

Commercial Contracts 2021

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Duncan Reid-Thomas
Baker McKenzie

Lexology Getting The Deal Through is delighted to publish the sixth edition of *Commercial Contracts*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Sweden and Ukraine.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Duncan Reid-Thomas of Baker McKenzie, for his continued assistance with this volume.



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CONTRACT FORMATION

Good faith in negotiating

1 | Is there an obligation to use good faith when negotiating a contract?

The Civil Code of the Philippines provides for a general obligation for parties to act in good faith. Under the Civil Code, every person must, in the exercise of his or her rights and in the performance of his or her duties, act with justice, give everyone his or her due, and observe honesty and good faith, and every person who, contrary to the law, willfully or negligently causes damage to another, shall indemnify the latter for the same.

The Philippine Supreme Court has referred to 'bad faith' as not merely pertaining to bad judgment or negligence but relates to a dishonest purpose and a deliberate doing of a wrongful act. The Philippine Supreme Court has ruled that bad faith involves breach of a known duty through some motive or interest or ill will that partakes of the nature of fraud.

The foregoing obligations would apply to parties negotiating a contract.

'Battle of the forms' disputes

2 | How are 'battle of the forms' disputes resolved in your jurisdiction?

Contracts are perfected by consent of the contracting parties. Under the Civil Code of the Philippines, consent is manifested by the meeting of the offer and the acceptance upon the thing and the cause that are to constitute the contract. The offer must be certain and the acceptance absolute. If acceptance is qualified, it constitutes a counter-offer that does not bring about the perfection of the contract. The Philippine Supreme Court has ruled that acceptance should be unequivocal and that any modification or variation from the terms of the offer frees the party making the offer.

The Philippine Supreme Court has also ruled that:

[w]hile Article 1319 of the new Civil Code prescribes that "consent is manifested by the meeting of the offer and the acceptance upon the thing and the cause which are to constitute the contract," this rule does not apply to a situation where one or both parties consider that the matters or details, in addition to the subject matter and the consideration, should be stipulated and agreed upon. The area of agreement must extend to all points that the parties deem material or there is no contract.

Given the foregoing, a 'battle of the forms' dispute is not common in the Philippines. It is typical for one of the parties involved in negotiating a contract to prevail and for the counterparty to accept the prescribed form of the prevailing party. There are also instances where both parties are forced to negotiate the terms of the contract to avoid an impasse.

Language requirements

3 | Is there a legal requirement to draft the contract in the local language?

There is no legal requirement in the Philippines for a contract to be drafted in the local language.

English is an official language in the Philippines, and most commercial documents are in English.

Signatures and other execution formalities

4 | In what circumstances are signatures or any other formalities required to execute commercial contracts in your jurisdiction? Is it possible to agree a B2B contract online (eg, using a click-to-accept process)? Does the law recognise the validity of electronic and digital contract signatures? If so, how are they treated in comparison to wet-ink signatures?

Under the Civil Code of the Philippines, the general law on contracts, a contract is formed once all of the following requisites are present:

- Consent – consent means that there has been an offer and an acceptance of the cause and object of the contract. The acceptance must be conveyed to the party making the offer.
- Object – all things within the commerce of men and services not contrary to law, morals, good customs, public order and public policy may be the object of a valid contract.
- Cause – cause is understood as 'consideration' in common law jurisdictions. Cause has been defined by the Philippine Supreme Court as 'the essential reason which moves the contracting parties to enter into the contract'.

Article 1356 of the Civil Code then provides that 'contracts shall be obligatory, in whatever form they may have been entered into, provided all the essential requisites for their validity are present.' As a general rule, therefore, a contract under Philippine law will be valid in whatever form it may be found, whether oral, paper-based or electronic or digital.

The Civil Code is supplemented by the Electronic Commerce Act (Republic Act No. 8792) with respect to electronic or digital documents and signatures.

Under the Electronic Commerce Act, electronic documents are expressly declared to have the same legal effect, validity and enforceability as any other document or legal writing provided that the electronic document maintains its integrity and reliability and can be authenticated. For evidentiary purposes, an electronic document is the functional equivalent of a written document under existing laws.

An 'electronic document' under the Electronic Commerce Act refers to a record 'generated, communicated, received or stored by electronic means in an information system or for transmission from one information system to another'. Accordingly, an online contract would generally be valid and enforceable if it were valid and enforceable had it been a

paper-based document. Further, under the Electronic Commerce Act, an offer, the acceptance of an offer and other elements for the formation of contracts may be expressed in or demonstrated in by means of electronic data messages or electronic documents. No contract is to be denied validity or enforceability on the sole ground that it is in the form of an electronic data message or electronic documents or that any or all of the elements required under existing laws for the formation of the contract is expressed, demonstrated and proved by means of electronic documents.

Thus, the Electronic Commerce Act expressly provides that electronic data messages or electronic documents 'shall have the legal effect, validity or enforceability as any other document or legal writing'.

An electronic document will be considered as the 'original' of a document, if:

- there exists a reliable assurance as to the integrity of the electronic document or electronic data message from the time when it was first generated in its final form and such integrity is shown by evidence (that is, evidence other than the electronic data message itself) or otherwise; and
- the electronic document or electronic data message is capable of being displayed to the person to whom it is to be present.

As electronic documents are given legal recognition under the Electronic Commerce Act, the expression of consent to a contract may necessarily be made electronically as well. Considering that 'consent' is an essential requisite to form a binding contract, a person's consent, albeit in digital or electronic means, must likewise be sufficiently established for a contract to be enforceable.

In this regard, similar to electronic documents, electronic signatures are likewise given express legal recognition under the E-Commerce Act. Under the E-Commerce Act, an 'electronic signature' refers to 'any distinctive mark, characteristic and/or sound in electronic form, representing the identity of a person and attached to or logically associated with the electronic data message or electronic document or any methodology or procedures employed or adopted by a person and executed or adopted by such person with the intention of authenticating or approving an electronic data message or electronic document'.

Accordingly, a digital form contract, coupled with an express (albeit electronic) acknowledgement of the terms and conditions of the contract (ie, 'I agree and understand the Terms and Conditions...'), should be enforceable under Philippine law. The parties should ensure, however, that the elements for the formation of the contract – particularly the customer's consent – are properly documented and recorded and, if needed, could be expressed in or demonstrated in a reliable manner.

On the other hand, there are contracts that must appear in a public document to be valid. Under the Civil Code, the following contracts must appear in a public document: deed of donation of real property, contract of partnership where immovable property or real rights are contributed, and assignment of a credit, right or action.

While the notarisation of a private document by a duly commissioned notary converts it into a public document, the 2004 Rules on Notarial Practice do not recognise the validity of electronic signatures, and still require the signatories to represent to the notary public that the signature on the instrument or document was voluntarily affixed by the signatory for the purposes stated in the instrument or document, and to declare that he or she executed the instrument or document as his or her free and voluntary act and deed. The foregoing contemplates that the signature is the 'wet' signature of the signatory. Thus, if the agreements will be notarised in the Philippines, electronic signatures cannot be used to execute the same.

STATUTORY CONTROLS AND IMPLIED TERMS

Controls on freedom to agree terms

- 5 | Are there any statutory or other controls on parties' freedom to agree terms in contracts between commercial parties in your jurisdiction?

Under the Civil Code of the Philippines, parties to a contract are generally free to establish stipulations, clauses, terms and conditions as they may deem convenient, provided they are not contrary to laws, morals, good customs, public order or public policy.

However, there are certain types of contracts for which Philippine law prescribes mandatory and prohibited clauses. These include, among others, technology transfer agreements and long-term lease agreements.

Standard form contracts

- 6 | Are standard form contracts treated differently?

Generally, standard form contracts are not treated differently. The Supreme Court of the Philippines has repeatedly upheld the validity of adhesion contracts. Adhesion contracts refer to 'contracts unilaterally prepared and drafted in advance by one party' and where the 'parties are not given a real arms' length opportunity to transact'. The Supreme Court has ruled that adhesion contracts are as binding as any ordinary contract, because a party who enters into an adhesion contract is free to reject the stipulations entirely. On the other hand, if the terms thereof are accepted without objection, then the contract is binding on both parties.

Nonetheless, adhesion contracts are construed strictly against the party who drafted the same.

Implied terms

- 7 | What terms are implied by law into the contract? Is it possible to exclude these in a commercial relationship?

The Civil Code of the Philippines provides for implied warranties or warranties that are deemed included in every contract of sale, unless otherwise provided. The following are the implied warranties under the Civil Code:

- that the vendor has a right to sell the thing and the buyer enjoy the legal and peaceful possession of the thing; and
- that the thing shall be free from any hidden faults or defects, or any charge or encumbrance not declared or known to the buyer.

In addition, the Consumer Act of the Philippines provides for an implied warranty on product quantity, product and service quality, and product and service safety. It also provides an implied warranty against deceptive, unfair and unconscionable acts by the seller.

Vienna Convention

- 8 | Is your jurisdiction a signatory to the United Nations Convention on Contracts for the International Sale of Goods (the Vienna Convention)?

The Philippines is not a signatory to the United Nations Convention for the International Sale of Goods.

Good faith in entering and performing

9 | Is there an obligation to use good faith when entering and performing a contract?

In addition to the general obligation to act in good faith, the Civil Code of the Philippines expressly provides that parties to a contract are bound not only to the fulfilment of what has been expressly stipulated but also to all the consequences that, according to their nature, may be in keeping with good faith, usage and law. Furthermore, obligations arising from contracts have the force of law between the contracting parties and should be complied with in good faith.

In line with the foregoing, the Philippine Supreme Court has ruled that 'where a person exercises his rights but does so arbitrarily or unjustly or performs his duties in a manner that is not in keeping with honesty and good faith, he opens himself to liability.'

LIMITING LIABILITY

Prohibition on exclusions and limitations

10 | What liabilities cannot be excluded or limited by a supplier in a contract?

A supplier cannot waive fraud. Responsibility arising from a fraudulent act is demandable in all obligations and cannot be excluded or limited because the same is contrary to public policy despite the presence of contractual limitations. Under the Civil Code of the Philippines, any waiver of an action for future fraud is void.

Similarly, responsibility arising from acts undertaken by a party in bad faith or in a fraudulent manner cannot be excluded, even if there is a contractual stipulation exempting a party from liability.

A limitation on liability for gross negligence (including intentional misconduct) may be construed as against public policy and, thus, also void.

Financial caps

11 | Are there any statutory controls on using financial caps to limit liability for breach of contract?

We are not aware of any statutory controls on placing caps to limit liabilities.

Indemnities

12 | Are there any statutory controls on indemnities used to cover liability risks in contracts?

Parties are generally free to stipulate on indemnities under Philippine law, provided that the terms of such indemnification are not contrary to mandatory laws, morals, good customs, public order or public policy.

Indemnification in the following circumstances may be considered invalid and unenforceable under Philippine law:

- future fraud;
- wilful injury to a person or property;
- future unlawful acts;
- gross negligence;
- intentional misconduct; and
- acts of bad faith.

Further, unless the parties agree, or the law otherwise provides, the indemnity will be limited to actual damages or only for pecuniary loss suffered by a person that has been duly proven. Under Philippine law, actual damages will include not only the value of the loss suffered, but also that of the profits that the party failed to obtain.

Liquidated damages

13 | Are liquidated damages clauses enforceable and commonly used in your jurisdiction?

Clauses providing for liquidated damages are recognised and allowed in the Philippines. They are defined as those that are agreed upon by the parties to a contract to be paid in the case of breach.

Liquidated damages are also commonly used either as an indemnity or a penalty and will be equitably reduced by the courts if they are found to be iniquitous or unconscionable.

PAYMENT TERMS

Statutory time limits on payments

14 | Are there statutory time limits for paying invoices? Is it possible to agree a different payment period?

There are no statutory limits for payment of invoices. Parties to a contract may provide a fixed period for the performance of each party's respective obligations. The latter applies to the payment of invoices.

Late payment interest

15 | Is statutory interest charged on late payments? Is it possible to agree a different rate of interest?

Parties are generally free to stipulate on the interest rate for late payment. The Usury Law, which imposed a ceiling on interest rates was suspended in 1983. However, the Philippine Supreme Court has ruled that, notwithstanding the suspension of the Usury Law, it can temper interest rates that are found to be excessive, iniquitous, unconscionable or exorbitant. The Philippine Supreme Court has held that a stipulated interest rate of 3 per cent per month or 36 per cent per annum is unconscionable.

In the absence of a stipulated interest rate, the current rate of interest for loans or forbearance of money, as prescribed by the Philippine Monetary Board, is 6 per cent per annum.

Civil penalties

16 | What are the civil penalties for failing to comply with statutory interest rate or late payment of invoices?

Parties are free to stipulate the applicable interest rate in the case of late payment of invoices. However, such interest or penalty may be equitably reduced if the obligation has been partly or irregularly complied with by the other party. Even if a party does not perform its obligations under a contract, penalties may also be reduced by the courts if they are iniquitous or unconscionable.

TERMINATION

Implied terms

17 | Do special rules apply to termination of a supply contract that will be implied by law into a contract? Can these terms be excluded or limited by including appropriate language in the contract?

Generally, a party may not unilaterally terminate a contract, unless there is a stipulation providing for such right in the contract. However, when the right to unilaterally terminate the contract is provided, the method of terminating the contract is primarily determined by the stipulation of the parties, including the time of giving, form, and manner of service of the notice.

Even if an agreement provides for the right to terminate, said right cannot be exercised arbitrarily or in bad faith. Otherwise, a party may

be held liable for damages, based on the principle of 'abuse of rights'. Under the Civil Code, '[e]very person must, in the exercise of his rights and in the performance of his duties, act with justice, give everyone his due, and observe honesty and good faith;' and '[e]very person who contrary to law, willfully or negligently causes damage to another, shall indemnify the latter for the same.'

Notice period

18 | If a contract does not include a notice period to terminate a contract, how is it calculated?

Generally, under Philippine contract law, when the right to unilaterally terminate the contract is provided, the method of terminating the contract is primarily determined by the stipulation of the parties, including the time of giving, form and manner of service of the notice.

We are not aware of any law or jurisprudence providing for the manner or method of establishing a notice period. However, as regards calculating the period, the Civil Code of the Philippines provides that in computing a period, the first day shall be excluded and the last days included.

Automatic termination on insolvency

19 | Will a commercial contract terminate automatically on insolvency of the other party?

Insolvency of a party does not automatically terminate a commercial contract unless stipulated on by the parties (eg, considered an event of default that results in the automatic termination of the contract). However, if the insolvent party undergoes rehabilitation proceedings in court under the Financial Rehabilitation and Insolvency Act, contracts may potentially be terminated by reason of such insolvency.

Termination for financial distress

20 | Are there restrictions on terminating a contract if the other party is in financial distress?

Under the Financial Rehabilitation and Insolvency Act, unless cancelled by a final judgment of a court of competent jurisdiction issued prior to the issuance of the commencement order in the rehabilitation proceedings or at any time 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 will 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 counterparty whether it is confirming the particular contract. Contracts not confirmed within the required deadline will be considered terminated.

Further, if the debtor undergoes liquidation proceedings in court under the Financial Rehabilitation and Insolvency Act, all contracts of the debtor will be deemed terminated and/or breached, unless the liquidator, within 90 days of the date of his or her assumption of office, declares otherwise and the contracting party agrees.

Force majeure

21 | Is force majeure recognised in your jurisdiction? What are the consequences of a force majeure event?

Under the Civil Code of the Philippines, a party to a contract is not generally responsible for force majeure, or those events that could not be foreseen or that, though foreseen, were inevitable.

For a party to be exempt from liability on account of force majeure, the following elements must concur:

- the cause of the breach of the obligation must be independent of the human will;
- the event must be either unforeseeable or unavoidable;
- the event must be such as to render it impossible for the debtor to fulfil his or her obligation in a normal manner; and
- the debtor must be free from any participation in, or aggravation of the injury to the creditor.

Under the Civil Code, a party may be liable notwithstanding a force majeure event in cases expressly specified by law, when it is stipulated by the parties, or when the nature of the obligation requires the assumption of risk.

SUBCONTRACTING, ASSIGNMENT AND THIRD-PARTY RIGHTS

Subcontracting without consent

22 | May a supplier subcontract its obligations under the contract without seeking consent from the other party?

Provided there is no contractual prohibition to do so, a supplier may subcontract its obligations under a contract without the need for obtaining the consent of the counterparty. For contracts between private entities, there is no statutory requirement to seek the other party's consent before subcontracting its obligations under the contract. The parties are free to stipulate on whether a party is allowed or not to enter into subcontracting arrangements to perform its obligations under the contract.

However, under the implementing rules of the Government Procurement Reform Act, should a party enter into a procurement contract with the Philippine government, subcontracting without the prior approval of the procuring government agency is a ground for blacklisting such a supplier.

Statutory rules

23 | Are there any statutory rules that apply to subcontracting in your jurisdiction?

We are not aware of any statutory rules governing subcontracting in the Philippines for the provision of goods. Contracting and subcontracting arrangements for employment are regulated by labour laws and regulations.

Under the Labor Code, there is a prohibition against 'labour-only' contracting or subcontracting, which is defined as an entity supplying workers to an employer does not have substantial capital or investments and the workers supplied perform activities that are directly related to the principal business of an employer.

Department Order No. 174, series of 2017 provides the circumstances for which contracting and subcontracting arrangements for employment are permitted:

- the contractor or subcontractor is engaged in a distinct and independent business from the employer;
- the contractor or subcontractor has substantial capital to carry out the work farmed out by the principal;
- the contractor or subcontractor is free from the control or direction of the principal except with regard to the result; and
- the service agreement between the contractor or subcontractor and the principal's agreement ensures compliance with all the rights and benefits of the employees of the subcontractor under labour laws.

Assignment of rights and obligations

24 | May a party assign its rights and obligations under the contract without seeking the other party's consent?

Assignment of rights

Generally, a party may assign its rights under the contract without seeking the other party's consent. Under the Civil Code, the assignment of a right, credit or action shall produce no effect as against third parties, unless it appears in a public instrument. If the assignment involves real property, the instrument must be duly recorded in the relevant Register of Deeds. Furthermore, the other party must have knowledge, acquired either by formal notice or some other means, of the assignment.

However, subrogation of a third person in the rights of the creditor requires the consent of the original parties to the contract and the third person.

To differentiate, an assignment refers to the process of transferring the rights of the assignor to the assignee, who would then have the right to proceed against the debtor. On the other hand, there is subrogation if there is a transfer of all the rights of the creditor to a third person, who substitutes him in all his rights. Subrogation extinguishes the original obligation, and creates a new one.

Assignment of obligations

On the other hand, an assignment of obligations requires the consent of the other party.

25 | What statutory controls apply to the assignment of rights or obligations under a supply contract?

Assignment of a right, credit or action shall produce no effect as against third parties, unless it appears in a public instrument (ie, notarised). If the assignment involves real property, the instrument must be duly recorded in the relevant Register of Deeds. Furthermore, the other party must have knowledge, acquired either by formal notice or some other means, of the assignment.

Assignment of obligations requires the consent of the other party.

Enforcement by third party

26 | How may a third party enforce a term of the contract?

A basic principle under Philippine contract law is the relativity of contracts, which means that contracts can only bind the parties (and their assigns and heirs) who entered into it, and cannot favour or prejudice a third party even if he or she is aware of such contract and has acted with knowledge thereof.

Under the Civil Code of the Philippines, by way of exception, if the contract should contain some stipulation in favour of a third person, and provided he communicated his acceptance to the obligor before its revocation, the third party may demand the fulfillment of the relevant provision of the contract from the parties to the contract. A mere incidental benefit is not sufficient. The parties must have clearly and deliberately conferred a favour upon a third party.

The Philippine Supreme Court has laid down the following requisites for a stipulation in favour of a third person to be enforceable:

- there is a stipulation in favour of a third person;
- the stipulation is a part, not the whole, of the contract;
- the contracting parties clearly and deliberately conferred a favour to the third person;
- the favour is unconditional and uncompensated;
- the third person communicated his or her acceptance of the favour before its revocation; and
- the contracting parties do not represent, or are not authorised by, the third party.

DISPUTES

Limitation periods

27 | What are the limitation periods for breach of contract claims? Is it possible to agree a shorter limitation period?

Under the Civil Code of the Philippines, the period for bringing claims based on a breach of contract is 10 years for written contracts and six years for oral contracts or quasi-contracts. These periods commence from the time a party breaches the contract or defaults on its obligations.

A party is considered in default from the time the counterparty judicially or extra-judicially demands from it the fulfilment of the obligation under the contract.

Demand is not necessary for another party to be in default in the following situations:

- when there is an express stipulation to that effect;
- where the law so provides;
- when the period is the controlling motive or the principal inducement for the creation of the obligation; and
- where demand would be useless.

Further, under Philippine law, contracting parties may shorten the periods in statutes of limitations, provided that the shortened period is reasonable. Philippine statutes of limitations prescribe periods ranging from four to 10 years. However, there are no decided cases providing clear guidance on what period would be reasonable, as reasonableness is determined based on the circumstances. Hence, whether or not a shortened period is reasonable will be determined on a case-to-case basis.

Choice-of-law clauses

28 | Do your courts recognise and respect choice-of-law clauses stipulating a foreign law?

Choice-of-law clauses stipulating foreign laws are generally recognised and given effect by the courts, provided that: (1) their provisions are not against the law, morals or public policy of the forum; and (2) the agreement has a reasonable connection with the law chosen.

The connection of the chosen law with the agreement may arise from any of the following: place of contracting, place of negotiation, place of performance, situs of the subject matter of the agreement or domicile, residence, nationality, place of incorporation and place of business of the parties.

Notwithstanding the choice of law, it would still be possible for a Philippine court to apply Philippine law in determining the rights and obligations of the parties under the contract.

Under Philippine law, a party relying on a foreign law has the burden of pleading and proving such foreign law. If a foreign law is not properly pleaded and proved, it will be presumed to be the same as Philippine law pursuant to the doctrine of processual presumption. In addition, Philippine courts have applied Philippine law notwithstanding choice of a foreign law when said law is against the prohibitive laws of the Philippines, public order, public policy or good customs.

29 | Do your courts recognise and respect choice-of-jurisdiction clauses stipulating a foreign jurisdiction?

Philippine courts recognise clauses in a contract providing for a foreign jurisdiction as the forum for resolving disputes. However, such choice-of-jurisdiction clause would not prevent a Philippine court from assuming jurisdiction over the case if such court is: (1) one to which the parties may conveniently resort; (2) in a position to make an intelligent decision as to the law and the facts; and (3) likely to have the power to enforce its decision.

Efficiency of local legal system

30 | How efficient and cost-effective is the local legal system in dealing with commercial disputes?

Litigation in Philippine courts is generally costly and subject to delays. Proceedings at the trial court level (or the court of first instance) normally take three to five years to complete. A judgment of the trial court may be appealed to the Court of Appeals, the resolution of which may take two to three years. The Court of Appeals' judgment may then be appealed further to the Supreme Court, which may take around another three to five years to decide the appeal.

New York Convention

31 | Is your jurisdiction a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Which arbitration rules are commonly used in your jurisdiction?

Yes, the Philippines is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Commonly used arbitration rules include the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL), the International Chamber of Commerce - International Court of Arbitration (ICC Rules), the Singapore International Arbitration Centre (SIAC Rules), the Hong Kong International Arbitration Centre (HKIAC Rules) and the Philippine Dispute Resolution Center (PDRCI Rules).

REMEDIES

Available remedies

32 | What remedies may a court or other adjudicator grant? Are punitive damages awarded for a breach of contract claim in your jurisdiction?

Injunction

Pending the issuance of the final judgment, a court may issue an injunction to protect the rights of the aggrieved party to the contract while the proceedings are ongoing. Such injunction may be either prohibitory or one that commands a party to refrain from doing a particular act or mandatory, which commands the performance of some positive act to correct a previous wrong.

An injunctive writ may only be issued upon a showing of the following: (1) the existence of a clear and unmistakable right that must be protected; and (2) the breach of contract will cause irreparable injury to the aggrieved party. An injury is considered irreparable when there is a constant and frequent recurrence that no fair or reasonable relief can be granted by a court or if the injury is not susceptible of mathematical computation.

Philippine rules also provide for Temporary Restraining Orders or TROs, which is an injunctive relief given in cases of extreme urgency where a party stands to suffer grave and irreparable injury, if the relief prayed for is not given, prior to the application for injunction being heard by a court. TROs are effective for 72 hours from issuance, and may be extended to 20 days, after a hearing is held for the said purpose.

Similar to an injunction granted by a Philippine court, a tribunal in an arbitration may issue an interim measure of protection to preserve or protect a party's rights pending the arbitration. Depending on the applicable arbitration rules, the interim measure of protection may take the form of an injunction or any such measure the tribunal deems necessary in respect of the subject-matter of the dispute.

Damages

Courts and adjudicators may also award damages to the party aggrieved by the breach of the counter-party. Damages awarded for a breach of contract usually include actual damages, liquidated damages, moral damages and exemplary damages.

Actual or compensatory damages refer to compensation for pecuniary loss suffered by a person that has been duly proven. These cannot be based on speculation, conjecture or guesswork. It is necessary to prove with a reasonable degree of certainty, premised upon competent proof and on the best evidence obtainable by the injured party, the actual amount of loss.

When the party in breach of the contract acted in good faith, the damages will only be to the extent of the natural and probable consequences of the breach of the obligation, and which the parties have foreseen or could have reasonably foreseen at the time the contract was constituted. However, under the Civil Code of the Philippines, if the party in breach acted with fraud, bad faith, malice or wanton attitude, the obligor shall be responsible for all damages that may be reasonably attributed to the non-performance of the obligation.

Liquidated damages, or those that are agreed upon by the parties in the case a breach, may also be awarded.

Moral damages are recoverable only when physical suffering, mental anguish, fright, serious anxiety, besmirched reputation, wounded feelings, moral shocks, social humiliation and similar injury are the proximate result of a party's actions. They may be awarded for a breach of contract if the party in breach acted fraudulently or in bad faith.

Under Philippine law, punitive or exemplary damages may be awarded in the case of a breach of contract by way of example or correction for the public good. Specifically, in cases of breach of contract, the courts may award exemplary damages if the party in breach acted in a wanton, fraudulent, reckless, oppressive or malevolent manner.

Parties cannot renounce exemplary damages in advance through contractual stipulations. Such renunciation would be null and void under Philippine law.

Court and adjudicators may also include attorney's fees and expenses of litigation in reasonable amounts under limited circumstances, including an award of exemplary damages, or when a party is compelled to litigate with third persons or to incur expenses to protect its interest.

UPDATE AND TRENDS

Recent developments

33 | Are there any other current developments or emerging trends that should be noted?

The Philippines became a party to the Hague Apostille Convention

In 2019, the Philippines became a party to the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents or the Apostille Convention.

The Apostille Convention states that each contracting state shall be exempt from legalisation of documents to be produced in its territory, which refers to the formality by which diplomatic or consular agents certify the authenticity of the signature, the capacity in which the person signing the document has acted, and the identity of the seal or stamp that it bears. In lieu thereof, the addition of an Apostille on the document itself or on the allonge issued by the competent authority of the state from which the document emanates shall be sufficient.

Currently, Philippine government agencies accept apostilled documents in lieu of documents authenticated by the Philippine consulate, for documents originating from outside the Philippines.

The Philippines' accession to the Hague Service Convention

The Philippines has acceded to the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters in March 2020, which aims to simplify service abroad of judicial documents in civil and commercial matters by designating a Central Authority in charge of receiving requests for service and executing them.

In September 2020, the Philippine Supreme Court issued the Guidelines on the Implementation of the Hague Service Convention on the Service Abroad of Judicial Documents in Civil and Commercial Matters containing the procedure for both inbound and outbound requests for service of documents in civil and commercial matters.

Shift to electronic filings and hearings

The Supreme Court has allowed the electronic filing and service of pleadings, papers, and other documents and issued the Guidelines on the Conduct of Videoconferencing to ensure that court cases continue to be heard despite the pandemic.

The above-mentioned guidelines provide, among others, that overseas Filipino workers, Filipinos residing abroad or temporarily outside the Philippines and non-resident foreign nationals can testify through videoconferencing from an embassy or consulate of the Philippines that has allowed the use of its facilities for videoconferencing.

Implementation of the Guidelines with regard to remote appearances from abroad are suspended until 30 June 2021 pending formulation of internal guidelines of the Philippine Department of Foreign Affairs and training of its personnel for videoconferencing. The application of the Guidelines with respect to remote appearances from abroad would allow for a more expeditious resolution of commercial disputes between Filipino and foreign parties to contracts.

Some government agencies have also shifted to online proceedings to ensure the health and safety of the parties and counsel appearing before them.

Coronavirus

34 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

Bayanihan I and II

The Philippine government enacted a series of laws containing relief programs to address the covid-19 pandemic. These are the Bayanihan to Heal as One Act or Bayanihan I, which was signed into law on 24 March 2020 and Bayanihan to Recover as One Act or Bayanihan II, which was signed into law on 11 September 2020. Bayanihan I has already lapsed. However, Bayanihan II has also lapsed except for certain appropriations of funds therein that have been extended. A third Bayanihan law is currently pending in Congress.

Nonetheless, we provide below some of the relevant measures found in Bayanihan I, which may have been relevant to and have affected existing contracts:

- provide for a minimum of 30-day grace period on residential rents falling due within the period of the enhanced community quarantine, without incurring interests, penalties, fees and other charges;
- direct all banks, quasi-banks, financing companies, lending companies, and other financial institutions to implement a minimum of a 30-day grace period for the payment of all loans;
- require businesses to prioritise and accept contracts, subject to fair and reasonable terms, for materials and services necessary to address the covid-19 pandemic;

- enforce measure to protect the people from hoarding, profiteering, injurious speculations, manipulation of prices, product deceptions, cartels, monopolies or other pernicious practices affecting the supply, distribution and movement of food, clothing, medicine, fuel and other essential goods;
- ensure that donation, acceptance and distribution of health products intended to address the covid-19 public health emergency are not unnecessarily delayed;
- undertake procurement of goods and such other supplies or equipment as may be determined by the Department of Health, among others, in the most expeditious manner, and as exempted from the provisions of the Government Procurement Reform Act and related laws;
- ensure availability of credit to the productive sectors of the economy especially in the countryside;
- liberalise the grant of incentives for the manufacture or importation of critical or needed equipment or supplies, including healthcare equipment and supplies;
- ensure the availability of essential goods, particularly food and medicine, by adopting measures to facilitate or minimise disruption to the supply chain;
- regulate and limit the operation of all sectors of transportation;
- authorise alternative working arrangements for employees and workers in the private sector;
- conserve and regulate the distribution and use of power, fuel, energy and water, and ensure adequate supply of the same; and
- move statutory deadlines and timelines for the filing and submission of any document, the payment of taxes, fees and other charges required by law, and the grant of any benefit, in order to ease the burden on individuals under the community quarantine.

On the other hand, the Bayanihan II provides for the following relevant measures:

- enforce measure to protect the people from hoarding, profiteering, injurious speculations, manipulation of prices, product deceptions, cartels, monopolies or other pernicious practices affecting the supply, distribution and movement of food, clothing, medicine, fuel and other essential goods;
- ensure that donation, acceptance and distribution of health products intended to address the covid-19 public health emergency are not unnecessarily delayed;
- procure goods and such other supplies or equipment as may be determined by the Department of Health, among others, in the most judicious, economical and expeditious manner, and as exempted from the provisions of the Government Procurement Reform Act and related laws;
- ensure availability of credit to the productive sectors of the economy especially in the countryside;
- provide loan interest rate subsidies for institutions of learning;
- direct the Land Bank of the Philippines and the Development Bank of the Philippines to introduce a low interest or flexible term loan programme for operating expenses available to businesses affected by the covid-19 pandemic;
- direct the Philippine Guarantee Corporation to issue an expanded government guarantee program for non-essential businesses;
- liberalise the grant of incentives for the manufacture or importation of critical or needed equipment or supplies, including healthcare equipment and supplies;
- ensure the availability of essential goods, particularly food and medicine, by adopting measures to facilitate and/or minimise disruption to the supply chain;

- require businesses to prioritise and accept contracts, subject to fair and reasonable terms, for materials and services necessary to address the covid-19 pandemic;
- provide extension support, direct cash or loan interest rate subsidy or other forms of assistance to qualified agri-fishery enterprises, agriculture cooperatives, farmers, fisherfolk and other agricultural workers through the Department of Agriculture;
- direct the Department of Transportation and other related agencies to extend assistance to critically impacted businesses in the transportation industry;
- direct the Department of Tourism to assist critically impacted businesses that are tourism enterprises;
- undertake measures in partnership with appropriate internet and communication service providers in the acceleration of the deployment of critical Information and Communications Technology infrastructure;
- direct the Department of Trade and Industry to accelerate and undertake massive promotion of online commerce and offer technical and financial assistance to those engaged in e-commerce, such as those involved in internet retail, digital financial services, digital media and ride-hailing;
- regulate and limit the operation of all sectors of transportation;
- authorise alternative working arrangements for employees and workers in the private sector;
- conserve and regulate the distribution and use of power, fuel, energy and water, and ensure adequate supply of the same;
- direct all banks, quasi-banks, financing companies, lending companies, real estate developers, insurance companies, pre-need companies, and other financial institutions to implement a one-time 60-day grace period to be granted for the payment of all existing, current and outstanding loans falling due, or any part thereof, on or before 31 December 2020;
- direct all institutions providing electric, water, telecommunications, and other similar utilities to implement a minimum of 30-day grace period for the payment of utilities falling due within the period of enhanced community quarantine or modified enhanced community quarantine without incurring interests, penalties and other charges;
- provide a minimum of 30-day grace period on residential rents and commercial rents of lessees not permitted to work, as well as micro, small and medium enterprises and cooperatives, ordered to temporarily cease operations, falling due within the period of the community quarantine, without incurring interests, penalties, fees and other charges;
- provide assistance to the agriculture industry;
- encourage the Bangko Sentral ng Pilipinas and the Securities and Exchange Commission to adopt measures, including the relaxation of regulatory and statutory restrictions and requirements for a period of not more than one year from their date of effectivity to encourage the banking industry and other financial institutions to extend loans and other forms of financial accommodation to help business recover from the economic effects of the covid-19 crisis;
- direct all government agencies and local government units to act on all pending and new applications for permit, licence, certificate, clearance, authorisation and resolutions within a non-extendable period of seven working days, to support business continuity and encourage resumption of all economic activities;
- provide regulatory relief to the critically impacted creative sector;
- provide loan assistance, subsidies, discounts or grants to schools, universities, colleges, technical vocational institutions, teachers, faculties and students for the purchase of distance learning tools;
- waive permits, licences, certificates, clearances, consents, authorisations or resolutions, except those relating to taxes, duties, border control and environmental laws and regulations, for private projects that are nationally significant or those with high economic returns or high employment potential;
- allow national and local government agencies to directly purchase agricultural and fishery products from farmers and fisherfolk and agriculture cooperatives; and
- provide regulatory relief for business entities by directing the Securities and Exchange Commission and other regulatory agencies to desist from imposing fines and other monetary penalties for non-filing, late filing, failure to comply with compulsory notification and other reportorial requirements relating to business activities and transactions that promote continuity and capacity-building in all sectors of the economy during the community quarantine.

Interim Rules on Remote Notarization

The Supreme Court has also recently issued the 2020 Interim Rules on Remote Notarization of Paper Documents, which shall be effective in localities under community quarantines due to covid-19. It allows the notarisation to be conducted through the use of videoconferencing facilities. However, it still requires the documents to be notarised to bear the 'handwritten signatures or marks' of the parties.

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