but must be registered with the BSP if the borrower will need to

purchase foreign exchange from the Philippine banking system to repay the loan. Registration of the foreign loan is generally required to be undertaken promptly after drawdown, disbursement or utilization of such loan, and the borrower is likewise expected to provide the BSP with key information relating to the terms and conditions of the foreign loan.

As with registration of foreign direct investments in the Philippines, procuring prior BSP approval and/or registration, as applicable, of foreign loans is not mandatory. These approval and/or registration requirements apply only if the borrower intends to (or the lenders expect the borrower to) procure or purchase foreign exchange necessary to service payments on the foreign loan from the Philippine banking system.

# 4. Other types of transactions

## 4.1. Trade transactions

Under BSP regulations, provided that the subject of the importation is not a prohibited commodity and subject to compliance with the relevant guidelines of the BSP, residents are generally allowed to purchase foreign exchange from the Philippine banking system without prior BSP approval to fund payments for imports under certain arrangements. These arrangements include letters of credit, documents against payment, documents against acceptance, direct remittance, advance payment and open account (including intercompany netting arrangement among non-bank related parties).

For export trade transactions, payments for exports made under certain arrangements, such as letters of credit, documents against payment or cash against documents, documents against acceptance and open account arrangements, are generally allowed without prior BSP approval, provided that the subject of the exportation is not a prohibited commodity.

## 4.2. Non-trade transactions

Residents are generally allowed to purchase foreign exchange from the Philippine banking system without prior BSP approval if the foreign exchange will be used to fund payments to non-resident beneficiaries for non-trade transactions enumerated in the relevant regulations of the BSP, subject to submission of an application to purchase foreign exchange and documentary requirements to the selling bank.

# VI. Taxation

## 1. Corporate income tax

A domestic corporation is taxed on its net income (gross income less allowable deductions) from all sources at the rate of 30%. A resident foreign corporation, such as a branch, is taxed only on its net income from Philippine sources at the same rate as a domestic corporation.

A non-resident foreign corporation is subject to final withholding tax on its gross income (without the benefit of deductions) from Philippine sources at the rate of 30%.

A foreign corporation is considered a resident when it is engaged in trade or business in the Philippines and is licensed by the Philippine SEC to engage in trade or business in the Philippines.

## 2. Individual income tax

A resident citizen is taxed on income from all sources at progressive rates ranging from 0 to 35% of net taxable income.

A non-resident alien engaged in trade or business in the Philippines is generally subject to tax on net income from Philippine sources at the same progressive tax rates imposed on resident aliens and citizens. A non-resident alien is deemed engaged in trade or business if he or she stays in the Philippines for an aggregate period of more than 180 days during any calendar year.

A non-resident alien not engaged in trade or business in the Philippines is taxed on gross income from Philippine sources at the rate of 25%, withheld at source.

## 3. Value added tax

Value added tax (**VAT**) is a tax on consumption levied on the sale, barter, exchange or lease of goods or properties and services in the Philippines, and on the importation of goods into the Philippines.

A person becomes subject to the 12% VAT when his or her gross sales or receipts for the past 12 months exceed PHP 3 million.

A VAT taxpayer is allowed input VAT credits against his or her output VAT liability, subject to certain limitations.

## 4. Local and real property taxes

Local government units, such as provinces, cities, municipalities and barangays, may also levy taxes and impose local license fees pursuant to the Local Government Code. Furthermore, real property tax applied solely to the lands, buildings and other improvements thereon is levied on the assessed value of the real property.

## 5. Treaties

Currently, the Philippines has entered into tax treaties with 41 countries, namely: Australia, Austria, Bahrain, Bangladesh, Belgium, Brazil, Canada, the People's Republic of China, the Czech Republic, Denmark, Finland, France, Germany, Hungary, India, Indonesia, Israel, Italy, Japan, South Korea, Kuwait, Malaysia, Netherlands, New Zealand, Nigeria, Norway, Pakistan, Poland, Qatar, Romania, Russia, Singapore, Spain, Sweden, Switzerland, Thailand, Turkey, United Arab Emirates, the United Kingdom, USA and Vietnam.

# VII. Border control and customs regulations

## 1. Overview

In addition to the 12% VAT and any applicable excise tax, importations are generally subject to customs duties. The Customs Modernization Act provides for the imposition of anti-dumping duty, countervailing duty, marking duty, safeguard duty and discriminating duty under special circumstances.

The rules of the Bureau of Customs (**BOC**) on border control measures prevent the entry into the Philippines of infringing merchandise and ensure expedited procedures for the handling and disposition of goods suspected to be imported in violation of the Intellectual Property Code of the Philippines (**IP Code**).

The Strategic Trade and Management Act likewise provides a mechanism for trade control in the importation, exportation, re-exportation, reassignment, transit and transshipment of strategic goods, and the provision of related services.

Strategic goods are goods enumerated in the National Strategic Goods List, which has yet to be issued by the National Security Council - Strategic Trade Management Committee. These are products that, for security reasons or due to international agreements, are considered to be of such military importance that their export is either prohibited altogether or subject to specific conditions. Such goods are generally suitable to be used for military purposes or for the production of weapons of mass destruction.

Related services refer to brokering, financing and transporting in relation to the movement of strategic goods between two foreign countries, as well as to providing technical assistance.

## 2. Customs and trade agreements

The Philippines is a member of the Association of Southeast Nations (**ASEAN**) and is a signatory to the ASEAN Trade in Goods Agreement (previously referred to as the ASEAN Free Trade Area Common Effective Preferential Tariff Scheme), along with the other ASEAN member states. The ASEAN aims to eliminate all import duties among the member states.

In addition, as part of the ASEAN, the Philippines has existing FTAs with China (ASEAN-China), South Korea (ASEAN-Korea), Japan (ASEAN-Japan Comprehensive Economic Partnership), Australia and New Zealand (ASEAN-Australia and New Zealand), and India (ASEAN-India).

The Philippines signed a free trade agreement with the European Free Trade Association (**EFTA**) member states, Iceland, Liechtenstein, Norway and Switzerland, on 28 April 2016 . The parties are currently undertaking their respective domestic processes for the ratification and entry into force of the agreement.

## 3. Border control

The BOC, in the implementation of laws and regulations prohibiting the importation of goods that infringe upon IP rights, approved on 3 September 2002, Customs Administrative Order No. 6-2002 or the *Rules and Regulations Implementing the Intellectual Property Code of the Philippines in relation to Sections 51-60 of the TRIPS Agreement, amending for the purpose Customs Administrative Order (CAO) No. 7-93 on Customs Border Control*. The guidelines seek to enhance existing procedures to prevent the entry into the country of infringing merchandises and to ensure expedited procedures for the handling and disposition of goods suspected to be imported in violation of the IP Code.

IP holders may register their products covered by patents, trademarks, copyrights and other similarly protected IP rights with the Intellectual Property Rights Registry maintained by the BOC. The application for registration serves as the consent of the IP owner for the BOC to conduct a physical inspection of imports suspected to be infringing. The registration will be the basis of the BOC to monitor on its own initiative suspected imports to determine whether they are liable to seizure and forfeiture.

The BOC may also, on its own initiative, conduct random checks of goods suspected to infringe IP rights.

# VIII. Employment

## 1. Labor standards

The Labor Code of the Philippines (**Labor Code**) lays down the minimum terms, conditions and benefits of employment that employers must provide or comply with and to which the employees are entitled as a matter of right.

### 1.1. Work hours

1.1.1. Normal hours of work – The normal hours of work should not exceed eight hours in a work day. Employees are entitled to at least 60 minutes unpaid time off from work for their regular meals.

1.1.2. Overtime pay – Any work done in excess of eight hours in a work day must be paid overtime pay based on the applicable basic rate, unless there is compressed work week arrangement. The Labor Code enumerates the specific instances when an employee may be required to render overtime work and the corresponding overtime pay rate. These overtime pay rates may vary depending on whether the overtime work is rendered on a regular work day, holiday or rest day, or during a night shift.

1.1.3. Night shift differential – An employee must be paid a night shift differential equivalent to a certain rate of his or her regular wage for work done between 10 pm and 6 am.

1.1.4. Premium pay for rest day or holiday work – For work done on rest days and holidays, the Labor Code requires the employer to pay a certain amount as additional compensation based on the regular wage of the employee.

The rules on work hours are not applicable to managerial employees, among others.

### 1.2. Wages

Under the minimum wage law in the Philippines, there is a different minimum wage rate in each region of the country; the minimum wage rates are prescribed by the Regional Tripartite Wages and Productivity Boards.

Wages are generally paid in cash at least twice a month (usually on the 15th and the last day of every month).

### 1.3. Other Compulsory Benefits

- Holiday pay
- Service incentive leave
- Thirteenth month pay
- Retirement benefits
- Rest day
- Maternity leave
- Paternity leave
- Parental leave
- Leave due to domestic violence
- Leave following surgery caused by gynecological disorders
- Lactation break

### 1.4. Rule on non-diminution of employment benefits

If an employee benefit has been granted by reason of employer practice or policy, the benefit becomes part of the terms and conditions of employment and cannot be unilaterally withdrawn or discontinued by the employer, despite the absence of a legal or contractual requirement to grant the said benefit.

The following criteria may be used to ascertain the existence of a binding and enforceable employer practice or policy under Philippine law:

(a) The act of the employer has been done for a long period or is consistently repeated.

(b) The act is done deliberately, knowingly and consistently.

(c) The act is not a product of erroneous interpretation or construction of a doubtful or difficult question of law.

## 2. Labor relations

As a general rule, employees have the right to form and join unions and to engage in concerted activities for their collective protection. Certain classes of employees, however, such as managerial and confidential employees, may not form or become members of labor unions. A labor union has to be registered with the DOLE for it to enjoy all the rights granted by law to labor unions. It may register as an independent labor union or as a charter of a federation or national union.

Employees, through their union representatives, may negotiate with their employers and enter into collective bargaining agreements (**CBAs**) concerning the terms and conditions of their employment.

Employees, under specified circumstances, have the right to conduct a strike in accordance with law. Correspondingly, the employer, under specified circumstances, has the right to lock out employees.

Aside from labor unions, employees may form and join workers' associations and other mutual aid and benefit associations for legitimate purposes other than collective bargaining.

## 3. Welfare legislation

The employer and its employees are required to be members of the Social Security System (**SSS**), Employees' Compensation (**EC**) program, Philippine Health Insurance Corporation (**PhilHealth**) and Home Development Mutual Fund (**HDMF**). The SSS administers both the social security and EC programs for employees in the private sector.

The employer should register with the SSS, PhilHealth and HDMF and report its employees for coverage with the said agencies. Furthermore, the employer and its employees should contribute to these agencies, with the contributions based on the monthly compensation of the employees. Each agency has its own definition of monthly compensation. The employer is responsible for withholding and remitting the contributions of its employees, and remitting its (i.e., the employer's) counterpart contributions, within the period that each agency has set. The employers' contributions may not be deducted from the employees' salary. Failure to remit the contributions to the SSS, PhilHealth and HDMF could give rise not only to monetary liability for the employer but also to criminal sanctions against the employer and its officers. If a juridical person is guilty of the offense, its managing director, partner, president, general manager and/or the responsible person are liable for the penalties.

The monetary liability would involve interest on the contributions that have not been remitted, computed from the date the contributions fall due until they are remitted to the relevant agencies. On the other hand, the criminal sanctions would involve a fine or imprisonment or both.

## 4. Rights of employer

Every employer has the right to regulate all aspects of employment according to its own discretion and judgment. This includes the hiring of employees; work assignments; instructing working methods; the time, place and manner of work; work supervision; transfer of employees; lay-off of workers; and discipline, dismissal and recall of employees. The only limitations to the exercise of this management prerogative are those imposed by labor laws and the requirements of good faith.

With respect to the transfer of employees, the employer has the prerogative to move them around in order to ascertain where they will function with maximum benefit to the company. While an employee enjoys the right to security of tenure, this does not mean that he or she has such a vested right in his or her position as to deprive the company of its prerogative to change the employee's assignment or transfer him or her where he or she will be most useful to the company. However, the transfer must not be unreasonable, inconvenient or prejudicial to the employee; it should not involve a demotion in rank or a diminution of his or her salaries, benefits and other privileges.

The right to dismiss employees is discussed in further detail below.

## 5. Contract of employment

Although not generally required, it is best to put in writing the employment contract between the employer and the employee. This will protect the employer in the event of a future disagreement as to the terms and conditions of employment.

It is also advisable for the employer to have an employee handbook containing the rules and regulations that will govern the relationship with the employees.

## 6. Type of employment

The Labor Code and jurisprudence classify employment status into regular, project, seasonal, casual, probationary and fixed-term.

The employment status of an employee is not determined by the specific designation given to it in the employment contract but by the nature of the work being performed by the employee.

An employment is presumed to be regular or permanent in nature, unless the legal requirements for the other types of employment are strictly observed. For instance, a probationary employee must be provided with written standards for regular employment no later than the start of his or her employment. Otherwise, he or she shall be deemed a regular employee from the start of his or her employment.

The classification of an employee is important because under Philippine law, the causes for terminating an employer-employee relationship will depend upon the classification of the employee.

### *Regular and probationary employment*

If an individual is engaged to perform activities that are usually necessary or desirable in the usual business or trade of the employer, he or she should be employed as a regular employee (i.e., an employee with indefinite term of employment), unless the employment relationship can qualify as an alternative employment arrangement.

In this connection, before an employee becomes a regular employee, his or her employer can require him or her to undergo probationary employment. The maximum length of the probationary period is six months, counted from the date the new employee started working. The employer normally may not extend the probationary period. Once the new employee is allowed to work after the lapse of the probationary period, his or her employment will be deemed regular employment by operation of law.

Also, at or before the beginning of the probationary period, the employer must notify the employee of the standards that he or she must satisfy. Otherwise, the employment will also be deemed regular employment from the time the employee started working.

### *Project and seasonal employment*

There is project employment when the period of employment has been fixed for a specific undertaking, the completion of which has been determined at the time of the engagement of the employee. A project employee may acquire the status of a regular employee when he or she is continuously rehired after the cessation of a project and the tasks he or she performs are vital, necessary and indispensable to the usual business or trade of his or her employer.

In contrast, there is seasonal employment when the work is to be performed only at a certain time of the year and the employment is for the duration of that time of the year.

### *Casual employment*

There is casual employment when an employee is engaged to perform work that is merely incidental to the business of the employer, and such work is for a definite period made known to the employee at the time of his or her engagement. If the casual employee renders at least one year of service, whether such service is continuous or not, he or she shall be considered a regular employee with respect to the activity for which he or she is employed, and his or her employment shall continue while such activity exists.

### *Fixed-period employment*

There is fixed-period employment when the commencement and termination dates of the employment relationship have been set before the employment relationship begins. Fixed-period employment is highly restricted and is subject to the following criteria: (i) the fixed period of employment was knowingly and voluntarily agreed upon by the parties without any force, duress or improper pressure being brought to bear upon the employee and absent any other circumstances vitiating his or her consent; or (ii) it satisfactorily appears that the employer and the employee dealt with each other on more or less equal terms, with no dominance exercised by the former over the latter. As much as possible, fixed-period employment should involve highly educated people or highly technical positions.

## 7. Termination of employment

Corollary to the employer's right to hire, terminate and discipline employees is the employee's right to security of tenure.

In general, an employer may terminate an employment only if there is a legal (i.e., just or authorized) cause for termination and it has followed the procedures required for the cause of termination. At-will employment, where the employer may dismiss an employee at any time, without cause and by mere notice or salary in lieu of notice, is not allowed under Philippine labor law.

On the other hand, an employee may terminate his or her employment for any reason by serving a written notice to his or her employer at least one month in advance. In the event that the employee does not give any notice, the employer may hold the employee liable for damages. Under certain instances, the employee may terminate his or her employment without need of any notice.

### *Causes for dismissal*

An employer may terminate an employment for any of the just and authorized causes defined in the Labor Code. The just causes for termination of employment are as follows:

- Serious misconduct or willful disobedience by the employee of the lawful orders of his or her employer or representative in connection with his or her work
- Gross and habitual neglect by the employee of his or her duties
- Fraud or willful breach by the employee of the trust reposed in him or her by his or her employer or duly authorized representative
- Commission of a crime or offense by the employee against the person of his or her employer or any immediate member of his or her family or his or her duly authorized representative
- Other causes analogous to the foregoing

On the other hand, the authorized causes for termination of employment are as follows:

- Installation of labor-saving devices
- Redundancy
- Retrenchment to prevent losses
- Closing or cessation of operation of the establishment or undertaking
- Disease, where the continued employment of the afflicted employee is prohibited by law or is prejudicial to his health as well as to the health of his co-employees

Termination of employment by the employer without a legal cause will entitle the illegally dismissed employee to reinstatement without loss of seniority rights and other privileges, to payment of full back wages and of other benefits or their monetary equivalent computed from the time compensation was withheld until actual reinstatement, and to payment of damages.

### *Procedures for dismissal*

In dismissing an employee from work due to a just cause, the Labor Code requires the employer to serve a written notice to the employee informing him or her of the charges against him or her. After serving the notice, the employer must afford the employee an opportunity to be heard where the employee can answer the charges with the assistance of counsel, if he or she so desires. If the employer decides to dismiss the employee, it must serve another written notice to the employee to inform him or her of its decision to dismiss him or her.

In the case of termination of employment due to an authorized cause, the employer must serve a written notice to each affected employee and to the DOLE at least one month before the intended effective date of the termination. For employment termination by reason of disease, there must also be a certification by a competent public health authority that the disease cannot be cured within a period of six months even with proper medical treatment. In all cases of authorized cause employment termination, the employee is entitled to receive separation pay. The separation pay is equivalent to half-month's salary for every year of service or one-month's salary for every year of service, depending on the authorized cause of employment termination.

If an employee is dismissed without his employer observing the appropriate procedures, he or she is entitled to nominal damages the amount of which is subject to the discretion of the court, even if there is a just or authorized cause for employment termination. For this purpose, the court will take into consideration the relevant circumstances of each case, particularly the gravity of the due process

violation. The nominal damage serves as a penalty upon the employer for its failure to comply with the requirements of procedural due process for employment termination.

# IX. Immigration

## 1. Entry to the Philippines

A foreign national who is not a "restricted" national[5] may enter the Philippines without obtaining an entry (9[a]) business visa from the Philippine Embassy from the country of origin. However, the said unrestricted foreign national must, upon entry: (a) have a passport valid for not less than six months; and (b) hold a valid return ticket. Upon arrival in the Philippines, the foreign national will be granted a 9(a) visa, valid for 30, 21, 14, or 7 days, depending on his or her nationality.

If the foreigner is a "restricted" national, he or she must, in addition to the passport and return ticket requirements, obtain from the Philippine embassy or consulate in his country of origin or residence a 9(a) visa before entering the country.

## 2. Work/employment requirements

All foreign nationals who intend to work in the Philippines are required to obtain proper work visas and/or permits, through a local petitioner or sponsor. The local petitioner or sponsor may be a domestic corporation (incorporated in the Philippines) or a foreign corporation registered and licensed to do business in the Philippines. The work visa and/or permit applications are usually filed upon the arrival of the foreign national in the Philippines.

Entities engaged in nationalized or partly nationalized industries (industries where foreign ownership/control is limited) can only employ foreign nationals as technical personnel and subject to issuance by the Department of Justice (**DOJ**) of an Authority to Employ. The issuance of an Authority to Employ is required before a foreign national can work for a partly-nationalized entity.

### 2.1. Short-term assignments (3-6 months)

A foreign national who: (a) intends to work in the Philippines for a short period not exceeding six months; and (b) will occupy a temporary position, is required by the Bureau of Immigration (**BI**) to obtain a special work permit (**SWP**). The SWP is a special permit issued for an initial period of three months and may be extended only once for another three months. The SWP must be filed by a local petitioner or sponsor on behalf of the foreign national, upon the latter's arrival in the Philippines.

### 2.2. Long-term expatriates, and/or local transfer

#### Alien employment permit (AEP)

A foreign national who intends to work in the Philippines beyond six months is required to obtain an AEP and a work visa from the relevant government agencies.

The issuance of an AEP is subject to the non-availability of a person in the Philippines who is competent, able and willing to perform the services for which the foreign national is desired. In general, the AEP application must first be filed with the DOLE on behalf of the foreign national.

It takes around two to three weeks from submission of the complete documentary requirements to process the AEP application. The validity period of the AEP usually coincides with the duration of the foreign national's assignment in the Philippines.

[5] A Department of Foreign Affairs (**DFA**) advisory enumerates the countries whose nationals are not required to obtain an entry or 9(a) visa from the Philippine embassy/consulate abroad before entering the country. These nationals are called "unrestricted" nationals. Nationals of countries not appearing in the DFA advisory are called "restricted" nationals and are required to obtain a 9(a) visa from the relevant Philippine embassy/consulate prior to entering the Philippines. For further information, please visit the DFA's website at www.dfa.gov.ph.

There are certain instances when a foreign national is exempt/excluded from securing an AEP, such as when the foreign national is: (a) a corporate officer, such as president, secretary or treasurer under the Corporation Code and the articles of incorporation and by-laws of the corporation; (b) an intra-corporate transferee who is a manager, executive or specialist who is an employee of the foreign service supplier for at least one year prior to deployment to a branch/subsidiary/affiliate or representative office in the Philippines; and (c) a consultant who does not have an employer in the Philippines.

The AEP application, once accepted for filing by the DOLE, does not allow a foreign national to work immediately. A provisional work permit will have to be applied for and issued before the foreign national can commence work with the Philippine employer during the pendency of the work visa and AEP applications.

### Work visas

2.2.1. The most common types of work visas that may be obtained are the following:

(a) *Pre-arranged employment or 9(g) Visa* - This visa is available to a foreign national who is proceeding to the Philippines to engage in a lawful occupation or gainful employment in a Philippine entity. The 9(g) visa may be extended to the foreign national's spouse and unmarried children under 21 years of age.

The 9(g) visa is granted for a period coterminous with the AEP, which is in turn granted for a period discretionary to the DOLE, usually based on the duration of the assignment of the foreigner. However, the officers of the BI have the discretion to shorten the validity period of the approved pre-arranged employment visa to one year.

It takes approximately two to three months from submission of the complete documentary requirements to process a 9(g) visa application.

(b) *Treaty Trader's/Investor or 9(d) Visa* - A foreigner is entitled to a treaty trader or investor visa only if he or she is a national of the US, Germany or Japan — countries with which the Philippines has concluded a reciprocal agreement for the admission of treaty traders or investors. The local petitioning company must be majority-owned by US, German or Japanese interests. The nationality of the foreigner and the majority of the shareholders of the employer company must be the same.

When granted, the visa may be extended to the foreigner's spouse and unmarried children below 21 years of age.

The treaty trader's/investor's visa is granted for a period coterminous with the AEP, which is in turn granted for a period discretionary to the DOLE, usually based on the duration of the assignment of the foreigner. However, the officers of the BI have the discretion to shorten the validity period of the approved 9(d) visa to one year.

It takes approximately two to three months from submission of the complete documentary requirements to process a 9(d) visa application.

(c) *Special non-immigrant (47[a][2]) Visa* - This visa is granted under Section 47(a)(2) of the Philippine Immigration Act, which allows the president to issue such visas when public interest warrants, subject to conditions the president may prescribe.

The president, acting through the appropriate government agencies, has exercised this authority to allow foreign nationals to be employed in supervisory, technical or advisory positions in Export Processing Zone Enterprises, BOI-registered enterprises, and special government projects (e.g., MRT, Skyway).

The 47(a)(2) visa may be extended to the foreign national's spouse and unmarried children under 21 years of age.

The 47(a)(2) visa is generally valid for an initial period of one year and is renewable from year to year.

It takes approximately five to six weeks from submission of the complete documentary requirements to process a 47(a)(2) visa application.

2.2.2. Special types of work visas are the following:

(a) *OBU or PD1034 Visa* - This visa is granted under Section 7 of Presidential Decree No. 1034, which allows foreign personnel to be assigned by any foreign bank to work in its OBU in the Philippines. Such foreign personnel, their spouses and unmarried children under 21 years of age shall be granted multiple entry special visa, valid for a period of one year.

(b) *Regional or Area Headquarters, Regional Operating Headquarters, and Regional Warehouse or RA8756 Visa* - This visa is granted under Section 5, Article 60 of Republic Act No. 8756, which allows foreign personnel of regional or area headquarters and regional operating headquarters of multinational companies, their respective spouses and unmarried children under 21 years of age, if accompanying them or if following to join them after their admission into the Philippines as non-immigrants, to be issued multiple-entry special visa, which shall be valid for a period of three years. Please note, however, that the validity period of the visa may be shorter, depending on the contract of the foreign personnel.

(c) *Subic Free Port Zone Work Visa* - A foreign national who possesses executive or highly technical skills, which no Filipino citizen within the SFZ possesses, as certified by the DOLE, may apply for this visa with the SBMA.

(d) *Clark Special Economic Zone Work Visa* - Foreign nationals who possess executive or highly technical skills, which no Filipino citizen within the CSEZ possesses, may apply for this type of work visa with the Clark Development Authority.

## 3. Special resident visas

A foreigner may apply for special resident visas. These visas allow a foreigner to work in the Philippines, subject to other requirements or limitations imposed by law.

The following are the different types of special resident visas:

(a) *Special Resident Retiree's Visa (SRRV)* - The SRRV program is available to foreigners and former Filipinos at least 35 years of age, who deposit the minimum amount required by law with a bank accredited by the Philippine Retirement Authority (**PRA**).

An SRRV holder may stay in the Philippines indefinitely or visit the country at any time.

The holder may also invest in any of the areas specifically designated by the PRA.

(b) *Special Investor's Resident Visa (SIRV)* - The SIRV is a program offered by the Philippine government to alien investors wanting to obtain a special resident status with multiple entries for as long as the required investment subsists.

The applicant's spouse and unmarried children under 21 years of age who are accompanying the applicant, may be included in the visa application.

(c) *SIRV for Investors in Tourist-Related Projects and Tourist Establishments* - A foreigner who invests an amount of at least USD 50,000 in a qualified tourist-related project or tourism establishment, as determined by a governmental committee, shall be entitled to an SIRV.

(d) *Subic Free Port Zone Residency Visas for Retirees* - This visa requires the applicant to be over 60 years old, of good moral character, with no previous conviction of a crime involving moral turpitude, no longer employed or not self-employed, and receiving a pension or passive income exceeding USD 50,000 per year.

(e) *Quota Visa* - This is issued on "quota basis" (i.e., not more than 50 in a calendar year) to foreign nationals of countries that have reciprocity agreements with the Philippines.

## 4. Others

There are other types of visas that are available to foreign nationals depending on the following factors: (i) nature of the business, registration and corporate structure of the Philippine company; (ii) nature of the work that the foreign nationals will perform while in the Philippines; (iii) nationality of the majority stockholder of the corporation; (iv) nationality (original and/or acquired), as well as nationality of the spouses, if any, of the foreign nationals; and (iv) other related information.

# X. Intellectual property

## 1. Overview

A wide range of industries are dealing with and affected by various intellectual property (**IP**) issues and concerns.

Local laws and regulations — particularly Republic Act No. 8293 or the IP Code, which took effect on 1 January 1998, as well as its implementing rules and regulations and other issuances of the Intellectual Property Office (**IPO**) — generally provide basis for the protection and enforcement of IP rights. The IP Code and the relevant regulations also incorporate and reinforce the Philippines' commitments under various international treaties and agreements, such as the Paris Convention for the Protection of Industrial Property, the Berne Convention for the Protection of Literary and Artistic Works, the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (**Madrid Protocol**), and the General Agreement on Tariffs and Trade (**GATT**) Uruguay Round, particularly the Agreement on the Trade Related Aspects of Intellectual Property Rights (**TRIPS Agreement**).

## 2. Types of IP rights

Under the IP Code, the term "IP rights" consists of the following:

### 2.1. Copyright and related rights

Literary, scholarly, scientific and artistic works, whether published or unpublished, may be copyrighted. Copyright protection extends to computer programs, multimedia works and databases that are original by reason of the selection, coordination or arrangement of their contents.

In general, copyrights endure for the lifetime of the creator and for 50 years after his or her death.

The IPO processes applications for copyrighted works and issues the corresponding certificates of registration. Copyrighted works are deposited with the National Library (and the Supreme Court Library for copyrighted works in the field of law).

### 2.2. Trademarks and service marks

Trademarks, service marks and trade names owned by persons, corporations, partnerships or associations domiciled in the Philippines or in any foreign country may be registered with the IPO. Kindly note, however, that trade names are protected even prior to or without registration.

Rights to a mark are acquired by registration. Priority is given to whoever applies first for registration. There is a single procedure for both foreign and local applicants for the registration of marks.

Trademark registration is valid for 10 years. The registration may be renewed for a period of 10 years, and for subsequent 10-year periods.

In order to maintain the registration, Declarations of Actual Use (**DAUs**) and evidence of use must be filed within the following timeframes:

- Three years from the filing date of the trademark application
- One year from the fifth anniversary of the registration
- One year from the date of renewal of the registration

In the event that the applicant or registrant has valid reasons that prevent it from using the mark commercially, a Declaration of Non-Use may be filed in lieu of a DAU, with proof of reasons that

must be beyond the control of the applicant or registrant. Justifiable reasons include a requirement imposed by another government agency; an existing restraining or injunctive order issued by a court of competent jurisdiction, the IPO or another quasi-judicial body; or if the mark is subject of an opposition or cancellation case.

## 2.3. Geographic indications

The IP Code does not specifically define a geographic indication (**GI**), and the IPO has not yet promulgated any rules regarding the same. The definition of the World Intellectual Property Organization (**WIPO**), however, may be used to define a GI, which is a sign used on products that have a specific geographical origin and possess qualities or a reputation that are due to that origin. In order to function as a GI, a sign must identify a product as originating in a given place. In addition, the qualities, characteristics or reputation of the product should be essentially due to the place of origin. Since the qualities depend on the geographical place of production, there is a clear link between the product and its original place of production.

## 2.4. Industrial designs

An industrial design is any composition of lines or colors or any three-dimensional form, whether or not associated with lines or colors, provided that such composition or form gives a special appearance to and can serve as pattern for an industrial product or handicraft. To be registrable, an industrial design must be a new or original creation relating to the ornamental features of shape, configuration, form, or a combination thereof, of an article of manufacture, whether or not associated with lines, patterns or colors, which imparts an aesthetic and pleasing appearance to the article. Furthermore, a design that is embodied in any composition of lines, patterns or colors must be inseparable from the article and cannot exist alone merely as a scheme of surface ornamentation.

The IP Code provides that industrial designs that are either dictated essentially by technical or functional considerations to obtain a technical result, or those that are contrary to public order, health and morals, are not registrable.

The term of registration of an industrial design is five years from the effective date of filing. Such term may be renewed for not more than two consecutive periods of five years.

## 2.5. Patents

The IP Code defines a “patentable invention” as any technical solution of a problem in any field of human activity that has the following qualities:

- New
- Involves an inventive step
- Industrially applicable

An invention is not considered new if it forms part of a prior art.

An invention involves an inventive step if, having regard to the prior art, it is not obvious to a person skilled in the art at the time of either the filing or priority date of the application claiming the invention. In the case of drugs and medicines, there is no inventive step if the invention results from the mere discovery of a new form or new property of a known substance that does not result in the enhancement of the known efficacy of that substance, or the mere discovery of any new property or new use for a known substance, or the mere use of a known process, unless such known process results in a new product that employs at least one new reactant.

An invention that can be produced and used in any industry is industrially applicable.

A patent registration for an invention is valid for 20 years from the date of filing of the application, subject to the payment of an annual fee starting from the expiration of four years from the date of publication of the application.

## 2.6. Utility models

Under the IP Code, the provisions governing patents generally apply, mutatis mutandis, to the registration of utility models. Regulations define a utility model as "any technical solution of a problem in any field of human activity which is new and industrially applicable." To be registrable, therefore, a utility model must be new and industrially applicable only. The inventive step is not a requirement.

The term of registration of a utility model is seven years, counting from the effective date of filing of the application and automatically expires at the end of the period. There is no opportunity for renewal of a utility model registration.

At any time before the grant or refusal of a patent, an applicant for a patent may, upon payment of a prescribed fee, convert such into an application for registration of a utility model, and vice versa.

Such converted application shall be accorded the effective filing date of the initial application. An application may only be converted once. Furthermore, parallel applications, or those involving the same subject filed as both a patent and utility model, are not allowed by the IP Code.

## 2.7. Layout-designs (topographies) of integrated circuits

Layout-design is synonymous with "topography" and means the three-dimensional disposition, however expressed, of the elements, at least one of which is an active element, and of some or all of the interconnections of an integrated circuit, or such a three-dimensional disposition prepared for an integrated circuit intended for manufacture.

Republic Act No. 9150, entitled An Act Providing for the Protection of Layout-Designs (Topographies) of Integrated Circuits amends certain sections of the IP Code. Its provisions aim to conform to the internationally acceptable standards for the protection of layout designs of integrated circuits. Notable provisions of the law include the requisites for registrability of the layout designs, the first-to-file rule and remedies for infringement. In order to be registrable, a layout design of integrated circuits must be original, that is, the result of the creator's own intellectual effort and is not commonplace among creators of layout designs and manufacturers of integrated circuits at the time of its creation. A layout design consisting of a combination of elements and interconnections that are commonplace shall be registered only if the combination, taken as a whole, is original.

The term of registration of a layout design is 10 years from the date of first commercial exploitation or from the date of filing the application for registration, if not previously exploited commercially. Such term may not be renewed.

Inventions, utility models and industrial designs (including topographies of integrated circuits) may be patented. A patent is granted to the inventor who filed his or her patent application earlier than others, thus simplifying the determination of who is entitled to own the patent.

A registration for a utility model is valid for seven years from the date of filing of the application and automatically expires at the end of the period. The term of registration of an industrial design is five years from the date of filing and may be renewed for two consecutive periods of five years each.

## 2.8. Protection of undisclosed information

There is no specific law in the Philippines governing trade secrets, although the IP Code recognizes the protection of undisclosed information as an independent IP right. Trade secrets and other confidential commercial information may be protected by contract. There are also some laws in the

Philippines providing for protection of confidential information, such as the Revised Penal Code, which prohibits the unauthorized revelation of secrets or confidential information by either private individuals or public officers, and the Food and Drug Act, which prohibits the unwarranted use or revelation of confidential or undisclosed information, including confidential data consisting of the active ingredient(s), formulation, dosages, clinical data, etc., from the registration files of an innovative drug submitted for purposes of obtaining marketing approval from the Food and Drug Administration (**FDA**).

Furthermore, the TRIPS Agreement, to which the Philippines is a signatory, requires member states to protect against disclosure and unfair commercial use of undisclosed data submitted by the originator/innovator in the process of securing approval for the marketing of pharmaceutical or of agricultural chemical products that utilize new chemical entities. However, it is still unclear whether Article 39 of the TRIPS Agreement is self-executory or if there should be a legislative enactment to give it effect in the Philippines. At present, Article 39 of the TRIPS Agreement does not have a counterpart provision under any Philippine law or statute.

## 3. Protection of IP rights

The first step is to ensure that IP rights are duly protected, recognized and/or registered with the relevant government agencies, such as the IPO.

Once IP protection is obtained, local laws would generally provide a sufficient basis for administrative, civil, and criminal actions against IP rights violations. Administrative actions are filed with the IPO and other government agencies, while civil and criminal actions are lodged with the commercial courts.

However, there are a number of practical difficulties that make effective enforcement elusive. For one, there is the inordinate length of time it takes to prosecute a criminal case or pursue a civil case for infringement or unfair competition. A second major practical problem is the lack of resources available to frontline government authorities whose role is to enforce IP laws. The government's declared policy is to discourage intellectual property counterfeiting and to prosecute infringers. However, the proliferation of counterfeit products in the Philippines has continued to be largely unabated, despite earnest efforts to arrest the concern.

Efforts to enforce IP rights continue to be plagued by other problems, such as delays in obtaining search warrants; varying levels of standard of evidence required by trial court judges hearing search warrant applications; the under-funded investigative, prosecutorial and judicial system; and the lack of heightened awareness of the public on IP rights. Even after successful seizures, endless delays mar the post-raid enforcement system. The abolition of the specialized IP Courts several years ago is considered a setback in the country's anti-counterfeiting campaign, as the judges that had been assigned to Special IP Courts and had received specialized training on IP issues are now also assigned to handle other types of commercial cases.

Notwithstanding many difficulties, experience has shown that immediate, decisive and aggressive action on the part of the IP owner upon detection of any violation of IP rights can lead to an expedited resolution of the problem. What is required is a detailed knowledge of the workings of the enforcement systems available, a rapport with local enforcement authorities, and a flexible and creative approach to enforcement actions.

The Supreme Court Special Rules for IP cases, which took effect in November 2011, shortened the litigation period and included the appointment of eight courts in Metro Manila that can issue search warrants that can be validly enforced anywhere in the Philippines.

In addition, Republic Act No. 10372, which became effective on 22 March 2013, amended portions of the IP Code and provided additional enforcement powers to the IPO, which gives IP owners another

option in pursuing the infringement of its IP rights. The issuance by the IPO on the rules for IPO visits fully complements R.A. 10372.

In 2016, the IPO issued a memorandum amending the Revised Rules and Regulations on Inter Partes Proceedings (**IPC Rules**), which expands the authority of the IPO Hearing/Adjudication Officers. Under the amended IPC Rules, IPO Hearing/Adjudication Officers may now issue and sign decisions and final orders and perform other functions, such as issue orders relating to the IPO's enforcement and visitorial powers.

## 4. Technology transfer arrangements

A technology transfer arrangement (**TTA**) refers to a contract or an agreement involving the transfer of systematic knowledge for the manufacture of a product, the application of a process, or the rendering of a service, including management contracts. A TTA also refers to an agreement to transfer, assign or license all forms of IP rights, including the licensing of computer software, except computer software developed for the mass market.

Parties are free to negotiate the amount or the rate of royalties to be paid under the TTA. Under the IP Code, however, the IPO has quasi-judicial jurisdiction to settle disputes regarding technology transfer payments, including the fixing of the appropriate amount or rate of royalty.

TTAs should not contain certain prohibited clauses that are deemed to be adverse to competition and trade, and should contain certain mandatory provisions. Non-conformity to the requirement on prohibited clauses[6] and mandatory provisions[7] will automatically render the TTA unenforceable. However, there are exceptional cases[8] where exemptions from the prohibited and/or mandatory clauses may be allowed by the IPO on a case-by-case basis, upon showing that substantial benefits will accrue to the Philippine economy as a result of the implementation of the TTA.

A TTA that conforms with the IP Code provisions need not be registered with the IPO. However, there are practical benefits to registering a compliant TTA, particularly for license agreements. These are as follows:

- The registration will serve as the best evidence that the agreement is compliant with the IP Code requirements and is enforceable in this respect. Philippine courts generally lend great weight to findings of administrative agencies like the Documentation, Information and Technology Transfer Bureau (**DITTB**) of the IPO. In the event of litigation over the agreement, the DITTB ruling may be used as evidence of the enforceability of the agreement.
- If the licensor intends to avail itself of tax treaty relief with respect to royalty income derived under the agreement, a DITTB registration or certificate of compliance must be submitted to the Philippine Bureau of Internal Revenue (**BIR**) in support of an application for tax treaty relief.
- If the agreement involves the licensing of a trademark, the registration of the agreement may serve as evidence of the use of the trademark and against the cancellation thereof for non-use. Under the IP Code, a trademark license agreement that is not recorded with the IPO will have no effect against third parties. Thus, non-recordation of a trademark license may render the registration of the mark(s) covered by the license vulnerable to cancellation actions by third parties due to non-use. The IP Code specifically provides that a trademark registration may be cancelled any time if the registered owner of the mark, without legitimate reason, fails to use the mark in the Philippines or fails to cause it to be used in the Philippines under license during an uninterrupted period of three years or longer.

[6] Section 87, IP Code.
[7] Section 88, IP Code.
[8] Section 91, IP Code.

The regulations also provide that as part of the evaluation procedure of TTAs, the DITTB shall take into account acceptable worldwide industry standards and practices for licensing technology in the relevant sectors.

**For more detailed information about IP laws and regulations, Quisumbing Torres publishes an annual IP Guide, which may be made available upon request.**

# XI. Competition law

The Philippine Competition Act (**PCA**) took effect on 8 August 2015. It represents the country's long-awaited comprehensive legal framework on antitrust. Passed as part of a concerted effort to prepare the country for the ASEAN integration, the PCA brings the Philippines closer to the level of antitrust regulation in other countries. It may also create new risks for companies doing business in, or affecting, the Philippines. As such, these businesses are encouraged to evaluate their business structures and agreements for possible infringements under the PCA.

## 1. Philippine Competition Commission

The PCA provided for the creation and organization of the Philippine Competition Commission (**PCC**), an independent quasi-judicial body that is tasked to implement a national competition policy and enforce the provisions of the PCA. The PCC is vested with original and primary jurisdiction over the enforcement and implementation of the PCA, and its implementing rules and regulations (**PCA IRR**). The express powers and functions of the PCC under the PCA include the following:

- Conduct inquiries and investigations, hear and decide cases on violations of the PCA and other competition laws, and impose administrative sanctions
- Review mergers and acquisitions from an antitrust perspective
- Impose and apply remedies to redress anti-competitive conduct, such as injunctions, divestment orders and disgorgement of profits
- Issue *subpoena ad testificandum* and *subpoena duces tecum*
- Upon order of the court, undertake inspection of business premises, offices and vehicles in relation to its investigations

## 2. Prohibited agreements and conduct

### 2.1. Anti-competitive agreements

The PCA prohibits the following anti-competitive agreements:

1. As illegal per se, agreements among competitors: (i) restricting competition on price, its components or other terms of trade; and (ii) various forms of bid rigging
2. Agreements among competitors that have the object or effect of substantially preventing, restricting or limiting competition in the relevant market in respect of: (i) setting, limiting or controlling production, markets, technical development or investment; and (ii) dividing or sharing the market, whether by volume of sales or purchases, territory, type of goods or services, buyers or sellers, or any other means
3. Agreements other than (1) and (2) above that have the object or effect of substantially preventing, restricting or lessening competition in the relevant market in the Philippines, provided that those agreements, which contribute to improving the production or distribution of goods and services or to promoting technical or economic progress while allowing consumers a fair share of the resulting benefits, may not necessarily be prohibited under the PCA.

An entity engaging in anti-competitive agreements under (1) and (2) may be subject to criminal penalties of imprisonment from two to seven years, and a fine of PHP 50 million to PHP 250 million.[9]

[9] PHP 50 million to PHP 250 million is approximately USD 1 million to USD 5 million, assuming an exchange rate of USD 1 = PHP 50.

The penalty of imprisonment shall be imposed upon the responsible officers and directors of the entity.

When the entities involved are juridical persons, the penalty of imprisonment shall be imposed on its officers, directors or employees holding managerial positions who are knowingly and willfully responsible for such violation.

In addition, all types of anti-competitive agreements may be imposed administrative fines of up to PHP 100 million for the first offense and up to PHP 250 million[10] for the second offense, depending on the gravity and the duration of the violation.

The PCA provides that the schedule of administrative fines (PHP 100 million to PHP 250 million) as provided above shall be increased by the PCC every five years to maintain their real value from the time it was set.

## 2.2. Abuse of dominance

The PCA also prohibits an entity from abusing its dominant position by engaging in conduct that would substantially prevent, restrict or lessen competition.

Under the PCA, such conduct would include the following actions of a dominant entity:

1. Selling goods or services below cost with the object of driving competition out of the relevant market

   The PCC will consider whether the entity or entities did not have such object, and the price was established in good faith to meet or compete with the lower price of a competitor in the same market selling the same or comparable product or service of like quality.

2. Imposing barriers to entry or committing acts that prevent competitors from growing within the market in an anti-competitive manner, except those that develop in the market as a result of or arising from a superior product or process, business acumen, or legal rights or laws

3. Tying, or making a transaction subject to acceptance by the other parties of other obligations which, by their nature or according to commercial usage, have no connection with the transaction

4. Setting prices or other terms or conditions that discriminate unreasonably between customers or sellers of the same goods or services, where the effect may be to lessen competition substantially

   However, the following are considered permissible price differentials:

   (a) Socialized pricing for the less fortunate sector of the economy

   (b) Price differential that reasonably or approximately reflect differences in the cost of manufacture, sale or delivery resulting from differing methods, technical conditions or quantities in which the goods or services are sold or delivered to the buyers or sellers

   (c) Price differential or terms of sale offered in response to the competitive price of payments, services or changes in the facilities furnished by a competitor

   (d) Price changes in response to changing market conditions, marketability of goods or services or volume

[10] PHP 100 million to PHP 250 million is approximately USD 2 million to USD 5 million, assuming an exchange rate of USD 1 = PHP 50.

5. Imposing restrictions on the lease or sale or trade of goods or services, such as where, to whom, or in what forms goods or services may be sold or traded; fixing prices; giving preferential discounts or rebate upon such price; or imposing conditions not to deal with competing entities, where the object or effect of the restrictions is to prevent, restrict or lessen competition substantially

   Nonetheless, the following are not prohibited under the PCA:

   (a) Permissible franchising, licensing, exclusive merchandising or exclusive distributorship agreements, such as those that give each party the right to unilaterally terminate the agreement

   (b) Agreements protecting intellectual property rights, confidential information or trade secrets

6. Making supply of particular goods or services dependent upon the purchase of other goods or services from the supplier, which have no direct connection with the main goods or services to be supplied

7. Imposing unfairly low purchase prices for the goods or services of, among others, marginalized agricultural producers; fisherfolk; micro-, small- and medium-scale enterprises; and other marginalized service providers and producers

8. Imposing unfair purchase or selling price on their competitors, customers, suppliers or consumers, provided that prices that develop in the market as a result of or due to a superior product or process, business acumen or legal rights or laws shall not be considered unfair prices

9. Limiting production, markets or technical development to the prejudice of consumers

   However, limitations that develop in the market as a result of or due to a superior product or process, business acumen or legal rights or laws are not considered violative of the PCA.

While the PCA prohibits the above actions that constitute abuse of dominance, it does not prohibit a person from having a dominant position in a relevant market or on acquiring, maintaining and increasing market share through legitimate means that do not substantially prevent, restrict or lessen competition. Further, any conduct that contributes to improving production or distribution of goods or services within the relevant market, or promoting technical and economic progress while allowing consumers a fair share of the resulting benefit may not necessarily be considered an abuse of dominant position.

Under the PCA, there is a rebuttable presumption of dominance when an entity has a market share of at least 50% of the relevant market. An entity may also be considered dominant despite a lower market share, according to the following factors under the PCA:

(a) The share of the entity in the relevant market and whether it is able to fix prices unilaterally or to restrict supply in the relevant market

(b) The existence of barriers to entry and the elements that could foreseeably alter both said barriers and the supply from competitors

(c) The existence and power of its competitors

(d) The possibility of access by its competitors or other entities to its sources of inputs

(e) The power of its customers to switch to other goods or services

(f) Its recent conducts

(g) Other criteria established by the regulations issued pursuant to the PCA

An entity engaging in abuse of dominance may be imposed administrative fines of up to PHP 100 million for the first offense and up to PHP 250 million[11] for the second offense, depending on the gravity and the duration of the violation.

### 2.3. Enforcement rules of procedure

Following its issuance of the Interim Rules on Preliminary Inquiry and Full Administrative Investigation in August 2017, the PCC has issued its more comprehensive Rules of Procedure (**PCC Rules of Procedure**). The PCC Rules of Procedure took effect on 30 September 2017. The PCC Rules of Procedure apply to investigations, hearings and proceedings of the PCC, except matters involving mergers and acquisitions.

Under the PCC Rules of Procedure, administrative proceedings for alleged violations of the PCA or other existing competition laws consist of two stages: investigation and adjudication. An investigation is initiated by a verified complaint, a referral by another regulatory agency, or a motu proprio directive from the PCC. Its enforcement office conducts the investigation, which consists of: (i) a preliminary inquiry; and (ii) a full administrative investigation.

## 3. Merger control

The PCA prohibits mergers and acquisitions that would substantially prevent, restrict or lessen competition in the relevant market. A merger is broadly defined as the joining of two or more entities into an existing entity or to form a new entity, and includes joint ventures. An acquisition is broadly defined as the purchase of securities or assets, through contract or other means, for the purpose of obtaining control by one entity of the whole or part of another, two or more entities over another, or one or more entities over one or more entities.

On 23 November 2017, the PCC published its Rules on Merger Procedure (**Merger Rules**), which took effect on 8 December 2017. On 5 March 2018, the PCC issued Memorandum Circular no. 18-01 (**MC 18-01**), which increases the thresholds for mandatory notification of M&A transactions.

Parties to an M&A, including joint ventures, must notify the PCC within 30 days from the date of signing of the definitive agreement if: (a) the gross revenues in the Philippines or the assets in the Philippines of the ultimate parent of either the acquiring or acquired entity and its controlled entities exceed PHP 5 billion; and (b) the value of the transaction in the Philippines exceeds PHP 2 billion. Transaction value is determined depending on the type of M&A transaction.

For an acquisition of assets, mandatory notification is required if: (a) the value of the assets being acquired in the Philippines or the value of the acquiring entity's assets in the Philippines, depending on where the assets to be acquired are located; and (b) the gross revenues generated by those assets in or into the Philippines exceed PHP 2 billion.

For acquisition of shares in a corporation or of an interest in a non-corporate entity, mandatory notification is required if: (a) the value of the assets of the target or its gross revenues in, into or from the Philippines exceed PHP 2 billion; and (b) the acquisition will give the acquirer and its affiliates more than 35% of the target's outstanding voting shares or profits, or more than 50% of such voting shares or profits if the acquirer already has more than 35% interest in the target prior to the transaction.

[11] PHP 100 million to PHP 250 million is approximately USD 2 million to USD 5 million, assuming an exchange rate of USD 1 = PHP 50.

In the case of a joint venture, the acquirer is subject to mandatory notification if the total value of assets to be combined and contributed to the joint venture in the Philippines, or the gross revenues in the Philippines from such assets, exceed PHP 2 billion.

The PCC's review covers various stages and periods, beginning with a preliminary review within 15 days to determine whether the form is sufficient. Following such determination, the PCC will proceed to review the transaction within an initial period of 30 days (**Phase I review**), at which time it may inform the parties of the need for a more comprehensive and detailed analysis of the transaction (**Phase II review**). A Phase II review may take an additional 60 days. The total period for Phase I review and Phase II review must not exceed 90 days.

Within the review period, the PCC may absolutely prohibit the agreement, subject the agreement to certain changes, or require parties to enter into agreements specified by the PCC, based on its assessment of whether the transaction will substantially prevent, restrict or lessen competition in the relevant market in the Philippines.

A merger or acquisition agreement consummated in violation of the notification requirement shall be considered void and subject the parties to an administrative fine of 1% to 5% of the value of the transaction.

Other violations not specifically penalized by the PCA may carry a fine ranging from PHP 50,000 to PHP 2 million.

# XII. Privacy Laws

## 1. Overview

Government policies in the Philippines and decisions of the Supreme Court tilt heavily toward the protection of an individual's privacy rights. However, the Philippines also recognizes that the free flow of information is vital to promote innovation and growth. Thus, the recent trend in cases of conflict is to balance the interests of the business sector and that of an individual's right to privacy.

The Philippines also enacted a data privacy act, which became effective on 8 September 2012, and was modeled after the European Union Data Protection Directive and the Asia-Pacific Economic Cooperation Privacy Framework.

## 2. Privacy of communications

Privacy of communications is a recognized right in the Philippines and is in fact found in Article III, Section 3 of the Philippine Constitution, as follows:

> "Section 3. (1) The privacy of communications and correspondence shall be inviolable except upon lawful order of the court or when public safety or order requires otherwise, as prescribed by law. (2) Any evidence obtained in violation of this or the preceding section shall be inadmissible for any purpose in any proceeding."

Other provisions on privacy of communications can be found in the Civil Code of the Philippines (**Civil Code**), and Republic Act No. 4200 (**RA No. 4200**) or the Anti-Wire Tapping Act, which, in summary, makes it unlawful for any person to record any private communication without the consent of all the parties involved. Private communication has been interpreted by the Supreme Court to mean one that is made between a person and another as opposed to a speaker and the public, and to cover communications of all types, such as telephone conversations and electronic messages.

Rights to privacy of communications, however, may be waived so long as the waiver is not contrary to law, public order, public policy, morals or good customs, or prejudicial to a third person with a right recognized by law.

## 3. Data privacy

Republic Act No. 10173 or the Data Privacy Act of 2012 (**DPA**) applies to the processing of all types of personal information and to any natural and/or juridical person involved in personal information processing, including those personal information controllers and processors who, although not found or established in the Philippines: (1) use equipment that are located in the Philippines or maintain an office, branch or agency in the Philippines; and (2) process personal information pertaining to a Philippine citizen or resident and maintain commercial links to the Philippines.

"Personal Information" is defined as any information from which the identity of an individual is apparent or can be reasonably and directly ascertained, or that, when put together with other information, would directly and certainly identify an individual.

"Sensitive personal information," on the other hand, is defined as personal information: (1) about an individual's race, ethnic origin, marital status, age, color, and religious, philosophical or political affiliations; (2) about an individual's health, education, genetic or sexual life of a person, or to any proceeding for any offense committed or alleged to have been committed by such person, the disposal of such proceedings, or the sentence of any court in such proceedings; (3) issued by government agencies peculiar to an individual, which includes but is not limited to social security numbers, previous or current health records, licenses or its denials, suspension or revocation, and tax returns;

and (4) specifically established by an executive order or an act of Philippine Congress to be kept classified.

In general, the DPA prohibits the processing of personal information without the express and recorded consent of the data subject. The law also enumerates the rights of data subjects (i.e., notice, access, control, data portability, and the right to be indemnified by personal information controllers for damages arising from the unlawful processing of personal information) and the obligations of personal information controllers and processors to ensure the privacy, security and integrity of personal information, including but not limited to a breach notification requirement). More particularly, the DPA requires personal information controllers to employ reasonable and appropriate organizational, physical and technical measures to protect the security of personal information. At a minimum, these measures should include: (1) anti-computer hacking safeguards; (2) a security policy; (3) a process for preventing and mitigating security breaches; (4) contractual or other reasonable data protection arrangements with third party contractors; and (5) the appointment of an information security officer who will ensure the entity's compliance with the DPA.

In addition, the DPA has created the National Privacy Commission (**NPC**), which is tasked with administering and implementing the provisions of the law, as well as with monitoring and ensuring compliance with international standards for data protection.

Under the DPA, personal information may only be processed if: (a) the data subject has given his or her consent; (b) the processing of personal information is necessary and is related to the fulfillment of a contract with the data subject or in order to take steps at the request of the data subject prior to entering into a contract; (c) the processing is necessary for compliance with a legal obligation to which the personal information controller is subject; (d) the processing is necessary to protect vitally important interests of the data subject; (e) the processing is necessary in order to respond to national emergency, to comply with the requirements of public order and safety, or to fulfill functions of public authority; or (f) the processing is necessary for the purposes of the legitimate interests of the personal information controller or by a third party or parties to whom the data is disclosed.

On the other hand, processing of sensitive personal information is only allowed if: (a) the employee has given his or her consent; (b) the processing is provided for by existing law, in case the employee's consent is not required by such law; (c) it is necessary to protect the life and health of the employee or another person, and the employee is not legally or physically able to express his consent prior to the processing; (d) it is necessary to achieve the lawful and non-commercial objectives of public organizations and associations, provided that the same is limited only to their members and prior consent was obtained; (e) it is carried out by a medical practitioner or a medical treatment institution and necessary for purposes of medical treatment; (f) it is necessary for the protection of lawful rights and interests of natural or legal persons in court proceedings, or for the establishment, exercise or defense of legal claims, or when provided to government or public authority.

The DPA sets forth a detailed schedule of penalties, which include both imprisonment and fines, for violations of such Act, such as unauthorized processing, accessing due to negligence, improper disposal, processing for unauthorized purposes, unauthorized access or intentional breach, concealment of security breaches, malicious disclosure, and unauthorized disclosure of personal information and sensitive personal information.

On 25 August 2016, the NPC issued the implementing rules and regulations (**Rules**) of the DPA. The Rules took effect on 9 September 2016.

In addition to the more general requirements of the DPA on the processing of personal information, the Rules impose several registration and compliance obligations on covered controllers and processors. The most important of these obligations are:

- *Registration of Personal Data Processing Systems.* A personal information controller (**PIC**) or a personal information processor (**PIP**) is required to appoint a Data Protection Officer (**DPO**) under the DPA and the Rules.

  Additionally, a PIC or PIP is required to register its data processing systems with the NPC if it is processing personal data and operating under any of the following conditions:

  - The PIC or PIP employs at least 250 employees.
  - The processing includes sensitive personal information of at least one thousand 1,000 individuals.
  - The processing is likely to pose a risk to the rights and freedoms of data subjects, that is, those that involve information that would likely affect national security, public safety, public order, or public health; or information required by applicable laws or rules to be confidential; or information about vulnerable data subjects like minors, the mentally ill, etc.; or those that involve automated decision-making or profiling.
  - The processing is not occasional, that is, the processing constitutes a core activity of a PIC or PIP, or is integral to the business of the PIC or PIP.

  Please note that the following registration deadlines have passed:

  - Phase 1: Deadline to register a DPO – 9 September 2017
  - Phase 2: Period to register the data processing systems – January 2018 to 8 March 2018.

  In any event, the NPC is still accepting late registrants, but they will be automatically included in the list of priority organizations for data privacy compliance checks or audits.

- *Reportorial Requirements.* Personal information controllers are required to notify the NPC and affected data subjects of a data breach within 72 hours from the discovery thereof. In addition, covered entities shall also report to the NPC with a summary of documented security incidents and data breaches on an annual basis (the Annual Security Incident Report for 2017 will be due on 30 June 2018), and notify the NPC when automated processing becomes the sole basis of making decisions about a data subject.

- *Nature of Consent of Data Subjects.* The Rules clarify that in cases not exempt from the consent requirement, the data subject's consent to the personal information processing should be time-bound in relation to the purpose of the processing. Data sharing, even between entities belonging to the same corporate organization, should also have the prior consent of the affected data subjects.

- *Minimum Security Requirements; Contents of Data Transfer Agreements between Controllers and Processors.* The Rules enumerate the specific minimum organizational, physical and technical requirements that controllers and processors are required to implement while processing personal information. These security standards are subject to periodic evaluation and updating by the NPC via subsequent issuances. The Rules also contain the minimum requirements as to the compliance provisions to be included in any data processing agreement between personal information controllers and its processors.

Subsequent to the issuance of the Rules, the NPC also released several circulars and advisories that state the requirements and guidelines on the following matters: (a) the public sector's compliance with the DPA; (b) personal data breach management and notification; (c) the NPC's rules on practice and procedure; (d) appointment of DPOs and compliance officers for privacy; (e) registration of data processing systems with the NPC, including a list of the business sectors covered by the mandatory

registration requirement; (f) conduct of privacy impact assessments; and (g) security incident and personal data breach reportorial requirements.

## 4. Cybercrime

Republic Act No. 10175, or the Cybercrime Prevention Act of 2012 and its Implementing Rules and Regulations (**Cybercrime Act**) penalizes by fine and/or imprisonment those offenses against the confidentiality, integrity and availability of computer data and systems. These cybercrimes include, among others, illegal access to a computer system, illegal interception of non-public data, intentional or reckless computer data interference such as the introduction or transmission of viruses, and computer-related identity theft.

If any of the cybercrimes were committed on behalf of or for the benefit of any juridical person by its authorized representative, or the commission of the crime results from the juridical person's failure to supervise or control its representative, the juridical person faces liability under the Cybercrime Act in the form of fines, without prejudice to the criminal liability of the natural person(s) who committed the offense.

The Cybercrime Act also imposes several obligations on service providers with respect to maintaining the integrity of computer data and reporting to public authorities such computer data as required by an order and/or court warrant. A "service provider" is any entity that: (a) provides users of its service with the ability to communicate by means of a computer system; or (b) processes or stores computer data on behalf of such communication service or users of such service.

The implementing rules and regulations of the Cybercrime Act were issued by the DOJ, the DOST, and the Department of Interior and Local Government (**DILG**). The rules do not cover the law's provisions criminalizing online libel and unsolicited commercial communications or "spam," and those that allow a warrantless takedown of internet material, which were declared as unconstitutional and therefore void by the Supreme Court in 2014.[12]

[12] *Disini v. The Secretary of Justice, G.R. No. 203335, 11 February 2014.*

# XIII. Ownership and lease of land

## 1. Ownership of private land

Under the Philippine Constitution, only Filipino citizens and corporations or partnerships, at least 60% of which are owned by Filipino citizens, may acquire and own private land in the Philippines. The following are the exceptions:

1. Foreign nationals and entities who have acquired land before the effectivity of the 1935 Constitution

2. Former natural-born Filipino, subject to limitations prescribed by law

The ownership of real property, other than land, such as buildings, is not subject to foreign equity restrictions. Furthermore, foreign nationals may, subject to the provisions of the Philippine Condominium Act, purchase condominium units in certain condominium projects.

## 2. Lease of private land

Foreign investors may lease private lands, which will be used exclusively for investments for a period of up to 50 years, renewable once for a period of 25 years. The lease must be registered with the Philippine BOI under the Investors' Lease Act. The long-term lease will be subject to the following conditions, among others: (a) the leased area shall be used solely for the purpose of the investment upon the mutual agreement of the parties; (b) the leased premises shall comprise such area as may reasonably be required for the purpose of the investment, subject, however, to the Comprehensive Agrarian Reform Law and the Local Government Code; and (c) the lease agreement must incorporate certain mandatory conditions.

Foreigners investing at least USD 5 million in tourism projects, 70% of which must be invested in the project within three years from the signing of the lease contract, may lease private lands for the project for the same period.

With respect to land that the foreign investor will not use exclusively for the purpose of the investment, or land for tourism projects with investments of less than USD 5 million, the lease contract may be for a maximum period of 25 years, renewable for another 25 years.

# XIV. Environmental regulations

The Philippines adheres to a policy of protecting and advancing the right of its people to a balanced and healthful ecology.

Philippine environmental law consists of a series of legislative enactments, executive decrees and administrative regulations, each addressing a specific area of concern relating to the environment.

Therefore, the environmental law applicable to a particular business concern depends largely on the activities of that business concern.

The Department of Environment and Natural Resources (**DENR**) is the lead agency in environmental protection and administration.

The DENR is assisted in the formulation and implementation of environmental policies by the Environmental Management Bureau (**EMB**), local government units, and other governmental agencies and departments.

## 1. Project requirements

Presidential Decree No. 1586 (**PD 1586**) established the Philippine Environmental Impact Statement (**EIS**) System. Environmental impact assessment (**EIA**) is part of project planning and is conducted to identify and evaluate important environmental consequences, including social factors that may occur if a project will be undertaken. Measures to eliminate or minimize these impacts are incorporated into project design and operations.

PD 1586 requires proponents of environmentally critical projects (**ECPs**) and projects within environmentally critical areas (**ECAs**) to obtain an environmental compliance certificate (**ECC**) prior to the commencement of the project.

The ECC is a document certifying that based on the representations of the proponent, the proposed project or undertaking will not cause significant negative environmental impact. The ECC also certifies that the proponent has complied with all the requirements of the EIS System and has committed to implementing its approved Environmental Management Plan. The ECC contains specific measures and conditions that the project proponent has to undertake.

An ECA is an area delineated as environmentally sensitive, such that significant environmental impacts are expected if certain types of proposed projects or programs are located, developed or implemented in it. An ECP is a project or program that has high potential for significant negative environmental impact.

The EMB of the DENR, together with the EIA Review Committee, is the government agency that implements the EIS System.

## 2. Specific areas of regulation

Presidential Decree No. 984 (**PD 984**), otherwise known as the National Pollution Control Decree of 1976, is the general legislation on pollution prevention and control that is being enforced by the government.

Republic Act No. 9003 (**RA 9003**), or the Ecological Solid Waste Management Act of 2000, calls for the institutionalization of a national program that will manage the control, transfer, transport, processing and disposal of solid waste in the country.

Republic Act No. 6969 (**RA 6969**), or the Toxic Substances and Hazardous and Nuclear Wastes Control Act, provides the legal framework for the country's program to control and manage the

importation, manufacture, processing, distribution, use, transport, treatment and disposal of toxic substances as well as that of hazardous and nuclear wastes.

Republic Act No. 8749 (**RA 8749**), or the Philippine Clean Air Act of 1999, provides the framework for preventing, managing, controlling and reversing air pollution nationwide.

The Philippine Clean Water Act of 2004 requires the DENR to implement a comprehensive water quality management program to guarantee effective water utilization and conservation. The Clean Water Act applies to water quality management in all water bodies. However, it primarily applies to the abatement and control of pollution from land-based sources.

# XV. Industry-specific regulations

## 1. Banking

Under Philippine laws, banks are entities that engage in the lending of funds obtained in the form of deposits. An entity intending to engage in banking in the Philippines must obtain an authority or secondary license to operate (such as a commercial banking license) from the BSP.

Banks are classified into the following under Philippine law:

(a) Universal banks

(b) Commercial banks

(c) Thrift banks, composed of: (i) savings and mortgage banks; (ii) stock savings and loan associations; and (iii) private development banks

(d) Rural banks

(e) Cooperative banks

(f) Islamic banks

(g) Other classifications of banks as determined by the BSP

Philippine law provides that foreign individuals and non-bank corporations may own or control up to 40% (individual or aggregate) of the voting stock of a universal bank, commercial bank, thrift bank or rural bank.

By way of exception, foreign banks may own up to 100% of the voting stock of a universal bank, commercial bank, thrift bank or rural bank, with prior approval from the BSP. In determining whether or not approval will be issued, the BSP will consider whether reciprocity rights are enjoyed by or granted to Philippine banks in the country of the foreign bank.

Following the recent liberalization of regulations relating the entry of foreign banks into the Philippines, the BSP may authorize foreign banks to operate in the Philippine banking system through any of the following modes of entry: (a) owning up to 100% of the voting stock of an existing domestic bank; (b) investing up to 100% of the voting stock of a new banking subsidiary incorporated under Philippine law; or (c) establishing branches with full banking authority.

A foreign bank branch must comply with the same minimum capital and prudential capital ratios applicable to domestic banks of the same category. Subsidiaries and branches of foreign banks will be allowed to perform the same functions and enjoy the same privileges of, and be subject to the same limitations imposed upon, a Philippine bank of the same category.

## 2. Consumer goods

The Consumer Act of the Philippines (**Consumer Act**) was enacted to establish standards of conduct for business and industry, with the goal of consumer protection and promotion of general welfare. It covers businesses and transactions that deal with general consumer products and services, which refer to goods, services and credits, debts or obligations that are primarily for personal, family, household or agricultural purposes. It provides for requirements relating to consumer product quality and safety, protection against deceptive, unfair and unconscionable sales acts or practices, and consumer credit transactions. It also provides for administrative sanctions and penalties for violations.

Under the Consumer Act, the sale of consumer products must contain express warranties and must conform to the mandatory requirements under the Consumer Act. Aside from the express warranties,

the Consumer Act further provides for certain implied warranties on the manufacturer of consumer goods. As a rule, the manufacturer is liable for damages caused to consumers by defects resulting from design, manufacture, construction, assembly, packing of the products, as well as the insufficiency and inadequacy of information on the use and hazards of the product. The Consumer Act also provides for the consumer's remedies in case of breach of warranties by the manufacturer or seller of consumer goods, which are generally not subject to waiver or limitation.

The Consumer Act also governs the advertisement and promotion of consumer goods. As a rule, any establishment that intends to conduct sales promotion must obtain a permit from the DTI.

The sale of consumer products to the general public may constitute retail trade. In such a case, the seller, if a foreign national, must comply with the capitalization and other requirements under the Retail Trade Liberalization Act.

## 3. Credit card issuers and acquirers

Under the Credit Card Industry Regulation Law (**Credit Card Law**), a credit card issuer is a bank or a corporation that offers the use of its credit card. On the other hand, a credit card acquirer refers to an institution that accepts and facilitates the processing of credit card transactions initially accepted by the merchant.

The Credit Card Law vests the authority to supervise all credit card issuers and acquirers on the BSP. However, the Credit Card Law does not provide any BSP licensing requirement for credit card issuers and acquirers. The Credit Card Law took effect on 16 August 2016, and its implementing rules and regulations have not been issued to date. The implementing rules and regulations may impose BSP licensing requirements on credit card issuers and acquirers.

## 4. Digital payment services

The BSP recently issued the regulatory framework for entities engaged in digital payment services, including remittance and transfer companies and virtual currency exchanges.

### 4.1. Remittance and transfer companies

The BSP regulates remittance and transfer companies (such as remittance agents, remittance platform providers and e-money issuers) or entities that provide money or value transfer service. Remittance and transfer companies are required to register with the BSP.

Foreign citizens are allowed to own up to 100% of the shares in a remittance and transfer company. Based on BSP regulations, remittance and transfer companies must meet benchmark capital requirements ranging from PHP 10 million to PHP 100 million, depending on the category.

### 4.2. Virtual currency exchanges

BSP regulations define virtual currency as any type of digital unit that is used as a medium of exchange or a form of digitally stored value created by agreement within the community of virtual currency users. Virtual currencies are broadly construed to include digital units of exchange that have a centralized repository or administrator, are decentralized and have no centralized repository or administrator, or may be created or obtained by computing or manufacturing effort.

The BSP regulates virtual currency exchanges or entities that offer services or engages in activities that provide facility for the conversion or exchange of fiat currency to virtual currency or vice versa. A virtual currency exchange must obtain from the BSP a certificate of registration to operate as a remittance and transfer company.

The BSP does not impose nationality requirements on a virtual exchange.

# 5. Energy

## 5.1. Regulatory framework

Republic Act No. 9136, also known as the Electric Power Industry Reform Act of 2001 (**EPIRA**) primarily governs the electric power industry and its participants, together with other special laws. The main objectives of the EPIRA include ensuring and accelerating the total electrification of the country, and the quality, reliability, security and affordability of the supply of electric power.

For this purpose, the EPIRA has mandated the Department of Energy (**DOE**) to supervise the restructuring of the electric energy industry. The EPIRA also created the Energy Regulatory Commission (**ERC**), an independent quasi-judicial regulatory body. Its functions include to promote competition, encourage market development, ensure customer choice and penalize abuse of market power in the restructured electricity industry. The Wholesale Electricity Spot Market was also created to serve as the mechanism for identifying and setting the price of actual variations from the quantities transacted under contracts between sellers and purchasers of electricity.

On the other hand, Republic Act No. 9513, also known as the Renewable Energy Act of 2008 (**RE Act**) provides for a framework for the accelerated development and advancement of Renewable Energy (**RE**) Resources and the development of a strategic program to increase the utilization of RE Resources. The RE Act governs renewable energy power generation in the Philippines. Under the RE Act, the DOE was designated as the lead agency to implement the provisions thereof. The National Renewable Energy Board (**NREB**) and Renewable Energy Management Bureau were also created to perform the functions necessary to attain the objectives of the RE Act.

## 5.2. Organization of the Philippine electric power industry; foreign equity restrictions

The EPIRA restructured and divided the Philippine electric power industry into four sectors: generation, transmission, distribution and supply.

### 5.2.1. Generation

"Generation of electricity" refers to the production of electricity by a generation company or a co-generation facility. Generally, generation of electricity is not subject to foreign equity limitations. A company engaged in the generation of electricity may therefore be 100% foreign-owned.

However, regulations issued by the DOE pursuant to the RE Act impose a Filipino nationality requirement of at least 60% on the generation of electricity from RE Resources. Accordingly, RE Developers[13] are generally subject to a foreign equity limitation of a maximum of 40%. By way of exception, large-scale geothermal projects undertaken by way of foreign technical or financial assistance (FTAA) can be 100% foreign-owned. Hence, an RE Developer must be at least 60% Filipino-owned, unless the RE project is a large-scale geothermal project undertaken by way of FTAA.

### 5.2.2. Transmission

"Transmission of electricity" refers to the conveyance of electricity through the high voltage backbone system or the Philippine Grid. Under the EPIRA, the transmission of electricity shall be a regulated common electricity carrier business, which is considered a public utility requiring a franchise from the Philippine Congress. In this connection, the 1987 Philippine Constitution imposes a 60% Filipino ownership requirement on public utility operators. Accordingly, corporations and

[13] "RE Developers" refers to individual/s or juridical entity created, registered and/or authorized to operate in the Philippines in accordance with existing Philippine laws and engaged in the exploration, development and utilization of RE resources and actual operation of RE systems/facilities.

associations engaged in the transmission of electricity may have up to a maximum of 40% foreign equity and are required to obtain a franchise from the Philippine Congress.

In 2009, the transmission sector was privatized through a grant of a 25-year concession to the National Grid Corporation of the Philippines (**NGCP**) to operate the Philippine Grid. A congressional franchise was granted to NGCP for this purpose. Prior to the privatization, it was the National Transmission Corporation (**TRANSCO**) that assumed the electrical transmission function of the National Power Corporation, including the authority and responsibility for the planning, construction and centralized operation and maintenance of the Philippine Grid.

#### 5.2.3. Distribution

"Distribution of electricity" refers to the conveyance of electric power by a distribution utility through its distribution system. Under the EPIRA, the distribution of electricity to end-users shall be a regulated common carrier business requiring a franchise. The EPIRA provides that the power to grant franchises to persons engaged in the distribution of electricity shall be vested exclusively in the Philippine Congress. Thus, similar to transmission of electricity, corporations or associations that will engage in the business of distribution of electricity must at least be 60% Filipino-owned and must also obtain a franchise from the Philippine Congress.

#### 5.2.4. Supply

"Supply of electricity" means the sale of electricity by authorized persons or entities. There are no foreign equity restrictions imposed on corporations engaged in the business of supply of electricity to the contestable market, subject to meeting certain requirements such as capitalization.

# 6. Financing companies

Under Philippine law, financing companies are corporations (except banks, investments houses, savings and loan associations, insurance companies, cooperatives and other financial institutions organized or operating under other special laws) that are primarily organized for the purpose of extending credit facilities to consumers and to industrial, commercial or agricultural enterprises, by direct lending or by discounting or factoring commercial papers or accounts receivable, or by buying and selling contracts, leases, chattel mortgages or other evidences of indebtedness, or by financial leasing of movable as well as immovable property. An entity intending to engage as a financing company must obtain an authority or secondary license to operate as a financing company from the SEC. If the entity intends to perform quasi-banking functions (that is, engaging in the lending of funds obtained in the form of deposit-substitutes), such entity must secure a quasi-banking license from the BSP.

Under the Financing Company Act, as amended, a financing company must have a paid-up capital ranging from at least PHP 2.5 million to PHP 10 million, depending on where the financing company will set up its office in the Philippines. Subject to certain conditions, foreign persons may own up to 100% of the shares in a financing company.

# 7. Healthcare

## 7.1. Health products

Republic Act No. 3720, as amended, or the Food and Drug Administration Act and its implementing rules and regulations (**FDA Act**), regulate the manufacture, importation, distribution, marketing, advertising and related activities for health products. The FDA Act defines health products as including drugs, medical devices, cosmetics and health supplements, among others.

Entities that deal with health products are generally required to obtain a license to operate from the FDA.

Furthermore, certain health products, such as drugs, certain medical devices and health supplements, must be registered with the FDA.

Others, such as cosmetics, must only be notified to the FDA.

The labels of health products must also comply with the labelling requirements under FDA regulations.

### 7.2. Clinical trials

Clinical trials in the Philippines are regulated by the FDA and the Philippine National Health Research System (**PNHRS**) through the Philippine Health Research Ethics Board (**PHREB**).

Clinical trials may be undertaken by sponsors or Contract Research Organizations (**CRO**). A "sponsor" refers to an individual, company, institution, organization or an entity that takes responsibility for the initiation, management, and/or financing of a clinical trial. On the other hand, a "CRO" refers to a person or an organization (commercial, academic, or other) contracted by a sponsor to perform one of more of the sponsor's trial-related duties and functions.

Current FDA regulations require a sponsor and the CRO to obtain an LTO from the FDA. Furthermore, clinical trials must be conducted according to an approved clinical trial protocol from the FDA.

## 8. Insurance

### 8.1. Entry of foreign insurance companies

A certificate of authority must be obtained from the Philippine Insurance Commission (**IC**) before a person can engage in the insurance business.

There are no foreign equity restrictions on insurance companies.

An insurance company may be established as a domestic company, a branch of a foreign insurance company, or a mutual benefit association. (The discussion below focuses on domestic insurance companies and branches of foreign insurance companies.) A foreign insurance company may do business in the Philippines, provided: (i) it is among the top 200 foreign insurance corporations globally, or among the top 10 insurance companies in its country of origin; and (ii) it has been doing business for the last 10 years as of the date of its application for IC approval.

In addition, if the foreign insurance company will establish a domestic insurance company or a branch (as opposed to acquiring shares in an existing domestic insurance company), it must be: (i) widely owned and/or publicly listed in its country of origin; or (ii) majority-owned by the government of the country of origin. The term "widely owned" means that not a single stockholder of the applicant owns more than 20% of its voting stock; while "publicly listed" means that its shares of stock are listed in the stock exchanges.

### 8.2. Minimum capitalization requirement

A new domestic insurance or a branch must have a minimum paid-up capital / assigned capital of PHP 1 billion.[14] In addition:

[14] Section 194, Amended Insurance Code. See also IC Circular Letter No. 2015-20-A.

- In the case of a domestic company, the IC may require the stockholders of a new insurance company to pay in cash to the company, in proportion to their subscription interests, a contributed surplus fund of not less PHP 100 million.
- In the case of a branch, it must deposit with the IC, for the benefit of policyholders and creditors of the foreign insurer in the Philippines, securities that have a market value of not less than PHP 1 billion. The securities must be acceptable to the IC, and at least 50% of the securities must consist of bonds or other instruments of debt of the government of the Philippines.

Existing insurance companies (domestic companies and branches) as well as those to be established before 31 December 2019, must comply with the following net worth requirement:

| Minimum net worth | Compliance date |
|---|---|
| PHP 900 million | 31 December 2019 |
| PHP 1.3 billion | 31 December 2022 |

The minimum paid-up capital and net worth requirement must remain unimpaired for the continuance of the license. Foreign insurance companies are required to set aside an amount corresponding to the legal reserves of the policies written in the Philippines, and such amount may be invested only in certain classes of acceptable Philippine securities, subject to aggregate limits.

Further, insurance companies must comply with solvency requirements. The IC adopts a risk-based capital approach.

The president of the Philippines has the power to order a periodic review of the capital structures of insurance companies, to determine the capital adequacy of the local insurance industry, every two years from and after the integration and liberalization of the financial services (including insurance) in the ASEAN Region.

## 8.3. Acquisition of control of a domestic insurance company

Prior IC approval must be obtained for an acquisition by a foreign company of control of a domestic insurance company. “Control” means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities by a contract other than a commercial contract for goods or nonmanagement services or otherwise. Control is presumed to exist if any person directly or indirectly owns, controls or holds the power to vote 40% or more of the voting securities of an insurance company.

In reviewing a proposed acquisition of control, the IC will consider the following factors:

(a) The financial condition of the acquiring person and the insurer

(b) The trustworthiness of the acquiring person or any of its officers or directors

(c) The plan for the proper and effective conduct of the insurer’s operations

(d) The source of the funds or assets for the acquisition

(e) The fairness of any exchange of stock, assets, cash or other consideration for the stock or assets to be received

(f) Whether the effect of the acquisition may substantially lessen competition in any line of commerce in insurance or to tend to create a monopoly therein

(g) Whether the acquisition is likely to be hazardous or prejudicial to the insurer's policyholders or stockholders[15]

### 8.4. Registration with the Anti-Money Laundering Council

Insurance companies are considered "covered persons" under the Anti-Money Laundering Act. A new insurance company must register as such with the Anti-Money Laundering Council.

### 8.5. Insurance brokers and agents

A person (an individual, partnership or corporation) intending to act as an insurance broker or an insurance agent must obtain authority from the IC.

An "insurance agent" refers to a person who, for compensation, solicits or obtains insurance on behalf of any insurance company or transmits for a person other than himself an application for a policy or contract of insurance to or from such company, or offers or assumes to act in the negotiating of such insurance. On the other hand, an "insurance broker" refers to any person who, for any compensation, commission or other thing of value , acts or aids in any manner in soliciting, negotiating or procuring the making of any insurance contract, or in placing risk or taking out insurance, on behalf of an insured other than himself. A "reinsurance broker" is one who, for compensation, not being a duly authorized agent, employee or officer of an insurer in which any reinsurance is effected, acts or aids in any manner in negotiating contracts of reinsurance, or placing risks of effecting reinsurance, for any insurance company authorized to do business in the Philippines.

## 9. Lending companies

On the other hand, "lending companies" refer to corporations engaged in granting loans from its own capital funds or from funds sourced from not more than 19 persons. The term "lending companies" exclude banking institutions, investment houses, savings and loan associations, financing companies, pawnshops, insurance companies, cooperatives and other credit institutions already regulated by other laws.

A company intending to perform activities as a lending company must obtain from the SEC an authority or secondary license to operate as a lending company.

Under the Lending Company Act, as amended, a lending company must have a minimum paid-up capital of PHP 1 million. Subject to certain conditions, foreign persons are allowed to own up to 100% of the shares in a lending company.

However, no foreign national may be allowed to own shares in a lending company unless the country of which such person is a national accords reciprocal rights to Philippine citizens.

## 10. Mining

### 10.1. Philippine Constitution and Mining Law

Under the 1987 Philippine Constitution, the state can undertake the exploration, development and utilization of the natural resources, or it can enter into agreements with private parties or contractors under revenue-sharing or production-sharing arrangements. The general rule, as stated in the Philippine Constitution, is that contractors, with whom the state can enter into agreements for the exploration, development and utilization of natural resources, must be Filipino citizens or corporations whose capital is at least 60% Filipino-owned. A mineral agreement must be held by a Filipino citizen or by a company that is at least 60% Filipino-owned.

[15] IC Circular Letter No. 2014-37.

The foreign equity limitation is removed for large-scale exploration, development and utilization of minerals and petroleum, and other mineral oils. This exception is implemented through the Financial or Technical Assistance Agreement (**FTAA**). Furthermore, an Exploration Permit (**EP**) and a Mineral Processing Permit (**MPP**) can be held by a corporation that is up to 100% foreign-owned.

Under the Republic Act No. 7942 or the Philippine Mining Act of 1995 (**Mining Act**), there are three types of mineral agreements: Mineral Production Sharing Agreement (**MPSA**), Co-Production Agreement, and Joint Venture Agreement.

Under the Implementing Rules and Regulations of the Mining Act (**Mining Act IRR**), an applicant that wants to conduct exploration activities over a specific area needs to apply for and obtain an EP. Depending on the exploration results, the EP can be converted into an MPSA or an FTAA.

## 10.2. Mining Act

The Mining Act governs the exploration, development, processing and utilization of mineral resources in the Philippines. The Mining Act and the Mining Act IRR define these agreements, delineate the various mining rights recognized in the Philippines, and provide the requirements to acquire these mining rights.

### 10.2.1. EP

The acquisition of mineral rights is a process that begins with the acquisition of an EP. An EP is a grant from the Philippine government that gives the permit holder the right to conduct exploration for all minerals within a specified area. An EP allows the holder to conduct "exploration," which is defined under the Mining Act as "searching or prospecting for mineral resources by geological, geochemical and/or geophysical surveys, remote sensing, test pitting, trenching, drilling, shaft sinking, tunneling or any other means for the purpose of determining their existence, extent, quality and quantity and the feasibility of mining them for profit."

### 10.2.2. Mineral Agreements

The three types of mineral agreements are as follows:

- MPSA, under which the government grants to the MPSA holder the exclusive right to conduct mining operations within a contract area; the share of the government is in the form of excise tax equivalent to a percentage of the gross output. The MPSA holder will provide the financing, technology, management and personnel necessary for the implementation of the MPSA.
- Co-production Agreement, under which the government will provide inputs to the mining operations other than the mineral resource
- Joint Venture Agreement, under which a joint venture company is organized by the government and the contractor with both parties holding equity shares; in addition to earnings from the equity, the government will be entitled to a share in the gross output.

### 10.2.3. FTAA

The Philippine Constitution provides that the president may, on behalf of the government, enter into agreements involving either technical or financial assistance for large scale exploration, development and utilization of minerals according to the general terms and conditions provided by law, based on real contributions to the economic growth and general welfare of the Philippines.

To implement this Constitutional provision and to promote investments from both domestic and international sources, the Mining Act authorizes the President to execute and approve on behalf of the government FTAAs to be entered into with qualified entities for large scale exploration, development

and commercial utilization of mineral resources. The minimum project for development and construction for an FTAA is USD 50 million.

The FTAA holder is granted the exclusive rights to explore, mine, utilize, process, refine, market, transport, export and dispose of minerals and mineral products and by-products that may be derived or produced from the FTAA area, subject to such permitting requirements that may be applicable under pertinent laws, rules and regulations.

10.2.4. MPP

An MPP refers to the permit granted by the Philippine government to allow the holder thereof to undertake mineral processing. "Mineral processing" refers to the milling, beneficiation, leaching, smelting, cyanidation, calcination or upgrading of ores, minerals, rocks, mill tailings, mine waste and/or other metallurgical by-products or by similar means to convert the same into marketable products.

# 11. Securitization Act

The Securitization Act provides the legal and regulatory framework for asset securitization and grants tax exemptions and other incentives in favor of securitization transactions in the Philippines. It is designed to create a favorable capital market environment for asset-backed securities (**ABS**) and to facilitate the development of a secondary market for residential mortgage-backed securities.

In the securitization process, loans, receivables or similar financial assets with an expected cash payment stream (**Assets**) are sold on a without-recourse basis by a seller to a special purpose entity (**SPE**). The SPE issues to investors ABS that depend, for their payment, on the cash flow from the Assets. The issuance of the ABS must be in accordance with the plan for securitization approved by the SEC.

# 12. Telecommunications

## 12.1. The Telecoms Act

The Public Telecommunications Policy Act of the Philippines (**RA 7925** or the **Telecoms Act**) and its implementing rules regulate the performance of telecommunications services in the Philippines. Telecommunications services are defined as those services involving "any process which enables a telecommunications entity to relay and receive voice, data, electronic messages, written or printed matter, fixed or moving pictures, words, music or visible or audible signals or any control signals of any design and for any purpose by wire, radio or other electromagnetic, spectral, optical or technological means."

## 12.2. The Public Service Law

The Philippines' Public Service Law (**Commonwealth Act No. 146**) is the law that applies to industries/entities engaged in "public service" in general. The Public Service law therefore applies to telecommunications services offered to the public.

The regulatory body in charge of telecommunications services in the Philippines is the National Telecommunications Commission (**NTC**). By virtue of the authority granted to it by the Telecoms Act and the Public Service Law, the NTC has regulatory and quasijudicial powers. The NTC can also enforce compliance of its issuances by initiating complaints (which may result in fines and imprisonment) and/or imposing fees and penalties.

## 12.3. Provision of telecommunications services by a public telecommunications entity

The provision of telecommunications services by a public telecommunications entity (**PTE**) is heavily regulated. A PTE is a person, firm, partnership or corporation, government or private, engaged in the provision of telecommunications services: (a) to the public; (b) for compensation. Generally, a PTE is required to secure a legislative franchise from the Philippine Congress and a CPCN or Provisional Authority (**PA**) from the NTC. The franchise contains conditions as to its grant, such as restrictions on transfers and annual reporting obligations.

On the other hand, the CPCN issued by the NTC certifies that the telecommunications service to be provided by the enfranchised entity is feasible and necessary. It is usually granted after an entity's showing of its legal, technical and financial capability to provide the contemplated service. Additionally, a PTE is required to be at least 60% Filipino-owned.

## 12.4. Value-added services

Regulated telecommunications services also include value-added service (**VAS**). The Telecoms Act provides that a "VAS operator" is "an entity which, relying on the transmission, switching and local distribution facilities of the local exchange and inter-exchange operators, and overseas carriers, offers enhanced services beyond those ordinarily provided for by such carriers." The implementing rules of the Telecoms Act define "VAS" as "a service which adds a feature or value to basic telephone service not ordinarily provided by a public telecommunications entity such as format, media, conversion, encryption, enhanced security features, paging, internet protocol, computer processing and the like." Under the Telecoms Act, a VAS provider is not considered a PTE, provided that it does not put up its own network.

NTC Memorandum Circular No. 02-05-2008 provides that VAS providers that offer their services to the public for a fee are required to register their services with the NTC. However, under current NTC policy, only VAS providers that are owned by citizens of the Philippines or entities that are 60% owned and controlled by Philippine citizens may register with the NTC.

In practice, however, the NTC differentiates between non-regulated VAS and regulated VAS. The NTC only applies the VAS restriction requirements (i.e., the registration / nationality restriction requirements) to regulated VAS providers. VAS providers are regulated if they have the following characteristics: (i) the VAS services are provided directly to the Philippine public; and (ii) the VAS services are provided for a fee.

## 12.5. Voice Over Internet Protocol as Value-added service

Voice Over Internet Protocol (**VoIP**) is a form of VAS that is governed by its own set of rules. VoIP services intended to be offered for use by the public for compensation is expressly regulated by the NTC. Service providers that intend to offer such service are required to register with the NTC as VoIP providers. Further, "any person or entity that intends to derive or source VoIP from a duly registered VoIP provider under an agreement to resell the service directly to retail end-user customers" must also register with the NTC as a VoIP reseller.

## 12.6. Broadcast messaging

Broadcast messaging is a form of telecommunications service that allows one to send the same SMS/MMS messages to a large number of mobile phones.

Under NTC Memorandum Circular No. 03-03-2005, as amended, application service providers are generally prohibited from providing broadcast messaging services without prior registration with the NTC. However, we note that the said NTC regulations only apply to application service providers that offer its products or services to the public for a fee. Based on current NTC practice, it does not require

content/information service providers, which do not charge individual mobile subscribers, to register with the NTC. However, the NTC requires all application service providers, without regard to the gratuitous nature of their services, to comply with the NTC regulations with regard to securing the subscribers' prior, express and written consent/opt-in to receive broadcast messages. In addition, content/information service providers are also required to:

(a) Provide in the broadcast messages their company names or assigned codes, instructions for free opting out, including a hotline number or valid addresses for such purpose

(b) Adopt the keyword "STOP" as the universal keyword for opting-out

(c) Maintain and regularly update a list of subscribers who opted out

(d) Refrain from sending messages between 9 pm and 7 am

(e) Retain text data records for three months from date of entry

Violations of any of the foregoing NTC requirements shall subject the violator to blacklisting by the NTC, and administrative fines of PHP 200 (approximately USD 4) per violation. Each spam text message is considered a violation.

Per current NTC practice, the foregoing requirements on broadcast messaging are imposed only upon the broadcaster of the text messages (i.e., the telecommunications company or telcos), which is ultimately responsible for complying with the NTC requirements on broadcast messaging services. However, given that the telcos will be providing the broadcast messaging service to the applications provider under a private contract, the telcos are not prohibited by law to require the content/information provider, by contract: (1) to comply with the NTC requirements, such as the subscriber's opt-in and the content provider's opt-out instructions; and/or (2) to claim monetary compensation from said content/information provider should the NTC eventually find the telcos falling short of the said requirements. In this case therefore, the client's obligation to comply is not based on law, but may be potentially based on its private contract with the telcos.

## 12.7. Cybercrime Prevention Act

The Philippines' Cyber Crime Prevention Act of 2012 (**RA No. 10175** or the **Cyber Crime Act**) requires service providers to preserve the integrity of "traffic data and subscriber information relating to communication services" for at least six months from the date of the transaction. Content data (defined as communication or content of communication, the meaning or purport of the communication, or the message or information being conveyed by the communication, other than traffic data), shall also be preserved following an order from law enforcement authorities.

## 12.8. Importation/distribution of telecommunications equipment

Under current NTC regulations, type approval or type acceptance is required for all customer premises equipment (**CPE**) and radio transmitters and transceivers, that is, devices capable of emitting radio waves or energy. "Type approval" refers to the process by which an equipment is evaluated for conformance to established standards by undergoing laboratory tests and measurements. "Type acceptance on the other hand" is a process by which an equipment is evaluated for acceptability for use on the basis of type approval tests done by reputable foreign approval or certification agencies. The importer/distributor of CPEs and radio transmitters/transceivers should secure authorization from the NTC in order to supply these equipment.

An import permit must be secured from the NTC in order to import equipment that requires type approval or acceptance. The NTC import permit will be required by the BOC as a condition for customs clearance.

# XVI. Dispute resolution

## 1. Legal and judicial system

### 1.1. Type of legal system

The Philippine legal system is a blend of the Roman civil law and the Anglo-American common law systems. The civil law system operates in the areas of family relations, property, succession, contracts and criminal law; while statutes and principles of common law origin are evident in fields such as constitutional law, procedure, corporation law, negotiable instruments, taxation, insurance, labor relations, and banking laws. Islamic personal law is recognized and is operative in some parts of Mindanao with the establishment of Shari'ah courts and the Shari'ah Bar.

### 1.2. Main sources of law

The main sources of Philippine law are the Constitution, statutes, treaties and conventions, and judicial decisions. The Constitution is the fundamental law of the land and as such, it is authority of the highest order against which no law can prevail. Every official action, to be valid, must conform to it. On the other hand, statutes are enactments passed by the Philippine Legislature. Statutes also include presidential decrees issued during the martial law period, and executive orders issued by the President under the 1986 Provisional "Freedom" Constitution.

Treaties entered into by the Philippines with other states have the same force of authority as legislative enactments. Philippine law is also derived from case decisions because the Civil Code provides that "judicial decisions applying or interpreting the laws or the Constitution shall form part of the legal system of the Philippines." Only decisions of the Supreme Court, however, establish jurisprudence and are binding on all other courts.

## 2. The courts

### 2.1. Trial courts

At the first level are the Metropolitan Trial Courts (**MeTC**), Municipal Trial Courts (**MTC**), the Municipal Trial Courts in Cities (**MTCC**), and Municipal Circuit Trial Courts (**MCTC**). MeTCs are stationed by law in the cities and municipalities making up the metropolitan areas such as Metro Manila, Cebu and Davao. In cities outside the metropolitan areas, courts of the first level are called Municipal Trial Courts in Cities. There is an MTC in every municipality, and an MCTC presides over two or more municipalities grouped into a circuit.

Courts of the first level are essentially trial courts. They try and decide only cases specified by law. These courts have jurisdiction over cases of ejectment, recovery of personal property with a value of not more than PHP 300,000 (or PHP 400,000 in Metro Manila), cases involving title to or possession of real property where the assessed value of the property is not more than PHP 20,000 (or PHP 50,000 in Metro Manila), exclusive of interest, damages of whatever kind, attorney's fees, litigation expenses and costs, the amount of which must be specifically alleged. These courts also have delegated jurisdiction over cadastral or land registration cases covering lots where there is no controversy or opposition, or contested lots where the value does not exceed PHP 100,000.

First level trial courts have also been given jurisdiction over small claims cases, which are defined as actions for payment of money where the value of the claim does not exceed PHP 200,000, exclusive of interest and costs. The action is commenced by filing a statement of claims, in a standard form issued by the Supreme Court, together with supporting affidavits and documents. No formal pleading is necessary. The defendant, once summoned, is required to file a response within 10 days from receipt of the summons. The parties must appear personally, and lawyers are not allowed to appear unless they are the plaintiffs or defendants. At the hearing, the judge is required to exert efforts to

bring the parties to an amicable settlement. If such efforts fail, the judge shall proceed to hear the case and issue a decision on the same day as the hearing. The decision is final and executory, and cannot be appealed.

At the second level are the Regional Trial Courts. The Philippines is divided into 13 regions and in each region there is a Regional Trial Court that may have one or more branches. Like the first level courts, Regional Trial Courts are trial courts. They are courts of general jurisdiction; they try and decide not only the particular classes or kinds of cases assigned to them by law, but also those that are not otherwise within the exclusive jurisdiction of first level courts or any other tribunal. Regional Trial Courts also exercise appellate jurisdiction over decisions rendered by the first level courts.

Regional Trial Courts have jurisdiction over cases the subject matter of which is incapable of pecuniary estimation; or those involving title to, or possession of, real property where the assessed value of the property exceeds PHP 20,000 (or PHP 50,000 in Metro Manila), except cases of ejectment; all actions in admiralty and maritime jurisdiction where the demand or claim exceeds PHP 300,000 (or PHP 400,000 in Metro Manila); and those where the demand, exclusive of interest, damages of whatever kind, attorney's fees, litigation expenses and costs, or the value of the personal property in controversy exceeds PHP 300,000 (or PHP 400,000 in Metro Manila).

## 2.2. Appellate courts

At the third level is the Court of Appeals. It is essentially an appellate court. While it exercises exclusive original jurisdiction over actions for annulment of judgments of Regional Trial Courts, the Court of Appeals principally exercises exclusive appellate jurisdiction over all final judgments, decisions, resolutions, orders or awards of Regional Trial Courts and quasi-judicial agencies, instrumentalities, boards or commissions, except those falling within the appellate jurisdiction of the Supreme Court in accordance with the Constitution. The Court of Appeals may review questions of fact or mixed questions of fact and law.

Appeal of decisions rendered by the Regional Trial Courts in the exercise of the latter's original jurisdiction is a matter of right; but appeal of decisions rendered by the Regional Trial Courts in the exercise of appellate jurisdiction is a matter of discretion.

The Supreme Court is the highest court of the land. It is the court of last resort, from whose judgment no appeal lies. It exercises appellate jurisdiction over cases decided by the Court of Appeals and the Regional Trial Courts. As a general rule, appeals to the Supreme Court are not a matter of right, and only questions of law may be raised in such appeals. The only exception is with respect to criminal cases where the penalty of death,[16] *reclusion perpetua*, or life imprisonment has been imposed by the lower courts. Such cases are subject to automatic review by the Supreme Court, and both issues of fact and law may be raised.

## 2.3. Language of the courts

The language used in and by the courts is English (i.e., in hearings, pleadings, court orders and decisions). Statements made in court in another language are required to be translated to English.

In selected first and second level courts in Quezon City, Makati, Angeles, Iloilo, Davao and Cebu, where piloting of proposed revisions to the rules on civil procedure on preliminary conference and trial is effective, witnesses may testify in Filipino without the need for an English translation. Witnesses may also testify in other dialects or language, but the same should be quoted in English or Filipino in written court submissions.

[16] The imposition of the death penalty has been suspended by Republic Act No. 9346.

# 3. Litigation

## 3.1. Commencing proceedings

An action is generally commenced by the filing of a complaint containing a statement of the plaintiff's cause or causes of action. The complaint is required to contain a certification against forum shopping to the effect that the plaintiff has not commenced any action or filed any claim involving the same issue(s) in any court, tribunal or quasi-judicial agency and to the best of his knowledge, no such other action or claim is pending therein. Failure to comply with this requirement is a ground for dismissal of the case. The filing of the complaint must also be accompanied by the payment of the prescribed docket fee; otherwise, the trial court will not acquire jurisdiction over the case.

Unlicensed foreign corporations (i.e., foreign corporations that have not obtained a license from the SEC to do business in the Philippines) transacting business in the Philippines are not permitted to commence, maintain or intervene in any court action, suit or proceeding in the Philippines. It bears noting that this rule does not apply to international arbitration.

Upon the filing of the complaint and the payment of the requisite legal fees, the clerk of court will issue the corresponding summons to the defendant, together with a copy of the complaint.

When the defendant is a foreign private juridical entity that has transacted business in the Philippines, service of summons may be made on its resident agent designated in accordance with law for that purpose, or if there is no such agent, on the government official designated by law to that effect or on any of its officers or agents within the Philippines. If the foreign private juridical entity is not registered in the Philippines or has no resident agent, service may, with leave of court, be effected out of the Philippines through any of the following means:

(a) By personal service through the appropriate court in the foreign country with the assistance of the Department of Foreign Affairs

(b) By publication in a newspaper of general circulation in the country where the defendant may be found and by serving a copy of the summons and the court order by registered mail at the last known address of the defendant

(c) By facsimile or any recognized electronic means that can generate proof of service

(d) By such other means as the court may, in its discretion, direct

## 3.2. Piloting of a new system for speedy court trial

The Supreme Court approved the piloting of proposed revisions to the rules on civil procedure on preliminary conference and trial. The pilot courts are selected first and second level courts in Quezon City, Makati, Angeles, Iloilo, Davao and Cebu. The proposed rules include use of video-conferencing in the preparation of judicial affidavits, the preparation of a terms of reference during preliminary conference, giving the court the discretion to conduct alternate trial (where the parties take turns in presenting their witnesses) or face-to-face trial (where witnesses from contending sides sit face-to-face around a table in a non-adversarial environment, and answer questions from the court as well as the parties' counsels respecting the factual issues under consideration).

## 3.3. Default judgment

If the defendant fails to file an answer within the required period, the court may issue an order of default upon motion of the plaintiff. The court will then proceed to render judgment as the pleading may warrant, unless the court in its discretion requires the claimant to submit evidence. A judgment rendered against a party in default must not exceed the amount or be different in kind from that sought in the pleading. The court may not award unliquidated damages.

The order of default may be set aside, upon motion filed by the party declared in default at any time after notice and before judgment, by showing that the failure to answer was due to fraud, accident, mistake or excusable negligence, and that the defaulting party has a meritorious defense.

In any case, the party declared in default is entitled to notice of subsequent proceedings, but may not take part in the trial.

## 3.4. Summary judgment

A summary judgment, upon motion of either party, is granted by the court for an expeditious settlement of the case if it appears from the pleadings, affidavits, depositions and admissions that, except as to the amount of damages, there are no genuine questions or issues of fact involved and that the movant is entitled to a judgment as a matter of law. Summary judgment may be rendered upon the whole case or only on parts thereof where some facts appear to be without genuine controversy.

## 3.5. Provisional remedies

### 3.5.1. Preliminary attachment

At the commencement of the action or at any time before entry of judgment, a plaintiff or any proper party may have the property of the adverse party attached as security for the satisfaction of any judgment that may be recovered in certain cases involving fraud or intent to defraud creditors.

### 3.5.2. Preliminary injunction

A preliminary injunction is an order granted at any stage of an action or proceeding prior to the judgment or final order, requiring a party or a court, agency or a person to refrain from a particular act or acts. It may also require the performance of a particular act or acts, in which case it shall be known as a preliminary mandatory injunction.

If, based on affidavits or on the verified application, it is shown that the applicant may suffer great or irreparable injury before the matter can be heard on notice, the court may issue a temporary restraining order before a hearing is conducted.

### 3.5.3. Receivership

One or more receivers may be appointed by the court where the action is pending, or by the Court of Appeals or the Supreme Court, or a member thereof, in the following cases:

(a) When the applicant has an interest in the property or fund that is the subject of the action or proceeding, and that such property or fund is in danger of being lost, removed or materially injured

(b) When, in an action for foreclosure, it appears that the property is in danger of being wasted or dissipated or materially injured, and that its value is probably insufficient to discharge the mortgage debt, or that the parties have so stipulated in the contract of mortgage

(c) To preserve the property during appeal, or to dispose of it according to the judgment, or to aid execution when the execution or the judgment obligor refuses to apply his property in satisfaction of the judgment, or otherwise to carry the judgment into effect

(d) Whenever it is the most convenient and feasible means of preserving, administering or disposing of the property in litigation

#### 3.5.4. Replevin

A party praying for the recovery of possession of personal property may, at the commencement of the action or at any time before filing an answer, apply for an order for the delivery of such property to him.

#### 3.5.5. Support *pendente lite*

At the commencement of the proper action or proceeding, or at any time prior to the judgment or final order, a verified application for support *pendente lite* may be filed by any party, stating the grounds for the claim and the financial conditions of both parties, and accompanied by affidavits, depositions or other authentic documents in support thereof.

### 3.6. Discovery/Disclosure

It is the duty of each contending party to lay before the court all the material and relevant facts known to him, suppressing or concealing nothing, nor preventing another party from also presenting all the facts within his knowledge. As only the ultimate facts are set forth in pleadings, evidentiary matters may be inquired into and learned by the parties before the trial through the deposition-discovery mechanism. Refusal to comply with an order for discovery may result in various sanctions against the disobedient party, including refusal to allow said party to support or oppose designated claims or defenses, prohibiting said party from introducing in evidence designated documents or things or items of testimony, striking out of pleadings or parts thereof, dismissal of the action, or rendition of a judgment by default against said party.

However, despite the provisions allowing various types of discovery (e.g., depositions, interrogatories, request for admissions), resort to such procedures is not prevalent in the Philippine legal system.

### 3.7. Remedies

#### 3.7.1. Motion for new trial

Within 15 days from receipt of the decision or judgment, a party may move to set aside the judgment or final order and grant a new trial for one or more of the following grounds:

(a) Fraud, accident, mistake or excusable negligence that ordinary prudence could not have guarded against and by reason of which such party has probably been impaired in his rights

(b) Newly discovered evidence, which a party could not, with reasonable diligence, have discovered and produced at the trial, and which if presented would probably alter the result

#### 3.7.2. Motion for reconsideration

Within 15 days from receipt of the decision or judgment, a party may move for reconsideration on the grounds that the damages awarded are excessive, that the evidence is insufficient to justify the decision or final order, or that the decision or final order is contrary to law.

If the motion for reconsideration is denied, the movant has a fresh period of 15 days from receipt or notice of the order denying or dismissing the motion for reconsideration within which to file a notice of appeal.

#### 3.7.3. Petition for relief

When a judgment or final order is entered, or any other proceeding is thereafter taken against a party in any court through fraud, accident, mistake or excusable negligence, he may file a petition in such court and in the same case praying that the judgment, order or proceeding be set aside.

When a judgment or final order is rendered by any court in a case, and a party thereto, by fraud, accident, mistake or excusable negligence has been prevented from taking an appeal, he may file a petition in such court and in the same case praying that the appeal be given due course.

The petition shall be filed within 60 days after the petitioner learns of the judgment, final order or other proceeding to be set aside, and not more than six months after such judgment or final order was entered.

3.7.4. Petition for *certiorari*, prohibition and/or mandamus

When any tribunal, board or officer exercising judicial or quasi-judicial functions has acted without or in excess of its or his jurisdiction, or with grave abuse of discretion amounting to lack or excess of jurisdiction, a person aggrieved may file a verified petition for the annulment or modification of the proceedings of such tribunal, board or officer.

When the proceedings of any tribunal, corporation, board, officer or person, whether exercising judicial, quasi-judicial or ministerial functions, are without or in excess of its or his jurisdiction, or with grave abuse of discretion amounting to lack or excess of jurisdiction, a person aggrieved may file a verified petition to require the respondent to desist from further proceedings in the action or matter specified therein.

When any tribunal, corporation, board, officer or person unlawfully neglects the performance of an act that the law specifically enjoins as a duty resulting from an office, trust or station, or unlawfully excludes another from the use and enjoyment of a right or office to which such other is entitled, the person aggrieved may file a verified petition to command the respondent to do the act required to be done to protect the rights of the petitioner, and to pay the damages sustained by the petitioner by reason of the wrongful acts of the respondent.

As a rule, the foregoing remedies are available only if there is no appeal, or any plain, speedy and adequate remedy in the ordinary course of law.

The petition must be filed not later than 60 days from notice of the judgment, order or resolution being questioned. In case a motion for reconsideration or new trial is timely filed, the petition must be filed not later than 60 days counted from the notice of the denial of the motion.

## 3.8. Costs

Generally, costs are awarded to the prevailing party, but the court may for special reasons adjudge that either party pay the costs, or that the same be divided equitably. Attorney's fees and expenses of litigation, other than judicial costs, are not recoverable in the absence of stipulation, except in specific cases enumerated in the Civil Code.

## 3.9. Appeals

Appeals from first level courts can only be taken to the proper Regional Trial Courts, that is, the Regional Trial Court that has territorial jurisdiction over the first level court that rendered the decision. The appeal is a matter of right and made by filing a Notice of Appeal within 15 days after notice to the appellant of the judgment or final order appealed from. Where a record on appeal is required, the appellant shall file a notice of appeal and a record on appeal within 30 days after notice of the judgment or final order.

The mode of appeal from decisions rendered by the Regional Trial Court depends on several factors (i.e., whether the judgment was rendered in its original or appellate jurisdiction and whether the appeal involves questions of fact and/or law).

When the Regional Trial Court renders a decision in the exercise of its original jurisdiction, the appeal normally goes to the Court of Appeals. The appeal is a matter of right when questions of fact, or

mixed questions of fact and law are raised. The appeal is made by the filing of a notice of appeal with the Regional Trial Court within 15 days from notice of the judgment or final order appealed from. In the event that a losing party files a motion for new trial or reconsideration within the 15-day period for filing of appeal, the said party has 15 days from receipt or notice of a denial of the motion within which to file a notice of appeal. A motion for extension of time to file a motion for new trial or reconsideration is not allowed.

When the judgment to be appealed is rendered by the Regional Trial Court in the exercise of its appellate jurisdiction, appeal is not a matter of right, regardless of whether only questions of law, of fact, or mixed questions of fact and law, are involved. It will be given due course by the Court of Appeals only when the petition shows prima facie that the lower court has committed errors in its conclusions of fact or law that will warrant reversal or modification of the decision sought to be reviewed. The method of appeal is by petition for review, which should be filed and served within 15 days from notice of the decision sought to be reviewed. Upon proper motion and the payment of the full amount of fees before the expiration of the initial period, the Court of Appeals may grant an additional period of 15 days within which to file the petition for review. No further extension will be granted except for the most compelling reason, and in no case may exceed 15 days.

When the judgment to be appealed is rendered by the Regional Trial Court in the exercise of its original (not appellate) jurisdiction, and the appellant intends to raise only pure questions of law, the appeal from the Regional Trial Court may be taken directly to the Supreme Court, by petition for review on *certiorari*. The appeal, in this instance, is not a matter of right but subject to the discretion of the Supreme Court. The petition must be filed within 15 days from notice of the judgment or final order appealed from. On motion duly filed and served, with full payment of fees before the expiration of the reglementary period, the Supreme Court may, for justifiable reasons, grant an extension of 30 days within which to file the petition.

Appeals from the Court of Appeals are taken to the Supreme Court by petition for review on *certiorari*, the appeal being discretionary and generally limited to questions of law. The petition must be filed within 15 days from notice of the judgment or final order appealed from. On motion duly filed and served, with full payment of fees before the expiration of the reglementary period, the Supreme Court may for justifiable reasons grant an extension of 30 days within which to file the petition.

## 3.10. Enforcement of judgments

Execution will issue as a matter of right on motion, upon the expiration of the period to appeal. If the appeal has been duly perfected and finally resolved, execution may be applied for in the court of origin on motion.

By way of exception, the prevailing party may file a motion for execution of a judgment or final order that has been appealed. Discretionary execution may only issue upon good reasons to be stated in the order after due notice and hearing.

Judgments in actions for injunction, receivership, accounting and support are immediately executory and are not stayed by appeal, unless otherwise ordered by the trial court. Moreover, a decision by a first level court (e.g., Municipal Trial Courts, Metropolitan Trial Courts) against the defendant in an action for ejectment is executory and can be enforced pending appeal, unless the following requisites have been complied with: (i) an appeal has been perfected; (ii) defendant posts a sufficient supersedeas bond approved by the first level court; and (iii) defendant deposits with the appellate court the amount of rent due from time to time.

A final and executory judgment or order may be executed on motion within five years from the date of its entry. After the lapse of such time, and before it is barred by the statute of limitations, a judgment may be enforced by action. The revived judgment may also be enforced by motion within

five years from the date of its entry and thereafter by action before it is barred by the statute of limitations.

If a judgment debtor does not comply with the judgment upon demand, judgments may be enforced as follows:

- Satisfaction by levy, by seizure of sufficient property of the judgment debtor
- Garnishment of debts and credits
- Where a judgment directs a party to perform a specific act, a direction from the court that the act be done at the cost of the disobedient party
- Where a judgment is for the sale of real or personal property, a direction to a sheriff of the court to sell such property and apply the proceeds
- Delivery or restitution of real property
- Removal of improvements on property subject to execution through a special order of the court

### 3.11. Recognition of foreign laws

Philippine contract law recognizes the validity of contractual choice of law provisions. However, parties may not contract away applicable provisions of law especially provisions dealing with matters heavily impressed with public interest.

A party whose cause of action or defense depends upon a foreign law has the burden of proving the foreign law. Such foreign law is treated as a question of fact to be properly pleaded and proved. Otherwise, foreign law shall be presumed to be the same as Philippine law.

### 3.12. Recognition and enforcement of foreign judgments

A judgment of another state may not be directly enforced in the Philippines. A separate action must be filed in the Philippines for the foreign judgment to be recognized or enforced. The Philippine courts must be convinced that there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction. Moreover, a foreign judgment will not be enforced or recognized when it runs counter to laws that have for their object public order, public policy and good customs.

In case of a judgment in actions affecting title to or possession of real property or any interest therein, the judgment is conclusive upon the title to the property. However, in the case of a judgment in personal actions (e.g., actions against a person for his personal liability), the judgment is merely presumptive evidence of a right as between the parties and their successors in interest by a subsequent title. In either case, the judgment may be repelled by evidence of want of jurisdiction, want of notice to the party, collusion, fraud, or clear mistake of law or fact.

Comity and reciprocity are also factors to be considered in the recognition and enforcement of a foreign judgment by a Philippine court.[17]

## 4. Arbitration

Parties have the option to resort to arbitration in resolving their disputes in the Philippines.

All types of commercial disputes may be referred to arbitration. The word “commercial” is broadly defined as “matters arising from all relationships of a commercial nature, whether contractual or not.”

[17] *Marcos, Jr. v. Republic of the Philippines*, G.R. No. 189434, 12 March 2014.

The following disputes may not be submitted to commercial arbitration: (a) labor disputes covered by Presidential Decree No. 442 (**PD 442**), otherwise known as the Labor Code of the Philippines, as amended, and its Implementing Rules and Regulations; (b) the civil status of persons; (c) the validity of a marriage; (d) any ground for legal separation (of married persons); (e) the jurisdiction of courts; (f) future *legitime*; (g) criminal liability; and (h) those disputes that by law cannot be compromised.

## 4.1. Advantages of arbitration compared with court litigation

Arbitration, which is steadily growing in popularity as an alternative mode of dispute resolution, may be more attractive than court litigation for several reasons.

### 4.1.1. Speed

Despite the efforts of the Supreme Court to streamline the judiciary, the dockets of Philippine courts remain clogged. Consequently, it usually takes several years for the trial courts to hear and resolve cases filed with them. In contrast, disputes submitted to arbitration are relatively more speedily resolved, as parties may choose arbitrators whose schedules can accommodate the long hours necessary to hear and decide a case.

### 4.1.2. Flexibility of the rules

Foreign investors who are not familiar with local court procedures may prefer a more neutral process. Arbitration allows the parties to choose or craft the rules that will govern the arbitration proceedings. Since the procedure is mutually agreed upon, the parties have more faith in the integrity of the process. Also, the parties need not be bound by the strict rules of evidence.

### 4.1.3. Choice of arbitrators

The parties are generally free to choose the arbitrators who will resolve their disputes, subject to the requirement that the chosen arbitrators are impartial and independent. In many cases, parties appoint experienced professionals or individuals with the relevant expertise as arbitrators. The ability to choose the arbitrator(s) is especially attractive to a foreign party who may harbor reservations about the neutrality of a “home court” judge.

### 4.1.4. Finality of the award

Unlike court decisions, arbitral awards in commercial arbitration are generally final and unappealable. An arbitral award can be refused enforcement on limited grounds.

### 4.1.5. Confidentiality

Whereas court proceedings are open to the public, arbitration proceedings are generally private and confidential. Documents and information disclosed in arbitration proceedings, including witness statements made in the course of arbitral proceedings,[18] are generally confidential and may be disclosed to third parties only under exceptional circumstances.

## 4.2. Arbitration as a contract

An agreement to arbitrate is a contract, the relation of the parties is contractual, and the rights and liabilities of the parties are controlled by the law of contracts. As a general rule, there can be no arbitration unless the parties agree to submit their dispute to arbitration. If there is no agreement to submit a dispute to arbitration, the remedy of the aggrieved party is to file a case in court. An aggrieved party cannot compel the other party to arbitrate. When there is an agreement to arbitrate, the same can take effect only between the parties, their assigns and heirs. Thus, as a general rule, a corporation’s representative who did not personally bind himself to an arbitration agreement cannot

[18] See *Federal Express Corp. v. Airfreight 2100, Inc.*, G.R. No. 216600, 21 November 2016.

be forced to participate in arbitration proceedings made pursuant to an agreement entered into by the corporation.[19] However, corporate representatives may be compelled to submit to arbitration proceedings pursuant to a contract entered into by the corporation they represent if there are allegations of bad faith or malice in their acts representing the corporation in order to determine if the distinction between the personality of the corporation and the personalities of its representatives should be disregarded.[20]

Philippine law recognizes the principle of separability of arbitration contracts. An arbitration agreement that forms part of the main contract shall not be regarded as invalid or non-existent just because the main contract is invalid or did not come into existence, since the arbitration agreement shall be treated as a separate agreement independent of the main contract.[21] In *PEZA v. Edison (Bataan) Cogeneration Corporation*,[22] the Supreme Court further held that "the invalidity of the main contract, also referred to as the 'container' contract, does not affect the validity of the arbitration agreement."

The right to refer a dispute to arbitration can be waived by estoppel.[23]

## 4.3. Arbitration law

The following laws govern arbitration in the Philippines: Republic Act No. 876 (**Arbitration Law**), Republic Act No. 9285 (**Alternative Dispute Resolution Act of 2004** or **ADR Act**), Implementing Rules and Regulations of the ADR Act (**ADR Act IRR**), Executive Order No. 1008 (**Construction Industry Arbitration Law**), and the Special Rules of Court on Alternative Dispute Resolution (**Special ADR Rules**).

The Office for Alternative Dispute Resolution, the government agency tasked to promote ADR in the Philippines, has recently released its proposed amendments to the ADR Act.

### 4.3.1. International arbitration

International commercial arbitrations seated[24] in the Philippines are governed by the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985 (**United Nations Document A/40/17**).

Arbitration is considered international under any of the following circumstances:

(a) The parties to an arbitration agreement have, at the time of the conclusion of such agreement, their places of business in different countries.

(b) One of the following places is situated outside the state in which the parties have their places of business:

   (i) the place of arbitration determined in or pursuant to the arbitration agreement

[19] See *Aboitiz Transport System v. Carlos A. Gothong Lines*, G.R. No. 198226, 18 July 2014.
[20] *Lanuza v. BF Corporation*, G.R. No. 174938, 1 October 2014.
[21] *Cargill Philippines, Inc. v. San Fernando Regala Trading, Inc.*, G.R. No. 175404, 31 January 2011.
[22] G.R. No. 179537, 23 October 2009.
[23] *Benguet Corporation v. Department of Environment and Natural Resources – Mines Adjudication Board, et al.*, G.R. No. 163101, 13 February 2008.
[24] These are the instances when the Philippines is chosen as the place or seat of arbitration. The place or seat of arbitration is the legal or juridical home (or domicile) of the arbitration, the choice of which results in a number of highly significant legal consequences as it determines the (a) the national arbitration legislation applicable to the arbitration; (b) the law applicable to the "external" relationship between the arbitration and national law and courts (including annulment of awards and selection and removal of arbitrators); (c) the law applicable to the "internal" procedures of the arbitration (including requirements for equality of treatment and due process); and (d) the law presumptively applicable to the substantive validity of the arbitration agreement. (GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION*, (2014), 2051)

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected

(c) The parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

4.3.2. Domestic arbitration

The Arbitration Law, as amended by the ADR Act, applies to domestic arbitrations. "Domestic arbitration" is defined as arbitration that is not international. Thus, if the dispute is between parties who have their place of business in the Philippines, the place of arbitration is the Philippines, their obligations are to be performed in the Philippines, and there is no stipulation in the arbitration agreement that the subject matter of the arbitration agreement relates to another country, the arbitration will be considered domestic.

4.3.3. Construction arbitration

The arbitration of construction disputes is governed by the Constitution Industry Arbitration Law. The Construction Industry Arbitration Commission (**CIAC**) has original and exclusive jurisdiction over disputes arising from, or connected with, contracts entered into by parties involved in construction in the Philippines; all that is needed for the CIAC to acquire jurisdiction is for the parties to agree to submit the same to arbitration.

The Philippine Supreme Court has held that "as long as the parties agree to submit their dispute to voluntary arbitration, regardless of what forum they may choose, their agreement will fall within the jurisdiction of the CIAC, such that, even if they specifically choose another forum, the parties will not be precluded from electing to submit their dispute before the CIAC because this right has been vested by law."[25]

In *Ibex International, Inc. v. GSIS, et al.,*[26] the Supreme Court held: "The CIAC is the duly constituted quasi-judicial agency accorded with jurisdiction to resolve disputes arising from construction contracts in the Philippines. This Court must confer finality to its factual findings as they are supported by evidence."

On average, proceedings in the CIAC take around six months.

## 4.4. Role of the courts in arbitration

The Special ADR Rules define the role of the courts in relation to arbitration proceedings, including: challenge to the existence, validity and enforceability of arbitration agreements; referral to arbitration; interim measures of protection; appointment, challenge and termination of arbitrators; assistance in taking evidence; confidentiality/protective orders; confirmation, correction or vacation of awards in domestic arbitration; recognition and enforcement or setting aside of international commercial arbitration awards; recognition and enforcement of foreign arbitral awards; and appeals to the Court of Appeals and the Supreme Court. The Special ADR Rules reiterate the state policy of promoting arbitration.

In *BCDA v. DMCI Project Developers, Inc.*,[27] the Philippine Supreme Court held that in interpreting arbitration agreements, courts should render effective an arbitration clause if the terms of the agreement allow for such interpretation.

[25] *National Irrigation Administration v. Court of Appeals*, G.R. No. 129169, 17 November 1999.
[26] G.R. No. 162095, 12 October 2009.
[27] G.R. Nos. 173137 & 173170, 11 January 2016.

## 4.5. Arbitral institutions

Several arbitral institutions have been established in the Philippines, similar to those of the International Chamber of Commerce, Hong Kong International Arbitration Center and the Singapore International Arbitration Center. The leading commercial arbitration center in the Philippines is the Philippine Dispute Resolution Center, Inc. (**PDRCI**).

The PDRCI is a non-stock, non-profit organization incorporated in 1996 out of the Arbitration Committee of the Philippine Chamber of Commerce and Industry. It was formed for the purpose of promoting and encouraging the use of arbitration as an alternative mode of settling commercial transaction disputes and providing dispute resolution services to the business community. PDRCI's membership includes prominent lawyers and members of the judiciary, academicians, arbitrators, bankers, accountants, engineers, architects and businessmen. The average duration of arbitral proceedings at the PDRCI is around one year.

PDRCI amended its Rules of Arbitration and Guidelines on Fees on 1 January 2015. The revised rules contain new provisions on joinder of additional parties, consolidation of arbitrations, appointment of emergency arbitrator and expedited procedure, among others.

## 4.6. Ad hoc arbitration

There is no prohibition in the Philippines regarding the conduct of ad hoc arbitrations in accordance with the existing policy in favor of arbitration.

## 4.7. Enforcement of awards

The Philippines is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. An action for the recognition and/or enforcement of a foreign arbitral award must be filed with the proper Regional Trial Court and a copy of the award and the original agreement must likewise be submitted. If the said award or agreement is not made in an official language of the Philippines, the party-applicant shall produce a translation of the documents into the official language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

The Special ADR Rules provide rules for the confirmation of awards in domestic arbitration, as well as the recognition/enforcement of international commercial arbitration awards and foreign arbitral awards.

## 4.8. Challenging awards

The grounds to set aside arbitral awards are limited. Generally, awards may only be challenged on the basis of due process and procedural grounds, and not on questions of facts or law affecting the merits of the award.

The following are the grounds to challenge awards in international arbitrations:

(a) A party to the arbitration agreement was under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it, or failing any indication thereof, under Philippine law.

(b) The party making the application to set aside or resist enforcement was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present his or her case.

(c) The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration; provided that, if the decisions on matters submitted to arbitration can be

separated from those not so submitted, only that part of the award that contains decisions on matters not submitted to arbitration may be set aside or only that part of the award that contains decisions on matters submitted to arbitration may be enforced.

(d) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of Philippine law from which the parties cannot derogate, or failing such agreement, was not in accordance with Philippine law.

(e) The subject-matter of the dispute is not capable of settlement by arbitration under the law of the Philippines.

(f) The recognition or enforcement of the award would be contrary to public policy.

An additional ground for opposing recognition/enforcement is that "the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which that award was made."

In *Tuna Processing Inc. v. Philippine Kingford, Inc.*,[28] the Philippine Supreme Court held that an arbitral award cannot be set aside or refused enforcement on the basis of the rule in court litigation that "an unlicensed foreign corporation doing business in the Philippines has no capacity to sue in Philippine courts."

In *Fruehauf Electronics Philippines Corp. v. Technology Electronics Assembly and Management Pacific Corp.*,[29] the Philippine Supreme Court held that the only remedy against a final domestic arbitral award is to file a petition to vacate or to modify/correct the award not later than 30 days from the receipt of the award. Unless a ground to vacate has been established, the court must confirm the arbitral award as a matter of course.

Domestic arbitral awards may be vacated on any of the following grounds:

(a) The arbitral award was procured with through corruption, fraud or other undue means.

(b) There was evident partiality or corruption in the arbitral tribunal or any of its members.

(c) The arbitral tribunal was guilty of misconduct or any form of misbehavior that has materially prejudiced the rights of any party such as refusing to postpone a hearing upon sufficient cause shown or to hear evidence pertinent and material to the controversy.

(d) One or more of the arbitrators was disqualified to act as such under the law and willfully refrained from disclosing such disqualification.

(e) The arbitral tribunal exceeded its powers, or so imperfectly executed them, such that a complete, final and definite award upon the subject matter submitted to them was not made.

(f) The arbitration agreement did not exist, or is invalid for any ground for the revocation of a contract or is otherwise unenforceable.

(g) A party to arbitration is a minor or a person judicially declared to be incompetent.

## 5. Other modes of alternative dispute resolution

There have been increased efforts in recent years to institutionalize alternative dispute resolution (**ADR**) in the Philippine legal system to aid in the speedy administration of justice.

[28] G.R. No. 185582, 29 February 2012.
[29] G.R. No. 204197, 23 November 2016.

## 5.1. Court-annexed ADR

### 5.1.1. Court-annexed mediation

Beginning in 2001, the Supreme Court, in the exercise of its supervisory and regulatory powers over the Philippine judicial system, implemented, initially on a trial basis, the requirement for the conduct of mediation for certain cases commenced before the courts. In 2011, the Supreme Court expanded the cases covered by the court-annexed mediation (**CAM**) scheme. The following cases are currently covered by the rule on CAM:

1. All civil cases and the civil liability of criminal cases covered by the Rules on Summary Procedure, including civil liability for violation of the Bouncing Checks Law
2. Special proceedings for the settlement of estates
3. All civil and criminal cases requiring a certificate to file action under the Revised Katarungang Pambarangay Law
4. The civil aspect of quasi-offenses under the Revised Penal Code
5. The civil aspect of less grave felonies not exceeding six years of imprisonment where the offended party is a private person
6. Civil aspects of estafa (swindling), theft and libel
7. All civil cases and probate proceedings brought on appeal from the first-level courts
8. All cases of forcible entry and unlawful detainer brought on appeal from the first-level courts
9. All civil cases involving title or possession of real property or interest therein brought on appeal from first-level courts
10. Habeas corpus cases brought up on appeal from the first-level courts

The following cases are not proper subject of CAM:

1. Civil cases that by law cannot be compromised
2. Other criminal cases not covered by numbers 3 to 6 above
3. Habeas corpus petitions
4. All cases under the Violence Against Women and Children Act
5. Cases with pending applications for restraining orders or preliminary injunctions

The court before which a case was filed involving any of the aforementioned disputes calls the parties to a conference before a mediator appointed by the trial court from the list provided by the Supreme Court. During the mediation period, the court orders the suspension of the proceedings before it for 30 days. Individual parties are required to personally appear for mediation unless they send a representative who is fully authorized to appear, negotiate and enter into a compromise, through a special power of attorney. Corporations, partnerships or other juridical entities shall be represented by a ranking corporate officer fully authorized by a board resolution to offer, negotiate, accept, decide and enter into a compromise agreement, without need of further approval by or notification to the authorizing party.

If a settlement is reached, the compromise agreement entered into between the parties is submitted to the court and serves as basis for the rendition of a judgment by compromise that may be enforced by execution. Otherwise, the case is returned to the court.

Any and all matters discussed or communications made and documents presented during the mediation proceedings are privileged and confidential and inadmissible as evidence for any purpose in any other proceedings.

The period during which the case is undergoing mediation or conciliation are excluded from the regular and mandatory periods for trial and rendition of judgment in ordinary cases, as well as in cases under summary procedure.

5.1.2. Judicial dispute resolution

Judicial dispute resolution (**JDR**) is governed by A.M. No. 11-1-6 SC-PHILJA and was promulgated to give effect to the state policy under the ADR Act to actively promote the use of ADR as an important means to achieve speedy and impartial justice and de-clog court dockets. Together with CAM, JDR is intended to put an end to pending litigation through a compromise agreement and help unclog court dockets in the country. Cases covered by CAM are also subject to JDR.

Judicial proceedings covered by JDR are divided into two stages: (1) from the filing of the complaint to the conduct of CAM and JDR; and (2) pre-trial proper to trial and judgment. The judge to whom the case had been originally assigned is referred to as the JDR judge, who presides over the first stage. Another judge, called the trial judge, presides over the second stage. At the initial stage of the preliminary conference, the JDR judge briefs the parties on CAM and JDR. Upon failing to secure a settlement of the dispute during CAM, a second attempt to arrive at a compromise agreement is made through JDR. The JDR judge facilitates the settlement discussions between the parties and tries to reconcile their differences, assesses the relative strengths and weaknesses of each party's case, and makes a non-binding and impartial evaluation of the chances of each party's success in the case. On the basis of this neutral evaluation, the judge seeks to persuade the parties to a fair and mutually acceptable settlement of their dispute. The JDR judge may not preside over the trial of the case if the parties do not settle their dispute at JDR.

To complete the JDR process, judges of the first level courts shall have a period of not exceeding 30 days, while judges of the second level courts shall have a period of not exceeding 60 days. A longer period, however, may be granted upon the discretion of the JDR judge if there is a high probability of settlement and upon joint written motion of the parties. Both periods shall be computed from the date when the parties first appeared for JDR proceedings, as directed in the respective orders issued by the judge.

If full settlement of the dispute is reached within 30 days (in the first level court) or 60 days (in the second level court), the parties, assisted by their respective counsels, shall draft a compromise agreement, which shall be submitted to the court for a judgment upon compromise, enforceable by execution. Only upon failure of the JDR will parties proceed to trial proper, when the case is turned over to the trial judge.

Any and all matters discussed or communications made, including requests for mediation, and documents presented during the JDR proceedings before the trial judge, are privileged and confidential and inadmissible as evidence for any purpose in any other proceedings. Further, the JDR judge may not pass any information obtained in the course of conciliation and early neutral evaluation to the trial judge or to any other person.

5.1.3. Philippine Mediation Center - Appeals Court Mediation

At the Court of Appeals level, cases covered by CAM and JDR that have not been settled and went to trial must be referred to the Philippine Mediation Center - Appeals Court Mediation unit for mediation.

## 5.2. Commercial ADR

The ADR Act, without limiting the modes of ADR that the parties can avail of, provide for, in addition to arbitration, the following modes of ADR:

### 5.2.1. Mediation

Mediation is a voluntary process in which a mediator, selected by the disputing parties, facilitates communication and negotiation, and assists the parties in reaching a voluntary agreement regarding a dispute. Information obtained through mediation is privileged and confidential. A party, a mediator or a non-party participant may refuse to disclose and may prevent any other person from disclosing a mediation communication.

A mediated settlement agreement may be deposited with the appropriate clerk of a Regional Trial Court of the place where one of the parties resides. Where there is a need to enforce the settlement agreement, a petition may be filed by any of the parties with the same court. Pursuant to the Special ADR Rules, after a summary hearing, if the court finds that the agreement is a valid mediated settlement agreement, that there is no merit in any of the affirmative or negative defenses raised, and the respondent has breached that agreement, in whole or in part, the court shall order the enforcement thereof; otherwise, it shall dismiss the petition.

The parties may agree in the settlement agreement that the mediator shall become a sole arbitrator for the dispute and shall treat the settlement agreement as an arbitral award that shall be subject to enforcement.

### 5.2.2. Early Neutral Evaluation

Early neutral evaluation is an ADR process wherein parties and their lawyers are brought together early in the pre-trial phase to present summaries of their cases and to receive a non-binding assessment by an experienced neutral person with expertise in the subject matter or substance of the dispute.

All papers and written presentations communicated to the neutral third person, including any paper prepared by a party to be communicated to the neutral third person or to the other party as part of the dispute resolution process, and the neutral third person's written non-binding assessment or evaluation, shall be treated as confidential.

The proceedings are governed by the rules and procedure agreed upon by the parties. By default, the ADR Act IRR shall govern.

### 5.2.3. Mediation-Arbitration or Med-Arb

Med-Arb is a two-step dispute resolution process involving mediation and then followed by arbitration. It is governed by the rules and procedure agreed upon by the parties. Otherwise, the ADR Act IRR shall govern. As a general rule, a mediator may not act as an arbitrator in respect of the same dispute, or vice-versa.

### 5.2.4. Mini-trial

Mini-trial is a structured dispute resolution method in which the merits of a case are argued before a panel comprising of senior decision-makers, with or without the assistance of a neutral third person, before which the parties seek a negotiated settlement. It shall be governed by the rules and procedure agreed upon by the parties. Otherwise, the ADR Act IRR shall govern.

# XVII. Insolvency in the Philippines

## 1. Overview and introduction to the jurisdiction / applicable legislation

There are three types of remedies available to a financially distressed individual or juridical person: suspension of payments (only available to individuals), corporate rehabilitation (voluntary/involuntary, pre-negotiated, or out-of-court or informal restructuring agreements) and liquidation. The applicable laws and regulations are the Civil Code, the Financial Rehabilitation and Insolvency Act (**FRIA**), Presidential Decree No. 902-A (**PD 902-A**),[30] the Financial Rehabilitation Rules of Procedure (**Financial Rehabilitation Rules**),[31] and the Financial Liquidation and Suspension of Payments Rules for Procedure for Insolvent Debtors (**FLSP Rules**).[32] The type of proceeding that applies to a debtor depends on the particular relief sought.

The FRIA became effective on 31 August 2010. It provides for a more comprehensive framework for rehabilitation and liquidation of debtors, whether corporate or individual. More importantly, the FRIA has made available to partnerships and individuals the benefits of rehabilitation proceedings. This is advantageous for small businesses as they are more commonly formed as partnerships or individual enterprises. However, banks, insurance companies and pre-need companies, and national and local government agencies or units are not covered under the FRIA.

On 27 August 2013, the Supreme Court promulgated the Financial Rehabilitation Rules, which provide for the procedure governing rehabilitation proceedings under the FRIA. On 21 April 2015, the Supreme Court also promulgated the FLSP Rules, which provide for the procedure governing liquidation proceedings of insolvent juridical and individual debtors and suspension of payments of insolvent individual debtors under the FRIA. On 21 June 2016, the Supreme Court expanded the coverage of the current Special Commercial Courts to include cases governed by the FRIA.[33] On 5 October 2016, the Supreme Court also issued the schedule of legal fees for proceedings under the FRIA.[34]

If what is sought is merely a little financial breathing space, then the remedy is a suspension of payments, which provides for the deferment of payments and temporary protection against actions/ executions by unsecured creditors. If, on the other hand, the rehabilitation of a company entails more radical measures, such as changes in organization, management and/or strategy, and requires temporary protection against both secured and unsecured creditors, then the remedy is to seek corporate rehabilitation. Finally, if the debtor company has become insolvent and incapable of being rehabilitated, it may apply for liquidation and have its assets distributed accordingly among its creditors. In all cases under the FRIA, the debtor shall be insolvent or is generally unable to pay its or his liabilities as they fall due in the ordinary course of business or has liabilities that are greater than its or his assets.

Each of these remedies is discussed in more detail below.

[30] After the promulgation of Republic Act 8799 or the Securities Regulation Code, jurisdiction over petitions of corporations, partnerships or associations to be declared in the state of suspension of payments was transferred from the SEC to the Regional Trial Court. The SEC, however, retained jurisdiction over pending suspension of payments and rehabilitation cases filed as of 30 June 2000 until final disposition of such cases.
[31] Supreme Court Administrative Matter No 12-12-11.
[32] Supreme Court Administrative Matter No. 15-04-06-SC.
[33] Supreme Court Administrative Matter No. 03-03-03-SC.
[34] Supreme Court Administrative Matter No. 04-04-04-SC.

# 2. Proceedings for solvent debtors (individuals or corporations)

## 2.1. Suspension of payments

An individual debtor who possesses sufficient property to cover all of his or her debts, but foresees the impossibility of meeting them when they respectively fall due, may file a petition with a Philippine Regional Trial Court (**Court**) to be declared in a state of suspension of payments. The petition must be filed with the Court of the place where the debtor has resided at least six months prior to the filing of the petition.

### 2.1.1. Action on the petition for suspension of payments

If the Court finds the petition for suspension of payments sufficient in form and substance, it will issue an order:

(a) Calling a meeting of all the creditors named in the schedule of debts and liabilities (**Creditors' Meeting**)

(b) Directing such creditors to prepare and present written evidence of their claims before the Creditors' Meeting

(c) Directing the publication of the said Order in a newspaper of general circulation

(d) Directing the clerk of court to cause the sending of a copy of the Order to all creditors named in the schedule of debts and liabilities

(e) Forbidding the individual debtor from selling, transferring, encumbering or disposing of in any manner his or her property, except those used in the ordinary operations of commerce or of industry in which the petitioning individual debtor is engaged, so long as the proceedings relative to the suspension of payments are pending

(f) Prohibiting the individual debtor from making any payment outside of the necessary or legitimate expenses of his or her business or industry, so long as the proceedings relative to the suspension of payments are pending

(g) Appointing a commissioner to preside over the Creditors' Meeting.

### 2.1.2. Actions suspended

Upon motion filed by the individual debtor, the Court may issue an order suspending any pending execution against the individual debtor, provided that properties held as security by secured creditors will not be the subject of such suspension order.

A creditor may not sue or institute proceedings to collect his or her claim from the debtor from the time of the filing of the petition for suspension of payments and for as long as proceedings remain pending, except for the following:

(a) Creditors having claims for personal labor, maintenance, expense of last illness and funeral of the wife or children of the debtor incurred in the 60 days immediately prior to the filing of the petition

(b) Secured creditors

### 2.1.3. Agreement for suspension of payments

The petition for suspension of payments must include a statement of the debtor's assets and liabilities, and the debtor's proposed agreement with the creditors for the suspension of payments. The presence of creditors holding claims amounting to at least three-fifths of the liabilities is necessary for holding

a Creditors' Meeting. The proposed agreement must be approved by two-thirds of the creditors representing at least three-fifths of the debtor's total liabilities. The proposed agreement will be deemed rejected if the number of creditors required for holding a Creditors' Meeting is not attained, or if the required vote is not achieved. In such instances, the proceeding will be terminated and the creditors may enforce their respective credits.

If the required vote is achieved without any objection from the creditors, or the decision of the majority of the creditors to approve the proposed agreement or any amendment thereof made during the Creditors' Meeting is upheld by the Court, the latter will issue an order that the proposed agreement be carried out, and such agreement shall be binding on all creditors that have been properly summoned and included in the schedule of debts and liabilities. However, the agreement will not be binding upon those creditors mentioned in 2.1.2. (a) and (b) above.

If the required vote is achieved but there is an objection from any of the creditors, the Court will conduct a hearing on the objection. If the objection is found to be meritorious, the proceeding will terminate. If the objection is found to be unmeritorious, the Court will proceed as though no objection has been made.

The amount of the debts of the debtor is not affected by a suspension of payments. However, the payment for such debts is delayed.

2.1.4. Objections to the debtor's proposed agreement

The possible grounds for objecting to the proposed agreement are the following:

(a) Defects in the call for the meeting of the creditors, in the holding thereof, and in the deliberations thereat, which prejudice the rights of the creditors

(b) Fraudulent connivance between one or more creditors and the debtor to vote in favor of the proposed agreement

(c) Fraudulent conveyance of claims for the purpose of obtaining the required majority

If the debtor fails wholly or in part to perform the Court-approved agreement, the rights that the creditors had against the debtor before the agreement shall re-vest in them. In such case, the individual debtor may be made subject to the insolvency proceedings in the manner established by the FRIA.

## 2.2. Court-supervised rehabilitation

Some of the salient provisions of the FRIA on court-supervised rehabilitation are as follows:

(a) Under the FRIA, obligations incurred after the commencement date[35] to finance the rehabilitation of the debtor are considered administrative expenses. Thus, these obligations can be paid in the ordinary course of business during the rehabilitation period and enjoy priority in preference of credits. This provision improves creditor rights for creditors coming in during rehabilitation. By way of comparison, under the Rules on Corporate Rehabilitation, a stay order directs the payment of new loans or other forms of credit accommodations obtained for the rehabilitation of the debtor only with prior court approval.

(b) The FRIA also provides for a waiver of taxes and fees due to the government (national and local) upon issuance of the commencement order by the court and until approval of the rehabilitation plan or dismissal of the petition, whichever is earlier.

[35] Under the FRIA, the commencement date refers to the date on which the court issues the commencement order, which shall be retroactive to the date of filing of the petition for voluntary/involuntary proceedings.

(c) The duration of a stay order extends from the issuance of the commencement order until the termination of the proceedings, unlike before where the stay order was effective only until the approval of the rehabilitation plan.

(d) Compensation of employees required to carry on the business shall be considered an administrative expense. Claims for salary and separation pay for work performed after the commencement date shall also be an administrative expense. However, claims of separation pay for months worked prior to the commencement date shall be considered a pre-commencement claim.

(e) The FRIA provides further clarifications on the treatment of contracts. Under the FRIA, unless cancelled by a final judgment of a court of competent jurisdiction issued prior to the issuance of the commencement order, or at anytime thereafter by the court before which the rehabilitation proceedings are pending, all valid and subsisting contracts of the debtor with creditors and other third parties as at the commencement date shall continue in force; provided that within 90 days following the issuance of the commencement order, the debtor, with the written consent of the rehabilitation receiver, must notify in writing each contractual counter-party whether it is confirming the particular contract. Contractual obligations of the debtor arising or performed during this period, and afterwards for confirmed contracts, are considered administrative expenses. Contracts not confirmed within the required deadline shall be considered terminated. Claims for actual damages, if any, arising as a result of the election to terminate a contract shall be considered pre-commencement claims against the debtor, to be filed with the rehabilitation court as a separate claim. The claim will be considered in the rehabilitation plan with the other claims against the debtor. The provisions of the FRIA do not prevent the cancellation or termination of any contract of the debtor for any ground provided by law.

(f) The ability of the debtor's directors or officers to dispose of the debtor's assets is restricted. Directors or officers may be held liable for double the value of the property involved if having notice of the commencement of the proceedings under the FRIA, or having reason to believe that proceedings are about to be commenced, or in contemplation of the proceedings, willfully: (a) dispose or cause to be disposed of any property of the debtor other than in the ordinary course of business or authorize or approve any transaction in fraud of creditors or in a manner grossly disadvantageous to the debtor and/or creditors; or (b) conceal or authorize or approve the concealment, from the creditors, or embezzles or misappropriates, any property of the debtor. The liability of the director or officer shall be determined by considering the amount of shareholding or equity interest of such director or officer, the degree of his control, and the extent of his involvement in the actual management of the operations of the corporation.

2.2.1. Types of proceedings

(a) Voluntary proceedings

An insolvent debtor (whether a sole proprietorship, partnership or corporation) may initiate voluntary proceedings by filing a petition for rehabilitation with the Philippine Regional Trial Court, which has jurisdiction over the principal office of the debtor, as specified in its articles of incorporation or partnership, or in cases of sole proprietorships, in its registration papers with the Department of Trade and Industry (**DTI**). A group of debtors may also jointly file a petition for rehabilitation when one or more of its members foresee the impossibility of meeting debts when they respectively fall due, and the financial distress would likely adversely affect the financial condition and/or operations of the other members of the group, and/or the participation of the other members of the group is essential under the terms and conditions of the proposed rehabilitation plan.

(b) Involuntary proceedings

Any creditor or group of creditors with a claim of, or the aggregate of whose claims is, at least PHP 1 million or at least 25% of the subscribed capital stock or partners' contributions, whichever is higher, may initiate involuntary proceedings with the Philippine Regional Trial Court, which has jurisdiction over the principal office of the debtor, as specified in its articles of incorporation or partnership, or in cases of sole proprietorships, in its registration papers with the DTI against the debtor by filing a petition for rehabilitation with the court, under any of the following circumstances:

(i) There is no genuine issue of fact or law on the claim/s of the petitioner/s, and the due and demandable payments thereon have not been made for at least 60 days or the debtor has failed generally to meet its liabilities as they fall due.

(ii) A creditor, other than the petitioner/s, has initiated foreclosure proceedings against the debtor, which will prevent the debtor from paying its debts as they become due or will render it insolvent.

2.2.2. Action on the petition and commencement of proceedings

If the court finds the petition sufficient in form and substance, it will, not later than five working days from the filing of the petition, issue a commencement order, which, among others: (a) declares that the debtor is under rehabilitation; (b) appoints a rehabilitation receiver; (c) prohibits the debtor from selling, encumbering, transferring or disposing of in any manner any of its properties except in the ordinary course of business; (d) prohibits the debtor from making any payment of its liabilities outstanding as at the date of filing of the petition; (e) prohibits the debtor's suppliers of goods or services from withholding the supply of goods and services in the ordinary course of business for as long as the debtor makes payments for the services and goods supplied after the issuance of the commencement order; (f) authorizes the payment of administrative expenses as they become due; (g) suspends all actions or proceedings, in court or otherwise, for the enforcement of claims against the debtor; (h) suspends all actions to enforce any judgment, attachment or other provisional remedies against the debtor;[36] (i) sets an initial hearing on the petition; and (j) directs all creditors and interested parties to file their claims at least five days before the said initial hearing.

If, within the same period, the court finds the petition deficient in form or substance, it may give the petitioner/s not more than five working days to amend or supplement the petition. If the deficiency is not cured within the extended five-day period, the court must dismiss the petition.

Upon issuance of the commencement order and until approval of the Rehabilitation Plan or dismissal of the petition, whichever is earlier, the imposition of all taxes and fees including penalties, interests and charges thereof due to the national government or to local government units will be considered waived, in furtherance of the objectives of rehabilitation.

2.2.3. Effectivity and duration of commencement order

Unless lifted by the court, or where the rehabilitation plan is seasonably confirmed or approved, or the rehabilitation proceedings are ordered terminated by the court, the commencement order will be effective for the duration of the rehabilitation proceedings for as long as there is a substantial likelihood that the debtor will be successfully rehabilitated.

[36] The issuance of a stay or suspension order suspending all actions or proceedings for enforcement of all claims against the debtor, and any judgment, attachment or other provisional remedies against the debtor that prohibits the debtor from selling, encumbering, transferring or disposing of any of its properties except in the ordinary course of business and from making any payment for its outstanding liabilities as of commencement date, does not affect the right to commence actions or proceedings in order to preserve *ad cautelam* a claim against the debtor and to toll the running of the prescriptive period to file the claim.

### 2.2.4. Court proceedings

If, after the initial hearing on the petition for rehabilitation, the court is satisfied that there is merit in the petition, it will give due course to the petition and refer the same to the rehabilitation receiver. The rehabilitation receiver will evaluate the rehabilitation plan and submit his or her recommendations to the court within a period of not more than 90 days. However, the court may also refer any dispute relating to the rehabilitation plan or the rehabilitation proceedings to arbitration or other modes of dispute resolution.

If the petition is dismissed because of a finding that: (a) debtor is not insolvent; (b) the petition is a sham filing intended only to delay the enforcement of the rights of the creditor/s or of any group of creditors; (c) the petition, the rehabilitation plan and the attachments thereto contain any materially false or misleading statements; (d) the debtor has committed acts of misrepresentation or in fraud of its creditor/s or a group of creditors, the court may, in its discretion, order the petitioner to pay damages to any creditor or to the debtor, as the case may be, who may have been injured by the filing of the petition, to the extent of any such injury.

The court may also convert the proceedings into one for the liquidation of the debtor upon a finding that: (a) the debtor is insolvent; (b) there is no substantial likelihood for the debtor to be successfully rehabilitated as determined in accordance with the rules promulgated by the Supreme Court; and (c) there is failure of rehabilitation.

The court may also convert the proceedings into liquidation under any of the following circumstances:

(a) Upon motion of the debtor (juridical debtor) at any time during the pendency of court-supervised or pre-negotiated rehabilitation proceedings

(b) When, one year from the date of filing of the petition to confirm a rehabilitation plan, no rehabilitation plan is confirmed within the said period

(c) In cases of termination of proceedings due to failure of rehabilitation or dismissal of petition for reasons other than technical grounds

(d) Upon verified motion of three or more creditors whose aggregate claims total at least one million pesos (PHP 1 million) or at least 25% of the subscribed capital or partners' contributions of the debtor, whichever is higher.

### 2.2.5. Management of the juridic debtor

Unless otherwise ordered by the court upon motion of any interested party, the management of the juridical debtor will remain with the existing management, subject to the applicable laws and agreements, if any, on the election or appointment of directors, managers or managing partner. However, all disbursements, payments or sale, disposal, assignment, transfer or encumbrance of property, or any other act affecting title or interest in property, will be subject to the approval of the rehabilitation receiver and/or the court.

### 2.2.6. Claw-back provisions

The court may, upon motion and after notice and hearing, rescind or declare as null and void any sale, payment, transfer or conveyance of the debtor's unencumbered property or any encumbering thereof by the debtor or its agents or representatives after the commencement date that are not in the ordinary course of business of the debtor.

The court may also rescind or declare as null and void any transaction that occurred prior to the commencement date entered into by the debtor or involving its funds or assets, on the ground that the same was executed with intent to defraud a creditor or creditors, or constitute undue preference of creditors.

2.2.7. Rehabilitation plan

(a) Confirmation of the rehabilitation plan

If no objections to the rehabilitation plan are filed within the relevant period or if the objections filed are found by the court to be lacking in merit or have been cured or have been resolved pursuant to an order to cure issued by the court, then the court must issue an order confirming such rehabilitation plan. The court may confirm the rehabilitation plan notwithstanding the existence of unresolved disputes over claims if the rehabilitation plan has made adequate provisions for paying such claims.

(b) Effect of confirmation of the rehabilitation plan

(i) The confirmed rehabilitation plan will be binding upon the debtor and all persons who may be affected by it, including the creditors, whether or not they participated in the proceedings, opposed the rehabilitation plan, or whether or not their claims have been included in the schedule.

(ii) The debtor must comply with the provisions of the rehabilitation plan and take all actions necessary to carry them out.

(iii) Payments will be made to the creditors in accordance with the provisions of the rehabilitation plan.

(iv) Contracts and other arrangements between the debtor and its creditors will be deemed as continuing in application but only to the extent that they do not conflict with the provisions of the rehabilitation plan.

(v) Any compromise on amounts or rescheduling of timing of payments by the debtor will be binding on creditors regardless of the successful implementation of the rehabilitation plan.

(vi) Claims arising after approval of the rehabilitation plan that are otherwise not treated by the rehabilitation plan are not subject to any suspension order.

2.2.8. Termination of rehabilitation proceedings

The rehabilitation proceedings may be terminated upon motion by an interested party or the rehabilitation receiver if: (i) there is a successful implementation of the rehabilitation plan; or (ii) there is a failure of rehabilitation.

There is failure of rehabilitation in the following cases: (a) dismissal of the petition by the court; (b) the debtor fails to submit a Rehabilitation Plan; (c) there is no substantial likelihood that the debtor can be rehabilitated within a reasonable period based on the rehabilitation plan submitted by the debtor; (d) the rehabilitation plan or its amendment is approved by the court but the debtor fails to perform its obligations thereunder or there is a failure to realize the objectives, targets or goals set forth therein; (e) the commission of fraud in securing the approval of the rehabilitation plan or its amendment; and (f) other analogous circumstances.

## 2.3. Pre-negotiated rehabilitation

An insolvent debtor, by itself or jointly with any of its creditors, may file a verified petition with the court for the approval of a pre-negotiated rehabilitation plan, supported by an affidavit showing the written endorsement or approval of creditors holding at least two-thirds of the total liabilities of the debtor, including secured creditors holding more than 50% of the total secured claims of the debtor and unsecured creditors holding more than 50% of the total unsecured claims of the debtor.

## 2.4. Out-of-court or informal restructuring agreements and rehabilitation plans

In addition to the existing court-supervised and pre-negotiated rehabilitation, the FRIA introduces out-of-court rehabilitation (**OCRA**) or informal restructuring.

### 2.4.1. Minimum requirements

The following are the minimum requirements for an out-of-court or informal restructuring/workout agreement or rehabilitation plan under the FRIA:

(a) The debtor must agree to the out-of-court or informal restructuring/workout agreement or Rehabilitation Plan.

(b) It must be approved by creditors representing at least 67% of the secured obligations of the debtor.

(c) It must be approved by creditors representing at least 75% of the unsecured obligations of the debtor.

(d) It must be approved by creditors holding at least 85% of the total liabilities, secured and unsecured, of the debtor.

A standstill period, not exceeding 120 days, may be agreed upon by the parties pending negotiation and finalization of the out-of-court or informal restructuring. The standstill period will be effective and enforceable not only against the contracting parties but also against the other creditors, provided that the necessary creditor approval on the standstill period is obtained and notice thereof is published in a newspaper of general circulation once a week for two consecutive weeks.

### 2.4.2. Cram-down effect

A restructuring/workout agreement or rehabilitation plan that is approved pursuant to an informal workout framework will have the same legal effect as a court-approved rehabilitation plan.

Any court action or other proceedings arising from, or relating to, the out-of-court or informal restructuring shall not stay its implementation, unless the relevant party is able to secure a temporary restraining order or injunctive relief from the Court of Appeals.

# 3. Liquidation proceedings (individuals or corporations)

In cases where the debtor does not have enough assets/properties to cover his or her obligations or is generally unable to pay his or her liabilities as they fall due in the ordinary course of business, a liquidation proceeding may be initiated. It may be voluntary or involuntary.

## 3.1. Voluntary liquidation

An insolvent debtor may apply for liquidation by filing a verified petition for liquidation with the court. The petition must establish the insolvency of the debtor, and must contain the following:

(a) A schedule of the debtor's debts and liabilities, including a list of creditors with their addresses, amounts of claims and collaterals, or securities, if any

(b) An inventory of all its assets including receivables and claims against third parties

(c) The names of at least three nominees to the position of liquidator

At any time during the pendency of court-supervised or pre-negotiated rehabilitation proceedings, the debtor may also initiate liquidation proceedings by filing a motion to convert the rehabilitation

proceedings into liquidation proceedings in the same court where the rehabilitation proceedings are pending.

If the court finds the petition or the motion, as the case may be, to be sufficient in form and substance, the court will issue a liquidation order.

## 3.2. Involuntary liquidation

Three or more creditors of a corporate debtor whose total credits amount to at least PHP 1 million or at least 25% of the subscribed capital stock or partners' contribution of the debtor, whichever is higher, may seek the liquidation of an insolvent corporate debtor by filing a petition for liquidation of the debtor with the court.

At any time during the pendency of or after a court-supervised or pre-negotiated rehabilitation proceedings, three or more creditors whose claims are at least either PHP 1 million or at least 25% of the subscribed capital or partner's contributions of the debtor, whichever is higher, may also initiate liquidation proceedings by filing a motion in the same court where the rehabilitation proceedings are pending, to convert the rehabilitation proceedings into liquidation proceedings.

If the court determines the petition or motion to be meritorious, it will issue a liquidation order.

On the other hand, any creditor or group of creditors with a claim of, or with claims aggregating at least PHP 500,000 against an individual debtor, may file a verified petition for liquidation with the court of the city or province in which the debtor resides. The court will issue an order requiring the individual debtor to show cause why he or she should not be declared an insolvent. If the individual debtor shall default, or if after trial the issues are found in favor of the petitioning creditors, the court will issue the liquidation order.

## 3.3. Effects of the liquidation order

Upon the issuance of the liquidation order:

(a) The juridical debtor will be deemed dissolved and its corporate or juridical existence terminated.

(b) Legal title to and control of all the assets of the debtor, except those that may be exempt from execution, will be deemed vested in the liquidator, or pending his or her election or appointment, with the court.

(c) All contracts of the debtor will be deemed terminated and/or breached, unless the liquidator, within 90 days from the date of his or her assumption of office, declares otherwise and the contracting party agrees.

(d) No separate action for the collection of an unsecured claim will be allowed. Such actions already pending will be transferred to the liquidator to accept and settle or contest. If the liquidator contests or disputes the claim, the court will allow, hear and resolve such contest except when the case is already on appeal. In such a case, the suit may proceed to judgment, and any final and executory judgment therein for a claim against the debtor will be filed and allowed in court.

(e) No foreclosure proceeding will be allowed for a period of 180 days.

## 3.4. Rights of secured creditors

The liquidation order will not affect the right of a secured creditor to enforce his or her lien in accordance with the applicable contract or law. A secured creditor may undertake either of the following:

(a) Waive his or her right under the security or lien, prove his or her claim in the liquidation proceedings and share in the distribution of the assets of the debtor

(b) Maintain his or her rights under the security or lien

If the secured creditor maintains his or her rights under the security or lien:

(a) The value of the property may be fixed in a manner agreed upon by the creditor and the liquidator. When the value of the property is less than the claim it secures, the liquidator may convey the property to the secured creditor and the latter will be admitted in the liquidation proceedings as a creditor for the balance. If its value exceeds the claim secured, the liquidator may convey the property to the creditor and waive the debtor's right of redemption upon receiving the excess from the creditor.

(b) The liquidator may sell the property and satisfy the secured creditor's entire claim from the proceeds of the sale.

(c) The secured creditor may enforce the lien or foreclose on the property pursuant to applicable laws.

## 3.5. Liquidation plan

Within three months from assumption into office, the liquidator must submit a liquidation plan to the court. The liquidation plan must, as a minimum, enumerate all the assets of the debtor, all the claims against the debtor, and a schedule of liquidation of the assets and payment of the claims.

The liquidator must implement the Liquidation Plan as approved by the court. Payments must be made to creditors only in accordance with the provisions of the Liquidation Plan. But if the debtor and creditor are mutually debtor and creditor of each other, one may be set off against the other. If there is any balance, then the balance may be claimed in the liquidation proceedings.

## 3.6. Concurrence and preference of credits

The liquidation plan must ensure that the concurrence and preference of credits as enumerated in the Civil Code and other relevant laws will be observed, unless a preferred creditor voluntarily waives his or her preferred right. Credits for services rendered by employees or laborers to the debtor shall enjoy first preference, unless the claims constitute legal liens under relevant provisions of the Civil Code.

Certain types of credits enjoy preference with respect to specific movable or immovable properties (**Special Preferred Credits**).

Among the Special Preferred Credits, taxes and assessments due upon the property to which the claims relate enjoy absolute preference. All the remaining classes of Special Preferred Credits with respect to specific movable or immovable property (e.g., credits secured by a pledge or mortgage) do not enjoy priority among themselves, but must be paid concurrently and *pro rata*, that is, in proportion to the amount of the respective credits.

Credits that do not enjoy any preference with respect to specific property are satisfied in the order established in Article 2244 of the Civil Code. Article 2244 provides for the preference of certain claims and credits which, without special privilege, appear in: (i) a public instrument (i.e., the instrument is notarized); or (ii) a final judgment. These credits have preference among themselves in the order of priority of the dates of the instruments and of the judgments, respectively.

### 3.7. Claw-back provisions

Any transaction occurring prior to the issuance of the liquidation order, or in the case of conversion of the rehabilitation proceedings, prior to the commencement date, entered into by the debtor or involving its assets, may be rescinded or declared null and void on the ground that the same was executed with intent to defraud a creditor or creditors, or it constitutes undue preference of creditors.

The liquidator or a creditor, with the liquidator's conformity, may initiate and prosecute any action to rescind, or declare null and void, any transaction described in the immediately preceding paragraph.

## 4. Cross-border insolvency proceedings

The FRIA provides for recognition of foreign insolvency proceedings and adopts the Model Law on Cross-Border Insolvency of the UNCITRAL, subject to the FRIA Rules.

- The FRIA Rules apply when assistance is sought before a Philippine court by a foreign court or a foreign representative in connection with a foreign proceeding.
- Assistance is sought in a foreign state in connection with a proceeding governed by the FRIA and the FRIA Rules.
- A foreign proceeding and a proceeding governed by the FRIA and the FRIA Rules are concurrently taking place.
- Creditors in a foreign state have an interest in requesting the commencement of, or participating in, a proceeding under the FRIA Rules for court-supervised rehabilitation, pre-negotiated rehabilitation or OCRA.

Foreign creditors are accorded the same rights as creditors in the Philippines in proceedings involving court-supervised rehabilitation, pre-negotiated rehabilitation and OCRA governed by the FRIA Rules.

However, courts must refuse to take any action in any cross-border insolvency proceeding where: (a) the action would be manifestly contrary to the public policy of the Philippines; and (b) the court finds that the country where the foreign rehabilitation proceeding is taking place does not extend recognition to a Philippine rehabilitation proceeding, or that the country of which the petitioner-foreign creditor is a national does not grant the same rights to a Philippine creditor in a manner substantially in accordance with the FRIA Rules.

## 5. Consequences on shareholders of insolvent corporations

If an insolvent corporation is under rehabilitation, the shareholders' proportion of ownership of the insolvent corporation may be altered depending on the rehabilitation plan that will be recommended to and approved by the court. Certain debts may be recommended to be converted to equity, so the creditors may become new shareholders of the insolvent corporation. Unless otherwise ordered by the court, distribution of dividends will also be discontinued since this will constitute disposing of properties outside the ordinary course of business, which is disallowed by the stay order.

If an insolvent corporation is under liquidation, the insolvent corporation will be dissolved and liquidated, and all its debts and obligations would have to be paid first before its remaining assets (if any) can be distributed to its shareholders.

# Baker McKenzie locations

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