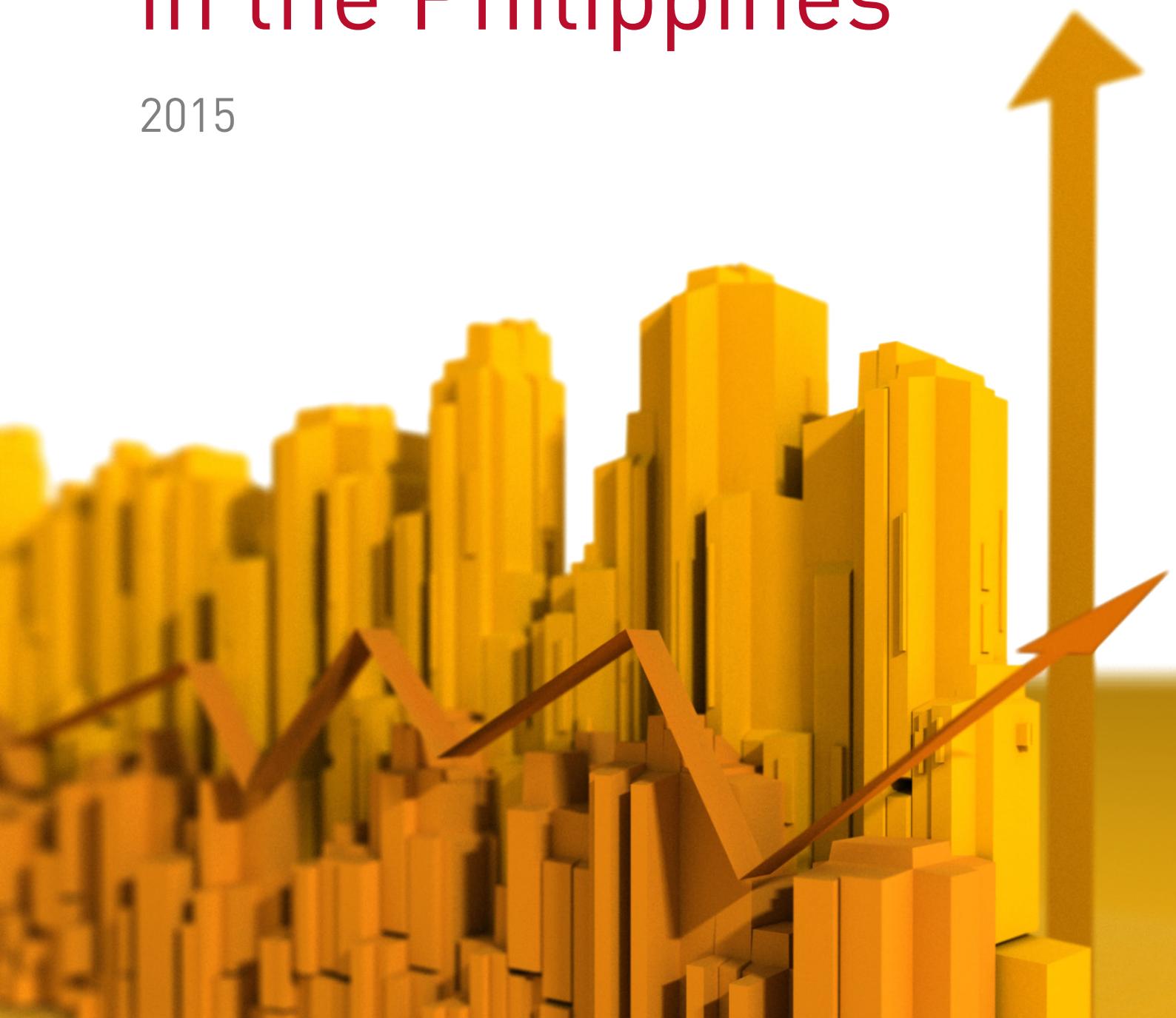


# Doing Business in the Philippines

2015



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The law is stated as of January 2015.

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## Introduction

### The Philippines

The Philippine economy is expected to continue expanding robustly in 2015, according to the latest Asian Development Bank (ADB) report. Forecast Philippine gross domestic product growth remains strong at 6.4 percent.

In 2014, the Philippines maintained its rapid economic progress, gaining confidence from the influx of foreign investors and global institutions flocking to the country. The Philippine economy grew by 6.9 percent in the last quarter of the year, pushing the average full-year growth to 6.1 percent.<sup>1</sup> The fourth quarter and full-year growth is above the market expectation of 6.0 percent and 5.8 percent, respectively. Net foreign investments increased by 61.3 percent within the first nine months of the year.<sup>2</sup>

Philippine credit ratings were significantly elevated by the world's major credit rating agencies in the past two years. In 2014, Standard & Poor's Financial Services (S&P) upgraded the Philippines' long-term sovereign credit rating from BBB- Stable to BBB Stable, the highest rating ever recorded in the country's history. This set the country's credit rating a notch higher than the minimum investment grade status granted to it by S&P on 2 May 2013, making the Philippines more internationally competitive and attractive to investors.<sup>3</sup> Likewise, Fitch Ratings (Fitch) and Moody's Investors Service (Moody's) have given the country an Investment Grade, reaffirming the country's strong economic fundamentals and its positive growth prospects.

As the country enters a demographic sweet spot, where majority of the over 100 million Filipinos would be within the working-age group, the nation's attractiveness as a global investment destination is further strengthened. This puts the country in a strong and enviable position to benefit from upcoming developments in the Southeast Asian regional landscape.

<sup>1</sup> <http://www.neda.gov.ph/?p=4767>. Accessed 30 January 2015.

<sup>2</sup> <http://president.gov.ph/news/2014-year-ender-5-signs-progressive-philippines/>. Accessed 5 January 2015

<sup>3</sup> <http://www.gov.ph/report/credit-ratings/>. Accessed 5 January 2015.

## We are Quisumbing Torres.

For more than five decades, Quisumbing Torres has been helping lead multinational and domestic organizations drive their growth in the Philippines. A consistent top-ranking law firm, we provide global reach with deep local roots, enabling us to deliver exceptional advice to clients across borders seamlessly.

In 1963, the Firm was established as Collas and Guerrero and later became known as Quisumbing Torres. As part of the Baker & McKenzie's global network with more than 11,000 people in 77 offices in 47 countries, we are able to offer market insight and international experience that few firms in the Philippines can match.

With our team of more than 50 Philippine lawyers, Quisumbing Torres proactively addresses legal issues that affect our clients' business in the country. Toward this end, we organize our lawyers into practice groups, to deal with specific legal issues that affect our clients' commercial operations. Today, Quisumbing Torres lawyers offer seasoned and industry-specific advice in the practice areas of Banking & Finance, Corporate & Commercial, Dispute Resolution, Employment, Immigration, Intellectual Property and Tax.

Our uncompromising commitment to excellence and the fluency in how we think, work and behave are recognized by legal directories. Our Firm was rated Tier 1 in *The Legal 500 Asia Pacific* from 2008 to 2015, in the areas of Employment, Immigration and Intellectual Property. *The Legal 500 Asia Pacific* also ranked our Aviation and Mining & Natural Resources/Projects & Energy at Tier 1 from 2009 to 2015, and our Real Estate and Construction Practice Tier 1 from 2008 to 2009, and 2012 to 2015. In 2015, our Corporate and M&A is ranked Tier 1.

In *Chambers Asia Pacific*, Quisumbing Torres was ranked Band 1 from 2008 to 2014 in Intellectual Property; from 2008 to 2011/2012 to 2014 in Natural Resources & Mining/Projects, as well as in Infrastructure & Energy. From 2008 to 2011, and 2013 to 2014, *Chambers Asia Pacific* placed our Dispute Resolution practice in Band 1 and, in 2012, distinguished the practice under the category *Spotlight Table*. In 2008 and 2014, *Chambers Asia Pacific* ranked our Real Estate practice in Band 1 and our Tax practice in Band 1 in 2008. Our Firm was adjudged to belong to Band 1 in Corporate / Mergers & Acquisitions (M&A) areas in 2014.

*Chambers Global* placed Quisumbing Torres in Band 1 for its Natural Resources & Mining/Projects, Infrastructure & Energy areas from 2009 to 2011/2012 to 2014.

*The Asian Legal Business* distinguished us as a *Spotlight Firm* in 2012 and as a *Leading Firm* in 2014 and has consistently recognized Quisumbing Torres as a Tier 1 firm in the Philippines for M&A Rankings.

*IFLR1000*, guide to the world's leading financial law firms, has consistently recommended Quisumbing Torres' banking and capital markets, M&A, and project finance practices in its guidebooks from 2005 to 2014. We are ranked Tier 1 for our Energy and Infrastructure in 2014.

## I. Foreign Investments 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). As stated in the FIA, it is 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.

### 1. Extent of Foreign Equity

The FIA provides for the formulation of a Foreign Investment Negative List (Negative List) – 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 the 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 to the extent of 100 percent of the domestic enterprise's or the export enterprise's capital, 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 percent thereof. An export enterprise is a manufacturer, processor or service (including tourism) enterprise that exports 60 percent or more of its output, or a trader that purchases products domestically and exports 60 percent 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 USD200,000 (an export enterprise is not required to comply with this minimum capitalization requirement). The capitalization requirements of a domestic market enterprise may be reduced to the peso

equivalent of USD100,000: (i) if its activity involves advanced technology as determined and certified by the Department of Science and Technology, 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 percent 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 percent 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 percent of the fund will accrue to the benefit of Philippine nationals. Where a corporation and its non-Filipino stockholders own stocks in an enterprise registered with the Philippine Securities and Exchange Commission (SEC), at least 60 percent of the capital stock outstanding and entitled to vote of each of both corporations must be owned and held by citizens of the Philippines and at least 60 percent of the members of the Board of Directors must be citizens of the Philippines, in order that the corporation shall be considered a Philippine national.

**Some of the activities that are included in the Ninth Negative List (which took effect on 13 November 2012) are as follows:**

No Foreign Equity

- Mass media, except recording
- Except in cases prescribed by law, the practice of all professions, including, but not limited to, engineering, medicine, accountancy, architecture, customs brokerage, geology, and agriculture, real estate service, respiratory therapy, and psychology
- Retail trade enterprises with a paid-up capital of less than USD2.5 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 percent Foreign Equity

- Private radio communications network

Up to 25 percent 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 percent Foreign Equity

- Advertising

Up to 40 percent Foreign Equity

- Exploration, development and utilization of natural resources
- Ownership of private lands
- Operation and management of public utilities
- Ownership, establishment and administration of educational institutions
- 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 project proponent and facility operator of a build-operate-transfer project requiring a public utilities franchise
- 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
- Domestic market enterprises (i.e., entities that do not export 60 percent or more of their output) with a paid-in equity capital of less than the equivalent of USD200,000

Up to 49 percent Foreign Equity

- Lending companies

Up to 60 percent Foreign Equity

- Financing companies regulated by the SEC
- Investment houses regulated by the SEC

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, the license is reserved for and issued only to Filipino sole proprietorships or partnerships/corporations with at least 60 percent Filipino equity participation, and duly organized and existing under and by virtue of the laws of the Philippines.

The foregoing is a non-exhaustive enumeration of the sectors/activities that are subject to foreign equity limitations.

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

The basis for the inclusion of the operation and management of public utilities in the Negative List is Article XII of the Constitution, which provides that a franchise for the operation of a public utility shall be granted only to Filipinos, or to corporations organized under the laws of the Philippines at least 60 percent of whose capital is owned by Filipinos.

In a recent landmark decision (Gamboa Case)<sup>4</sup>, the Philippine Supreme Court (Supreme Court) defined capital, as used in Article XII of the Constitution, as referring to “shares of stock entitled to vote in the election of directors,” coupled with full beneficial ownership of the stocks of the public utility operator. The Supreme Court further held that, to ensure that effective control of public utilities is held by Filipinos, the 60 percent Filipino ownership requirement shall apply separately to each class of shares of the public utility operator, whether common, preferred non-voting, preferred voting, or any other class of share.

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; and
- (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.

The SEC Guidelines, which took effect on 22 May 2013, gave all existing covered corporations which are non-compliant until 22 May 2014 to comply with the aforementioned requirement.

## **2. Anti-Dummy Law**

The Philippines has an Anti-Dummy Law, which imposes criminal and civil penalties on persons violating foreign equity limitations.

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<sup>4</sup> *Heirs of Wilson P. Gamboa v. Finance Secretary Margarito Teves, et al.*, G.R. No. 176579, 9 October 2012, which became final on 24 October 2012.

Under the Anti-Dummy Law, 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 percent of the capital is owned by such citizens, is prohibited from: (a) permitting or allowing the use, exploitation or enjoyment of such 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.

### 3. Forms of Investment Vehicle

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

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.

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.

Subject to nationality requirements pertaining to the intended activity, Philippine law allows foreign investors to establish and register a domestic corporation, and foreign corporations to transact business in the Philippines as a branch or a representative office.

A domestic corporation may be a joint venture or a wholly owned subsidiary.

A branch and a representative office of a foreign corporation are mere extensions of their head offices.

A foreign investor may also invest as a limited or general partner in a partnership.

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 that wish to engage in a business that is not subject to nationality restrictions generally choose between establishing a Philippine subsidiary and establishing a Philippine branch office.

### 4. Domestic Corporation versus Branch

Assuming that the proposed activity is not subject to any foreign equity limitation, a foreign investor may set up a domestic corporation or 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.

Generally, corporations that are more than 40 percent foreign-owned, as well as branches of foreign corporations that are considered domestic market enterprises must have a paid-in capital of at least USD200,000. The paid-in capital requirement is reduced to USD100,000 for domestic market enterprises whose activities involve advanced technology or which employ at least 50 direct employees.

Entities that qualify as export enterprises (enterprises that export 60 percent or more of their output) are not subject to any minimum paid-in capital requirement.

## 5. Other Types of Corporate Vehicle

### 5.1. Representative Office

A representative office may be established to deal 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 as well as quality control only. 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 USD30,000 to fund its operations.

### 5.2. 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 USD50,000 and thereafter, USD50,000 annually.

The regional headquarters is not subject to income tax, value-added tax (VAT), and all local licenses, fees and charges, except real property tax on land improvements and equipment. It enjoys tax- and duty- free importation of equipment and materials necessary for training and conferences.

### 5.3. Regional Operating Headquarters (ROHQ)

A multinational company may establish an 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 USD200,000.

#### 5.4. Regional Warehouses

A multinational company organized and existing under any laws other than those of the Philippines, which 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 therefore 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:

- 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; and
- b. serving as a storage or warehouse of goods purchased locally by the home office of the multinational for export abroad.

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

#### 5.5. Offshore Banking Unit (OBU)

A foreign bank may operate an OBU in the Philippines. The OBU may be a branch, subsidiary, or affiliate of a foreign banking corporation authorized by the Bangko Sentral ng Pilipinas (BSP), which is the Philippine Central Bank, to conduct business with funds from external sources.

### 6. Post-Registration Requirements

Upon incorporation/registration with the SEC, the newly incorporated/registered entity must comply with certain basic registration and licensing requirements with different government agencies. These

post-registration requirements include obtaining from certain government agencies and local government offices tax, employee-welfare-related, and commencement-of-operations permits, licenses and registrations.

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.

## II. Taxation

Philippine taxes are imposed by both the national government and the local government units.

### 1. Tax Treaties

The Philippines has tax treaties with the following countries:

Australia	Germany	Pakistan
Austria	Hungary	Poland
Bahrain	India	Romania
Bangladesh	Indonesia	Russia
Belgium	Israel	Singapore
Brazil	Italy	Spain
Canada	Japan	Sweden
China	Korea	Switzerland
Czech Republic	Kuwait	Thailand
Denmark	Malaysia	United Arab Emirates
Finland	Netherlands	United Kingdom
France	New Zealand	United States
	Nigeria	Vietnam
	Norway	

### 2. National Taxes

#### 2.1. 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 percent.

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 percent.

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.

The 30 percent corporate income tax rate was 35 percent prior to 1 January 2009.

##### 2.1.1. Income Subject to Different Tax Treatment

2.1.1.1. Interest and royalties interest

2.1.1.2. Dividends

2.1.1.3. Branch profits

- 2.1.1.4. Gains from sale of real property
- 2.1.1.5. Capital gains from sale or exchange of stock
- 2.1.1.6. Tax on initial public offer of shares of stock
- 2.1.2. Income Taxation for Specific Industries
  - 2.1.2.1. Foreign international carrier
  - 2.1.2.2. Non-resident cinematographic film owner/lessor/distributor
  - 2.1.2.3. Non-resident lessor of aircraft or machinery and other equipment
  - 2.1.2.4. Non-resident owner of chartered vessel
  - 2.1.2.5. Foreign currency transactions of OBUS
  - 2.1.2.6. Minimum corporate income tax
  - 2.1.2.7. Tax on improperly accumulated earnings

## 2.2. Individual Income Tax

A resident citizen is taxed on income from all sources at progressive rates ranging from 5 percent to 32 percent 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 percent, withheld at source.

## 2.3. Withholding of Taxes

Taxes due on the income of a non-resident alien and a non-resident foreign corporation are withheld at source.

The salary and certain other income receipts of residents, such as interest and rent income, are also subject to withholding tax.

## 2.4. Fringe Benefits Tax

A final tax of 32 percent is imposed on the grossed-up monetary value of fringe benefits furnished or granted to an employee (except rank-and-file) by the employer.

Fringe benefits tax is not imposed if the fringe benefit is required by the nature of, or necessary to, the trade, business, or profession of the employer, or when the fringe benefit is for the convenience or advantage of the employer.

## 2.5. Business Taxes

### 2.5.1. VAT

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 percent VAT when his or her gross sales or receipts for the past 12 months exceed PHP1,919,500.00.

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

#### 2.5.2. Excise Taxes

In addition to VAT, excise taxes apply to goods produced in the Philippines for domestic sale or consumption or for any other disposition, and to things imported.

Excise taxes that are based on the weight or volume capacity or any other physical unit of measurement of the goods are called specific taxes.

Excise taxes that are imposed and based on the selling price or other specified value of the goods are referred to as *ad valorem* taxes.

**The following are subject to excise taxes:**

- Distilled spirits, wines, fermented liquor
- Tobacco products, cigars, and cigarettes
- Manufactured oils and other fuels
- Fireworks
- Cinematographic films
- Saccharine
- Automobiles
- Non-essential goods (such as jewelry, perfumes, and toilet water)
- Yachts and other vessels intended for pleasure or sports
- Mineral products and quarry resources

Excise taxes paid on locally produced goods that are exported without return to the Philippines, whether in their original state or as ingredients or parts of any manufactured goods or products, are credited or refunded upon submission of proof of actual exportation and receipt of the corresponding foreign exchange payment.

#### 2.5.3. Percentage Taxes

Certain persons are subject to percentage taxes at rates ranging from 1 percent to 30 percent. Percentage taxes are normally imposed on gross receipts.

**Among those subject to percentage taxes are the following:**

- Keepers of garages and common carriers by land, air or water for the transport of passengers
- Entities engaged in the life insurance business
- Overseas dispatches, messages, or conversations transmitted from the Philippines by telephone, telegraph, telewriter exchange, wireless, and other communication equipment services
- Banks and non-bank financial intermediaries

Persons or entities subject to percentage taxes are exempt from VAT. Business establishments whose gross annual sales or receipts do not exceed PHP1,919,500.00 million are exempt from VAT, but are subject to percentage tax of 3 percent, unless they elect to pay the 12 percent VAT.

#### 2.5.4. Documentary Stamp Taxes

Documentary stamp taxes must be affixed to certain documents, instruments and papers evidencing business transactions, such as:

- Bonds
- Debentures
- Certificates of indebtedness
- Certificates of stock
- Certificates of profits or of interests in property or accumulations
- Bank checks
- Drafts
- Certificates of deposit
- Promissory notes
- Bills of exchange
- Letters of credit
- Insurance policies
- Fidelity bonds
- Annuity policies
- Indemnity bonds
- Certificates issued by certain officers
- Warehousing receipts
- *Jai-alai* and horse race tickets
- Bills of lading
- Proxies
- Powers of attorney
- Leases of real property
- Mortgages
- Pledges
- Deeds of sale of real property and charter parties

#### 2.6. Other Imposts of the National Government

In addition to the 12 percent VAT and any applicable excise tax, importations are generally subject to customs duties.

The Tariff and Customs Code provides for the imposition of anti-dumping duty, countervailing duty, marking duty and discriminating duty under special circumstances.

### 3. Local and Real Property Taxes

Local government units, such as provinces, cities, municipalities and *barangays*, may 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.

### III. Foreign Exchange Regulations

#### 1. Purchase and Sale of Foreign Exchange

Generally, foreign exchange may be freely bought and sold in the Philippines.

By way of exception, the BSP regulates the purchase and sale of foreign exchange by authorized agent banks (AABs), their subsidiary/affiliate foreign exchange corporations (AAB-forex corps), non-bank BSP-supervised entities, such as foreign exchange dealers, money changers and remittance agents (collectively, BSP Regulated Entities). Moreover, in times of national emergency or exchange crisis, the BSP, with the approval of the president of the Philippines, may regulate or restrict all foreign exchange transactions.

#### 2. Foreign Trade Transactions

Foreign trade includes import and export trade transactions.

As a rule, a wide variety of merchandise may be imported into and exported from the Philippines. However, the importation or exportation of certain commodities is regulated or prohibited for reasons of public health and safety, national security, international commitments, and the development and rationalization of local industry.

Without need of prior BSP approval, but subject to reporting requirements and other conditions, universal and commercial banks may sell foreign exchange to service payment of imports under the arrangements prescribed by the BSP. Such arrangements include letters of credit, documents against payment, documents against acceptance, open account arrangements and direct remittance.

AABs/AAB-forex corps may sell foreign exchange to importers without prior BSP approval for advance payment for importations, but subject to the submission by importers to the AABs/AAB-forex corps of prescribed documents.

Payments for exports may be made without prior BSP approval under the arrangements prescribed by the BSP. Such arrangements include letters of credit, documents against payment/cash against documents, documents against acceptance, open account arrangement, intercompany open account offset arrangements with the parent company or affiliates abroad, consignment and export advances.

#### 3. Non-trade Transactions

Non-trade transactions refer to all other foreign exchange transactions that are not merchandise import or export transactions. These include foreign loans and foreign investments.

Generally, all BSP Regulated Entities may sell foreign exchange to Philippine residents to fund payments of non-trade transactions (other than those relating to foreign/foreign currency loans and investments) even without prior BSP approval. However, if the sale of foreign exchange exceeds USD120,000, or its equivalent in other foreign currency, the BSP Regulated Entity selling the foreign exchange must require the purchaser to present the documentary requirements prescribed by the BSP.

##### 3.1. Foreign Inward Investments

Foreign investments, which include direct investments in cash or kind and portfolio investments, must be registered with the BSP or, in certain instances, with a custodian bank, so that foreign exchange may be sourced from AABs/AAB-forex corps to fund the repatriation of the investment and the remittance of profits and dividends.

All applications<sup>5</sup> for registration of foreign direct investments must be filed with the BSP within one (1) year from the date of inward remittance/actual transfer of assets to the Philippines. A Bangko Sentral Registration Document (BSRD) will be issued by the BSP evidencing registration of such investments.

Non-resident foreign investments in: (1) peso-denominated government securities; (2) peso time deposits; (3) PSE-listed securities issued by residents; and (4) PSE-listed equity securities issued by non-residents may be registered with designated custodian banks.

If a foreign investment is not registered with the BSP, AABs/AAB-forex corps would not be allowed to sell foreign exchange to fund the repatriation of such investment and the remittance of profits and dividends relating to such investment. However, foreign exchange to fund the repatriation and remittance may be sourced from foreign exchange dealers, money changers and remittance agents.

### **3.2. Outward Investments**

Prior BSP approval for outward investments would be required only if the foreign exchange needed to fund such outward investments would exceed USD60 million (or its equivalent in other foreign currency) per investor per year, and such foreign exchange would be sourced from AABs/AAB-forex corps. Qualified investors (which would be insurance and pre-need companies, collective/pooled funds [such as mutual funds, unit investment trust funds, and variable insurance], public or private pension or retirement or provident funds, and such other entities and funds that the BSP may determine to be such) may apply to the BSP for a higher annual outward investment limit.

### **3.3. Foreign Loans and Guarantees**

Foreign loans/foreign currency-denominated loans and guarantees must be approved and/or registered with the BSP so that foreign exchange may be purchased from AABs/AAB-forex corps to service payments.

If a foreign loan or guarantee is not approved and/or registered with the BSP, AABs/AAB-forex corps may not sell foreign exchange to fund payments of such foreign loan or guarantee. However, foreign exchange to fund the payments of the foreign loan or guarantee may be sourced from foreign exchange dealers, money changers and remittance agents.

### **3.4. Other Financing Schemes/Arrangements**

Financing schemes or arrangements that involve an option to purchase or a transfer of ownership after a certain period, as in the case of build-operate-and-transfer and build-and-transfer arrangements, must be registered with the BSP to be eligible for servicing payments using foreign exchange that will be purchased from AABs/AAB-forex corps.

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<sup>5</sup> Applications for registration of foreign direct investments already recorded in the investee firm's books may be filed with the BSP-IOD up to 18 April 2015, regardless of date of inward remittance of foreign exchange/actual transfer of assets to the Philippines. After this date, the one (1) year prescriptive period for filing of applications for registration of foreign direct investments will apply.

## IV. Incentives under Special Registrations

Qualified enterprises may register with the BOI under the Omnibus Investments Code (OIC) or with the PEZA to avail themselves 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 Special Economic Zones.

### 1. Enterprises Registered under the OIC

The OIC, through tax incentives and other benefits, encourages investments in preferred areas of economic activity specified by the BOI 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 case of a partnership or any other association, organized under Philippine laws with at least 60 percent of its capital being owned and controlled by citizens of the Philippines, or, in case of a corporation or a cooperative, organized under Philippine laws with at least 60 percent of its capital stock outstanding and entitled to vote being owned and held by Philippine nationals and at least 60 percent 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 percent 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 percent 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 percent 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.

Under Article 17 of the OIC, 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; or (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; or (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 2014 IPP departs from previous IPPs in that it is now a 3-year document subject to an annual review.

The 2014 IPP adopts a decision framework for the prioritization of economic activities that focuses on the potentials of the sectors to generate employment, move up the value chain, create spillovers, and promote competitiveness in the market, as well as closing the supply or value chain gaps as indicated in sectoral roadmaps and available studies. The 2014 IPP also employs the principle of geographical application, which takes into account the relevance and impact of an economic activity in a particular region, province, or a cluster of local government units.

The 2014 IPP provides for the following preferred areas of investments that may be entitled to incentives:

## 1.1. Preferred Activities

### 1.1.1. Manufacturing

- 1.1.1.1. Motor vehicle<sup>6</sup>
- 1.1.1.2. Shipbuilding
- 1.1.1.3. Aerospace parts and components
- 1.1.1.4. Chemicals
- 1.1.1.5. Virgin paper pulp
- 1.1.1.6. Copper wires and copper wire rods
- 1.1.1.7. Basic iron and steel
- 1.1.1.8. Tool and Die

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<sup>6</sup> Based on Logistics Efficiency Index

## 1.1.2. Agribusiness and Fishery

- 1.1.2.1. Commercial production<sup>7</sup>
- 1.1.2.2. Commercial processing<sup>8</sup>
- 1.1.2.3. Production of animal and aqua feeds excluding those for game animals, fowls and other species for pet/leisure purposes<sup>9</sup>
- 1.1.2.4. Production of fertilizers and pesticides<sup>10</sup>
- 1.1.2.5. Modernization of sugar mills
- 1.1.2.6. Mechanized agriculture support services<sup>11</sup>
- 1.1.2.7. Agriculture support infrastructures<sup>12</sup>

## 1.1.3. Services

- 1.1.3.1. Integrated Circuit Design
- 1.1.3.2. Creative Industries / Knowledge-Based Services<sup>13</sup>
- 1.1.3.3. Ship repair
- 1.1.3.4. Charging stations for e-vehicles
- 1.1.3.5. Maintenance, Repair and Overhaul of aircraft
- 1.1.3.6. Industrial waste treatment

## 1.1.4. Economic and Low-cost Housing

1.1.5. Hospitals<sup>14</sup>

## 1.1.6. Energy

- 1.1.6.1. Exploration and development of energy sources (including energy crops or upstream biofuels)
- 1.1.6.2. Power generation plants<sup>15</sup>
- 1.1.6.3. Ancillary services

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<sup>7</sup> Subject to geographical supply considerations. In the case of poultry and livestock production, this is limited to areas in ARMM, Mindoro and Palawan.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Covers start-ups of small newly incorporated domestic players/enterprises only.

<sup>14</sup> Subject to geographical considerations.

<sup>15</sup> Subject to capacity installation gap based on the Department of Energy's 5-year supply-demand forecast or up to 2019.

1.1.7. Public Infrastructure and Logistics

- 1.1.7.1. Airports and seaports
- 1.1.7.2. Air, land and water transport
- 1.1.7.3. LNG Storage and Regasification Facility
- 1.1.7.4. Bulk water treatment and supply

1.1.8. PPP Projects

**1.2. Export Activities**

- 1.2.1. Production and manufacture of export products
- 1.2.2. Services 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
  - 1.4.1.1. Export Trade and Service Exporters
  - 1.4.1.2. Support Activities for Exporters
- 1.4.2. Agriculture, Agribusiness/ Aquaculture & Fishery
- 1.4.3. Basic Industries
- 1.4.4. Consumer Manufactures
- 1.4.5. Infrastructure and Services
- 1.4.6. Industrial Service Facilities
- 1.4.7. Engineering Industries
- 1.4.8. Logistics

1.4.9. Brunei Darussalam-Indonesia-Malaysia-Philippines East ASEAN Growth Area (BIMP-EAGA) Trade and Investment Enterprises

1.4.10. Tourism

1.4.11. Health and Education Services and Facilities

1.4.12. *Halal* Industry

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

### 1.5. Tax Incentives

1.5.1. Income tax holiday consisting of income tax exemption for six years from the start of commercial operations for pioneer firms, and four years for non-pioneer firms. This incentive may be extended in certain instances and upon approval by the BOI.

Expanding firms are entitled to an exemption from income taxes proportionate to their expansion for a period of three years from the start of commercial operations of the expansion. However, they are not entitled to additional deductions for incremental labor expenses during the period that they avail themselves of this incentive.

The income tax holiday may not be extended for more than eight years.

1.5.2. Exemption from taxes and duties on spare parts and consumable supplies imported by a registered enterprise with a customs-bonded manufacturing warehouse and exporting at least 70 percent of its production

1.5.3. Exemption from taxes and duties on machinery, equipment, spare parts and accessories imported by new and expanding registered enterprises

1.5.4. For the first five years from registration, an additional deduction from taxable income of 50 percent of the wages of additional skilled and unskilled workers in the direct labor force. This incentive is granted only if the registered enterprise meets a prescribed capital-to-labor ratio.

1.5.5. 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

1.5.6. 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

1.5.7. 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

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

1.5.9. Exemption from local taxes for six years from the date of registration for pioneer enterprises, and four years for non-pioneer enterprises

Applications covering new and expansion projects that will be located in Metro Manila are no longer entitled to income tax holiday, except in the case of:

1.5.10. projects locating in governmental industrial estates, resettlement areas, or National Housing Authority (NHA) sites; and

1.5.11. service-type projects and trading projects with no manufacturing facilities.

1.5.12. Strategic Activities, as defined under the 2013 IPP.

The BOI may completely or partially deny incentives to enterprises dealing in traditional export products.

## **1.6. Non-tax Incentives**

- 1.6.1. Simplified customs procedures for the importation of equipment, spare parts, raw materials, and supplies, and the export of processed products
- 1.6.2. No restriction on the use of consigned equipment but re-export bond is required
- 1.6.3. 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.
- 1.6.4. The privilege to operate bonded manufacturing/trading warehouses, subject to customs rules and regulations

## **1.7. 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:

- 1.7.1. Double deduction from taxable income of 50 percent of the wages corresponding to the increment in the number of direct labor
- 1.7.2. Deduction of the cost of necessary and major infrastructure works constructed

## **2. Enterprises Registered with the PEZA**

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 Special Economic Zones

An Ecozone Manufacturing Enterprise is an entity engaged in the assembly, manufacturing or processing activities resulting in the exportation of at least 70 percent 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 percent 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; content development for multimedia or Internet purposes; and others.

## 2.1. Tax and Other Incentives

As a general rule, an Ecozone Enterprise (except a Logistics and Warehousing Services Enterprise, an Ecozone Developer and Operator, a Facilities Provider and an Ecozone Utilities Enterprise) is entitled to income tax holiday, which may have a duration of four years for new registered non-pioneer firms or six years for new registered pioneer firms. Expanding firms may be entitled to an income tax holiday of three years from the start of commercial operation of the expansion.

Upon expiry of the income tax holiday, an Ecozone Enterprise becomes entitled to a preferential rate of 5 percent of gross income in lieu of all national and local taxes.

Ecozone Enterprises (except Logistics and Warehousing Services Enterprises, Ecozone Developers and Operators, Facilities Providers, and Ecozone Utilities Enterprises) are further entitled to the following incentives:

- a. VAT zero rating of local purchases of goods and services

- b. Exemption from duties and taxes on importation of merchandise, raw materials, and supplies of equipment and machineries, including importation of capital equipment, construction materials, specialized office equipment and furniture, specialized vehicles and other transportation equipment, professional instruments, and household effects
- c. Tax credit for import substitution
- d. Exemption from wharfage dues, export tax, impost, or fee
- e. Additional deduction for training expenses
- f. Tax credit on domestic capital equipment, breeding stocks and genetic materials (as applicable)
- g. Additional deduction for labor expenses
- h. Unrestricted use of consigned equipment
- i. Employment of foreign nationals in executive, supervisory, technical and advisory positions, provided that the total number of foreign nationals employed by an Ecozone Enterprise does not at any time exceed 5 percent of its workforce

### **3. 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.

A 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 percent 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 percent special tax on gross income earned, in lieu of national and local taxes.

### **4. Enterprises Located in the Clark Special Economic Zone (CSEZ)**

The 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 percent 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. 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 USD5 million in tourism projects 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 USD5 million, the lease contract may be for a maximum period of 25 years, renewable for another 25 years.

## VI. Environmental Regulation

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.

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.

### 1. 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.

## VII. Intellectual Property Protection

The Philippines is a member of 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 World Trade Organization and, by such membership, adheres to the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).

The Intellectual Property Office (IPO) processes applications for patents, trademarks, service marks and trade names, and issues the corresponding certificates of registration. Copyrighted works may also be deposited with the IPO.

Trademarks, trade names and service marks owned by persons, corporations, partnerships, or associations domiciled in the Philippines or in any foreign country may be registered with the IPO.

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. An applicant should file a declaration of use within three years from the date of application.

Trademark registration is valid for 10 years, provided the registrant files with the IPO a declaration of use/justifiable non-use within one year following the fifth anniversary of the date of the registration or renewal. The registration is renewable at the end of each 10th year from registration so long as the mark is still in commercial use.

Inventions, utility models and industrial designs 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 patent registration for an invention is valid for 20 years from the date of filing the application. A patent for a utility model is valid for seven years from the date of filing 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.

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.

## VIII. Border Control Measures

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 (the IP Code).

Intellectual Property (IP) owners may record their products covered by patents, trademarks, copyrights and other similarly protected IP rights with the BOC.

The application for recordal serves as the consent of the IP owner for the BOC to conduct a physical inspection of imports suspected to be infringing. The application for recordal also serves as a continuing complaint on the part of the IP owner for importers of infringing products or material.

The recordal will be the basis of the BOC for monitoring suspected imports to determine whether they are liable to seizure, forfeiture and subsequent destruction. A BOC recordal is valid for two years from the date of recordal.

## IX. 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 intellectual property rights, including the licensing of computer software, except computer software developed for the mass market.

There are no restrictions regarding the amount or rate of royalty that may be charged. The parties are free to negotiate the amount or the rate of royalties to be paid under the TTA. 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 and should contain certain mandatory provisions. Non-conformity to the prohibited and mandatory clauses will automatically render the TTA unenforceable. However, there are exceptional cases where exemptions from the prohibited and/or mandatory clauses may be allowed.

A TTA that conforms to the prohibited and mandatory clauses 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 evidence that the agreements are compliant with the IP Code and are enforceable in this respect. Philippine courts generally lend great weight to findings of administrative agencies like the Documentation Information and Technology Transfer Bureau (DITTB). 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 agreements, 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 will facilitate the recordal of the Agreement against the Philippine trademark applications or registrations for the licensed marks. Under the IP Code, a trademark license agreement that is not recorded 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.

## X. Labor Law

Philippine labor law recognizes the rights of both workers and management.

Thus, labor law recognizes the workers' right to a just share in the fruits of production and management's right to a reasonable return on investments.

### 1. Labor Standards

The Labor Code of the Philippines (the 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 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 an overtime rate based on the applicable basic rate. 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 p.m. and 6 a.m.
- 1.1.4. Premium Pay for Rest Day or Holiday Work. All employees are generally entitled to a rest period of not less than 24 consecutive hours for every six consecutive normal working days.

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, minimum wages vary according to the location of the business.

The minimum wage rate in each region of the country varies and is 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
- Military Training Leave
- Maternity Leave
- Paternity Leave
- Parental Leave
- Leave Due to Domestic Violence
- Leave Following Surgery Caused by Gynecological Disorders

#### 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 and enter into collective bargaining agreements (CBAs) with their employers. The employees negotiate the terms and conditions of their employment in CBAs.

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

- a. Employee's Compensation and State Insurance Fund (ECSIF) - This provides for the benefits in case of work-related illness or injury.
- b. National Health Insurance Act (NHIA) - This provides for the benefits in case of non-work-related illness.
- c. Social Security Law - This provides employees in the private sector a more comprehensive benefits program, which includes sickness, disability, retirement and funeral benefits.
- d. Pag-IBIG Fund - This provides housing loans to employees in the private sector.

Under the foregoing welfare legislation, the employer is required to register itself and its employees with the Social Security System (SSS; the SSS also administers the ECSIF), the Philippine Health Insurance Corporation (PhilHealth; PhilHealth administers the NHIA), and the Pag-IBIG Fund.

The employer and the employee both contribute to the common fund from which the benefits are sourced. The employer is required to deduct the employee's contribution and remit the same to the SSS, PhilHealth and Pag-IBIG Fund, together with the employer's contribution. The contributions are based on the salary of the employee.

Contributions to the ECSIF are shouldered by the employer alone.

There are other special laws in the Philippines that govern specific sectors of Philippine labor, such as the Migrant Workers' and Overseas Filipinos Act of 1995, as amended.

#### **4. Classification 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.

#### **5. Termination of Employment**

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

The employees' right to security of tenure demands that they be removed only for any of the just or authorized causes defined under the Labor Code (called substantive due process) and only after the employer has observed procedural due process.

In the Philippines, a dismissed employee has the right to question the validity of his or her dismissal. Once questioned before the proper labor authorities, the employer must establish the validity of the dismissal by proving that the termination was due to a just and/or authorized cause and that the termination was done after complying with procedural due process.

An employee who is dismissed from work without a legally defined cause is entitled to the following:

- a. Reinstatement without loss of seniority rights and other privileges
- b. Payment of full back wages, including allowances and other benefits, or their monetary equivalent, computed from the time his or her compensation was withheld from him or her up to the time of his or her actual reinstatement

Even if there may have been a just or authorized cause for termination, an employee who is dismissed without procedural due process is entitled to nominal damages, the amount of which is subject to the discretion of the court. For this purpose, the court will take into consideration the relevant circumstances of each case, particularly the gravity of the employer's failure to follow due process requirements. The nominal damages serve as a penalty on the employer for its failure to comply with the requirements of procedural due process for terminating employment.

#### **6. Contract of Employment**

Although not generally required, it is best to put the employment contract between the employer and the employee in writing. 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 employment handbook containing the rules and regulations that will govern the relationship with the employee/s.

## XI. Immigration

### 1. Entry to the Philippines

A foreign national, who is not a “restricted” national,<sup>16</sup> 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.

#### 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, either an expatriate or a local transfer, 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.

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<sup>16</sup> The 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](http://www.dfa.gov.ph).

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:

2.2.1.1. *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 application is filed with the BI. The 9(g) visa may be extended to the foreign national's spouse and unmarried minor children under 21 years of age.

The 9(g) visa is granted for a period co-terminous 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.

2.2.1.2. *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 co-terminous 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.

2.2.1.3. *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 minor 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:

- 2.2.2.1. *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 a multiple entry special visa, valid for a period of one year.
- 2.2.2.2. *Regional or Area Headquarters, Regional Operating Headquarters, and Regional Warehouse or RA8756 Visa* - This visa is granted under Section 5, Art. 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 a 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.
- 2.2.2.3. *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.
- 2.2.2.4. *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).

The holder of an SRRV 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 USD50,000 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 USD50,000 per year.

#### 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.

## **XII. Finance-Related Regulations**

### **1. Banking**

A foreign bank may operate in the Philippines, subject to the prior approval of the Monetary Board of the BSP, by: (1) owning up to 100 percent of the voting stock of an existing domestic bank (including banks under receivership or liquidation, provided no final court liquidation order has been issued); (2) investing up to 100 percent of the voting stock of a new banking subsidiary incorporated under Philippine law; or (3) 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.

Notwithstanding this liberalization of entry into the Philippine banking system, the control of 60 percent of the resources or assets of the entire banking system must still be held by domestic banks, which are majority-owned by Filipinos.

### **2. Financing Companies**

Financing companies are corporations that are primarily organized for the purpose of extending credit facilities to consumers and to industrial, commercial, or agricultural enterprises by:

- direct lending;
- discounting or factoring commercial papers or accounts receivables;
- buying and selling contracts, leases, chattel mortgages, or other evidence of indebtedness; or
- financial leasing of movable as well as immovable property.

The term “financing companies” excludes banks, investment houses, savings and loan associations, insurance companies, cooperatives, and other financial institutions organized or operating under other special laws.

A financing company must be organized as a stock corporation, at least 40 percent of whose voting stock must be owned by citizens of the Philippines. A foreign national may own stock in any financing company if the country of which he is a national accords the same reciprocal rights to Filipinos.

A financing company must have a paid-up capital ranging from at least PHP2.5 million to PHP10 million, depending on where the financing company will set up its office in the Philippines.

Financing companies providing financial leases in connection with any purchase, importation, acquisition or other transactions are entitled to the same incentives, exemptions, benefits or privileges that are available to lenders, importers, purchasers or other eligible persons in such transactions. In addition, financing companies that provide medium- and long-term credit to small and medium-sized enterprises are entitled to the same rights, powers, benefits and privileges that are granted to other non-bank financial institutions providing similar credit.

### **3. Lending Companies**

Lending companies are corporations that are engaged in the granting of loans from its own capital funds or from funds sourced from not more than 19 persons.

The term “lending companies” excludes banking institutions, investment houses, savings and loan associations, financing companies, pawnshops, insurance companies, cooperatives, and other credit institutions already regulated by law.

A lending company must be organized as a stock corporation, at least 51 percent of whose voting stock must be owned by citizens of the Philippines. A foreign national may own stock in any lending company if the country of which he or she is a national accords reciprocal rights to Filipinos.

A lending company must have a paid-up capital of at least PHP1 million.

Lending companies are primarily regulated by the SEC. However, lending companies that are subsidiaries and affiliates of banks and quasi-banks will be subject to BSP supervision and examination.

#### 4. Securitization Act of 2004

The Securitization Act (Act) took effect on 10 April 2004. The Act establishes the legal and regulatory framework for asset securitization, and grants tax exemptions and other incentives in favor of securitization transactions.

In order to promote the development of the Philippine capital market, the Act seeks to create a favorable environment for the establishment of Special-Purpose Entities (SPE) and the issuance by such entities of a wide range of asset-backed securities (ABS). The Act also prescribes the rules for the creation and operation of Secondary Mortgage Institutions to develop a secondary market for the ABS, particularly for residential mortgage-backed securities and other housing-related financial instruments.

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

Prior endorsement of the BSP must be obtained in the following cases:

- a. The original obligee of the Assets is a bank or any other entity subject to the supervision of the BSP, or is controlled by such bank or entity.
- b. The SPE is constituted in the form of a special purpose trust.

Subject to certain conditions, the Act grants various tax and fiscal incentives.

#### 5. Special Purpose Vehicle Act of 2002

The Special Purpose Vehicle Act of 2002 (SPV Act), as amended by Republic Act No. 9343 (RA 9343), provides the framework for the creation and regulation of Special-Purpose Vehicles (SPVs) that acquire or invest in the non-performing assets (NPA) of financial institutions (FI). The SPV Act grants tax and fiscal incentives and exemption privileges to transactions involving the transfer of NPAs from an FI to an SPV and, subject to certain conditions, from an SPV to a third party.

The SPV Act prescribed a period within which the application for organizing and registering an SPV must be filed with the SEC. This period expired on 18 September 2004, but was extended by RA 9343 for another 18 months from its effectivity date (29 May 2006), or until 28 November 2007.

While there appears to be further clamor from the banking sector to allow additional time within which interested parties may register an SPV, the Senate Oversight Committee has yet to act on any amendments to the SPV Act.

## XIII. Insurance-Related Regulations

### 1. Promulgation of the Amended Insurance Code

Presidential Decree 612, or the Insurance Code, was amended on 15 August 2013 by Republic Act 10607 (Amended Insurance Code).

Republic Act 10607 introduced the following amendments:

- A uniform minimum capitalization requirement of PHP1 billion<sup>17</sup> is imposed on domestic and foreign insurance companies.
- Domestic insurance companies already doing business in the Philippines must comply with the following requirements:

Prescribed Additional Net Worth	Deadline for Compliance
PHP250 million	30 June 2013
PHP300 million	31 December 2016
PHP350 million	31 December 2019
PHP400 million	31 December 2022

- Increase in the required capitalization of partnerships, associations or corporations engaging in reinsurance business to PHP3 billion paid in cash. Of this capital, at least 50 percent must be paid up while the remaining portion may be contributed surplus, which must not be less than PHP400 million.<sup>18</sup>

Under the Amended Insurance Code, insurance companies may, among others:

- offer micro-insurance;
- engage in limited trust business, which consists in managing funds pertaining to retirement and pre-need plans, provided it has secured a license from the BSP and that such trust business is separate and distinct from the general business of the insurance company;<sup>19</sup> or
- participate in bancassurance, or the presentation and sale to bank customers by an insurance company of its insurance products within the premises of the head office of such bank duly licensed by the BSP or any of its branches.<sup>20</sup>

Under the Amended Insurance Code, insurance companies may already invest in mutual funds, real estate investment trusts, salary loans, unit investment trust funds and special deposit accounts.<sup>21</sup> Insurance companies may now also loan any of its money or deposits to any person, corporation or association upon security listed under the law.<sup>22</sup>

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<sup>17</sup> Section 194, Amended Insurance Code.

<sup>18</sup> Section 289, Amended Insurance Code.

<sup>19</sup> Section 429, Amended Insurance Code.

<sup>20</sup> Section 375, Amended Insurance Code.

<sup>21</sup> Section 202(j), Amended Insurance Code.

<sup>22</sup> Section 204, Amended Insurance Code.

## 2. Entry of Foreign Insurance Companies

Subject to the approval of the Insurance Commission, a foreign insurance company may be allowed to do business in the Philippines under any one of the following modes of entry:

- a. Ownership of the voting stock of an existing domestic insurance company
- b. Investment in a new insurance company incorporated in the Philippines (i.e., a subsidiary)
- c. Establishment of a branch

To be allowed entry, the foreign insurance company must be among:

- a. the top 200 foreign insurance corporations globally; or
- b. the top 10 insurance companies in its country of origin;

and

- c. has been doing business for the last 10 years as of the date of the application.

To qualify as a branch or a new company incorporated in the Philippines, the applicant must be:

- a. widely owned and/or publicly listed in its country of origin; or
- b. majority-owned by the government of the country of origin.

Depending on the extent of foreign equity, an applicant foreign insurance corporation must comply with certain capitalization requirements, including minimum paid-up capital and contributed surplus fund under the Amended Insurance Code.

## XIV. Dispute Resolution in the Philippines

### 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 such fields 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 P300,000 (or P400,000 in Metro Manila), cases involving title to or possession of real property where the assessed value of the property is not more than P20,000 (or P50,000 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 P100,000.

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 P100,000 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 ten 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 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 which are not otherwise within the exclusive jurisdiction of courts of the first level 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 P20,000 (or P50,000 in Metro Manila) except cases of ejectment; all actions in admiralty and maritime jurisdiction where the demand or claim exceeds P300,000 (or P400,000 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 P300,000 (or P400,000 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,<sup>23</sup> 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.

# 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

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<sup>23</sup> The imposition of the Death Penalty has been suspended by Republic Act No. 9346.

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.

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 which 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; or
- 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 recently 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 issue 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 a 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 which 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 on the following grounds:

- a. Fraud, accident, mistake or excusable negligence which ordinary prudence could not have guarded against and by reason of which such party has probably been impaired in his rights; or
- 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 6 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 which 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. 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 allowed 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 the courts of the first level can be taken only to the proper Regional Trial Courts. 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 and questions of fact as well as of law may be 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. 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 only within which to file the petition for review. No further extension will be granted except for the most compelling reason and in no case to exceed 15 days.

When 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*. This is true whether the case was decided by the Regional Trial Court in the exercise of its original or appellate jurisdiction. 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 only 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 only 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 the First Level Court (e.g. Municipal Trial Courts, Metropolitan Trial Courts) in an action for ejectment is likewise immediately executory and can be enforced pending appeal.

A final and executory judgment or order may be executed on motion within 5 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 5 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 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 which 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.<sup>24</sup>

## 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.”

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 which 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.

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<sup>24</sup> *Marcos, Jr. v. Republic of the Philippines*, G.R. No. 189434, 12 March 2014.

In contrast, disputes submitted to arbitration are more speedily resolved. Unlike judges, arbitrators do not have to contend with heavy caseloads. The 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 free to choose the arbitrators. They are expected to appoint arbitrators whom they regard as honest and competent. 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. Since the parties are given a free hand in choosing their arbitrator(s), the outcome becomes more acceptable.

On the part of the arbitrators, they have an added incentive to establish and build a reputation for competence and integrity. The greater their reputation for competence and integrity, the higher will be the demand for their services.

#### 4.1.4. Finality of the Award

Awards in commercial arbitration are generally not appealable. The grounds to question an arbitral award are limited as compared to judicial decisions.

#### 4.1.5. Arbitrators with expertise

Parties are usually able to appoint arbitrators who are knowledgeable in the subject matter of the dispute.

#### 4.1.6. Confidentiality

Whereas court proceedings are open to the public, arbitration proceedings are private and confidential.

### 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, a corporation's representative who did not personally bind himself to an arbitration agreement cannot be forced to participate in arbitration proceedings made pursuant to an agreement entered into by the corporation (*See Aboitiz Transport System v. Carlos A. Gothong Lines*, G.R. No. 198226, 18 July 2014).

However, the Supreme Court has recently held that 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 (*Lanuza v. BF Corporation*, G.R. No. 174938, 1 October 2014).

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 (*Cargill Philippines, Inc. v. San Fernando Regala Trading, Inc.*, G.R. No. 175404, January 31, 2011). In *PEZA v. Edison (Bataan) Cogeneration Corporation*, G.R. No. 179537, 23 October 2009, 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 parties may agree to submit a dispute to arbitration either before or after a dispute arises.

The right to refer a dispute to arbitration can be waived by estoppel (*Benguet Corporation v. Department of Environment and Natural Resources – Mines Adjudication Board and J.G. Realty and Mining Corporation*, G.R. No. 163101, 13 February 2008).

#### 4.3. Arbitration Law

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

##### 4.3.1. International Arbitration

International commercial arbitrations seated<sup>25</sup> 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* if:

- a. the parties to an arbitration agreement have, at the time of the conclusion of such agreement, their places of business in different countries; or
- 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; or
  - 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; or
- c. the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

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<sup>25</sup> 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. (**Chapter 14: Selection of Arbitral Seat in International Arbitration** in Gary B. Born, *International Commercial Arbitration*, Second Edition (© Kluwer Law International; Kluwer Law International 2014) p. 2051)

#### 4.3.2. Domestic Arbitration

The Arbitration Law, as amended by the ADR Act, applies to domestic arbitrations. *Domestic* arbitration is simply 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 and 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.”<sup>26</sup>

In *Ibex International, Inc. v. GSIS and Court of Appeals*, G.R. No. 162095, October 12, 2009, the Supreme Court held that: “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.”

### 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.

### 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.

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<sup>26</sup> *National Irrigation Administration v. Court of Appeals*, G.R. No. 129169, 17 November 1999.

It takes the PDRCI an average of around 1 year from the time of filing of the request for arbitration to hear the case and render an award.

To reflect recent trends in international commercial arbitration, and in order to keep pace with other arbitral institutions, the PDRCI recently approved its revised Rules of Arbitration and Guidelines on Fees, which will become effective on 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.

Special ADR Rules provide rules for the confirmation of awards in domestic arbitration, and 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 which contains decisions on matters not submitted to arbitration may be set aside or only that part of the award which 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.

The foregoing grounds also apply, with slight differences, to the challenge of domestic arbitral awards. With respect to foreign arbitral awards, 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.”

## 5. Other Modes of Alternative Dispute Resolution (ADR)

There have been increased efforts in recent years to institutionalize ADR in the Philippine legal system to aid in the speedy administration of justice.

### 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 scheme (CAM). The following cases are currently covered by the rule on mandatory mediation:

- (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 6 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; and
- (10) *habeas corpus* cases brought up on appeal from the first-level courts.

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.

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 is promulgated pursuant to the ADR Act. Together with Court-Annexed Mediation, 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 Court-Annexed Mediation and JDR, and (2) pre-trial proper to trial and judgment. The judge to whom the case had been originally assigned is referred 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 Court-Annexed Mediation and JDR. Upon failing to secure a settlement of the dispute during Court-Annexed Mediation, 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 thirty (30) days, while judges of the second level courts shall have a period of not exceeding sixty (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 counsel, draft a compromise agreement which is 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 Court-Annexed Mediation and JDR, which 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 which 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.

## XV. 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, corporate rehabilitation (voluntary / involuntary, pre-negotiated, or out-of-court or informal restructuring agreements) and insolvency. The applicable laws and regulations are the Civil Code of the Philippines (Civil Code), the Financial Rehabilitation and Insolvency Act (FRIA), Presidential Decree No. 902-A (PD 902-A)<sup>27</sup> and the Financial Rehabilitation Rules of Procedure (Financial Rehabilitation Rules).<sup>28</sup> 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. Banks, insurance companies and pre-need companies, and national and local government agencies or units, however, are not covered under the FRIA.

On 27 August 2013, the Supreme Court promulgated the Financial Rehabilitation Rules which provides for the procedure governing rehabilitation proceedings under the FRIA.

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.

Each of these remedies is discussed in more detail below.

### 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 (the 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.

##### a. 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:

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<sup>27</sup> 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.

<sup>28</sup> Supreme Court Administrative Matter No 12-12-11

- i. calling a meeting of all the creditors named in the schedule of debts and liabilities (Creditors' Meeting);
- ii. directing such creditors to prepare and present written evidence of their claims before the Creditors' Meeting;
- iii. directing the publication of the said Order in a newspaper of general circulation;
- iv. 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;
- v. 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;
- vi. 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; and
- vii. appointing a commissioner to preside over the Creditors' Meeting.

#### 2.1.1. 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:

- i. creditors having claims for personal labor, maintenance, expense of last illness and funeral of the wife or children of the debtor incurred in the sixty (60) days immediately prior to the filing of the petition; and
- ii. secured creditors.

#### 2.1.2. 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 (3/5) of the liabilities is necessary for holding a Creditors' Meeting. The proposed agreement must be approved by two-thirds (2/3) of the creditors representing at least three-fifths (3/5) 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.b (i) and (ii) 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.

#### 2.1.3. Objections to the debtor's proposed agreement

The possible grounds for objecting to the proposed agreement are:

- i. 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;
- ii. fraudulent connivance between one or more creditors and the debtor to vote in favor of the proposed agreement; and
- iii. 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 which 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<sup>29</sup> 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.
- 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.

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<sup>29</sup> 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.

- 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

### 2.2.1.1. 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.

### 2.2.1.2. Involuntary Proceedings

Any creditor or group of creditors with a claim of, or the aggregate of whose claims is, at least PHP1 million or at least 25 percent of the subscribed capital stock or partners' contributions, whichever is higher, may initiate involuntary proceedings against the debtor by filing a petition for rehabilitation with the court if:

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

2. a creditor, other than the petitioner/s, has initiated foreclosure proceedings against the debtor that 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;<sup>30</sup> (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.

#### 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.

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<sup>30</sup> The issuance of a Stay or Suspension Order suspending all actions or proceedings for enforcement of all claims against the debtor, any judgment, attachment or other provisional remedies against the debtor and 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.

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; and (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:

- 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; or
- d. upon verified motion of three or more creditors whose aggregate claims total at least one million pesos (PHP1 million) or at least 25 percent of the subscribed capital or partners' contributions of the debtor, whichever is higher.

#### 2.2.5. Management of the Juridical 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 which are not in the ordinary course of the 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 which constitute undue preference of creditors.

#### 2.2.7. Rehabilitation Plan

##### 2.2.7.1. 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.

2.2.7.2. Effect of Confirmation of the Rehabilitation Plan

- 2.2.7.2.1 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.
- 2.2.7.2.2 The debtor must comply with the provisions of the Rehabilitation Plan and take all actions necessary to carry them out.
- 2.2.7.2.3 Payments will be made to the creditors in accordance with the provisions of the Rehabilitation Plan.
- 2.2.7.2.4 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.
- 2.2.7.2.5 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.
- 2.2.7.2.6 Claims arising after approval of the Rehabilitation Plan that are otherwise not treated by the Rehabilitation Plan are not subject to any Suspension Order.

2.3. 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 (2/3) of the total liabilities of the debtor, including secured creditors holding more than 50 percent of the total secured claims of the debtor and unsecured creditors holding more than 50 percent 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/work-out agreement or Rehabilitation Plan under the FRIA:

- i. The debtor must agree to the out-of-court or informal restructuring/workout agreement or Rehabilitation Plan.
- ii. It must be approved by creditors representing at least 67 percent of the secured obligations of the debtor.
- iii. It must be approved by creditors representing at least 75 percent of the unsecured obligations of the debtor.

iv. It must be approved by creditors holding at least 85 percent 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 (2) consecutive weeks.

#### 2.4.2. Cram-Down Effect

A restructuring/workout agreement or Rehabilitation Plan that is approved pursuant to an informal work-out 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/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:

- i. 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
- ii. An inventory of all its assets including receivables and claims against third parties
- iii. 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 PHP1 million or at least 25 percent 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 rehabilitation court-supervised or pre-negotiated rehabilitation proceedings, three or more creditors whose claims are at least either PHP1 million or at least 25 percent 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 PHP500,000 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:

- i. the juridical debtor will be deemed dissolved and its corporate or juridical existence terminated;
- ii. 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;
- iii. 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;
- iv. 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; and
- v. 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:

- i. 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; or
- ii. maintain his or her rights under the security or lien.

If the secured creditor maintains his or her rights under the security or lien:

- i. 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;
- ii. the liquidator may sell the property and satisfy the secured creditor's entire claim from the proceeds of the sale; or
- iii. 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*, i.e., 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 case of the 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/s or which constitute undue preference of creditors.

The liquidator or, with his or her conformity, a creditor 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; and

- 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. Rules of Procedure

The FRIA provides that the Supreme Court shall designate the court/s that will hear and resolve cases brought under its provisions and shall promulgate the rules of pleading, practice and procedure to govern the said proceedings.

To this end, the Supreme Court issued a resolution<sup>31</sup> designating the branches of the various Regional Trial Courts in the Philippines that will try and decide cases previously under the jurisdiction of the SEC under PD 902-A, including petitions of corporations, partnerships or associations to be declared in the state of suspension of payments.

The Supreme Court also issued the FRIA Rehabilitation Rules<sup>32</sup> on 27 August 2013 to, among others, implement the FRIA provisions on rehabilitation proceedings. The Financial Rehabilitation Rules apply to petitions for rehabilitation filed pursuant to the FRIA, as well as to all further proceedings in suspension of payments and rehabilitation proceedings already pending, except to the extent that, in the opinion of the court, its application would not be feasible or would work injustice, in which event the procedures originally applicable shall continue to govern. Prior to the promulgation of the Financial Rehabilitation Rules, the rules that the Supreme Court followed were contained in the Rules of Procedure on Corporate Rehabilitation.

Under the Financial Rehabilitation Rules, all petitions pursuant to the said rules are filed in the Regional Trial Court which has jurisdiction over the principal office of the debtor alleged to be insolvent as specified in its articles of incorporation or partnership or in its registration papers with the DTI in cases of sole proprietorships. If the principal office of the corporation, partnership or association is in Metro Manila, the action is filed in the Regional Trial Court of the city or municipality where the head office is located. In addition, if the petition involves a group of debtors, the petition is filed in the Regional Trial Court which has jurisdiction over the principal office of any of the debtors alleged to be insolvent.

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<sup>31</sup> Supreme Court Administrative Matter No 00-11-03.

<sup>32</sup> Supreme Court Administrative Matter No 12-12-11.

## XVI. Privacy Laws in the Philippines

### 1. Overview

Government policies in the Philippines and decisions of the Supreme Court tilt heavily toward the protection of an individual's right to privacy of communications. 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 recently enacted a Data Privacy Act, which was modeled after the European Union Data Protection Directive and the Asia-Pacific Economic Cooperation Privacy Framework.

#### 1.1. Privacy of Communications

Privacy of Communications is a recognized right in the Philippines and is in fact found in Article III, Section 3 (1) of the 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 in a communication. 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.

### 2. Data Privacy

Republic Act No. 10173, or the Data Privacy Act of 2012 (“RA 10173”), applies to the processing of all types of personal information/data 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, use equipment that are located in the Philippines, or those who maintain an office, branch, or agency in 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.

The Act contains provisions that govern the processing of personal information, the rights of data subjects (e.g., notice, access, and data portability), the security of personal information (which includes a breach notification requirement), and the obligations of personal information controllers and processors. In addition, the Act creates the National Privacy Commission (NPC), which is tasked with administering and implementing the provisions of the Act, as well as with monitoring and ensuring compliance with international standards for data protection. (Note: The NPC has not been created yet and the Implementing Rules and Regulations has yet to be drafted and/or promulgated.)

The law sets forth a detailed schedule of penalties for violations of Act, which include both imprisonment and fines.

On the other hand, processing of sensitive personal information is only allowed if: (a) the employee has given his 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 the establishment, exercise, or defense of legal claims, or when provided to government or public authority. [Section 13]

In view of the foregoing, it is essential that employees are appropriately advised of the purpose, use, and possible transfer of their personal data and that they have signified their consent thereto. As it has become a norm for companies to engage third-party suppliers/service providers to provide company benefits (e.g., health service providers, insurance, among others) or to administer company records, we recommend adding these provisions to advise employees that the company may share their information to such providers.

Further, we also included a provision that allows the company to share personal information, should the company be compelled to do so pursuant to law, regulation, court orders, or subpoenas that the company may receive.

In this connection, please note that RA 10173 provides for criminal penalties (including imprisonment and fines) for specific violations of the law, e.g., 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.

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