



2021 Maritime  
Arbitration  
Enforcement Series

*Arbitration in the*  
**PHILIPPINES**

#07 | OCT

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# At Long Last, Justice Through Cost Recovery: Maritime Arbitration in the Philippines

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## Overview of Philippine Law on Arbitration

The Philippines was a Colony of Spain until the end of the 19<sup>th</sup> Century. Consequently, the law of the Philippines was heavily influenced by the Code system of laws in Spain. The Philippines thus adopted both the Spanish Civil Code and the Code of Commerce.

The Philippines updated its own Civil Code in 1950 and promulgated the “New Civil Code” (“**Civil Code**”). From the start of the 20<sup>th</sup> Century until the end of World War II, the Philippines was in turn a United States colony, and thereafter a United States Commonwealth prior to independence.

Arbitration as a means of resolving disputes has been in the Philippines’ statute books for more than half a century, but it has only been in the 21<sup>st</sup> Century that the mode of dispute resolution has gained some traction. Articles 2028 to 2046 of the Civil Code generally govern the arbitration process, but these Civil Code provisions could best be described as meager. Subsequently, Republic Act no. 876, known as the “Arbitration Law,” (“**Arbitration Law**”) was enacted in 1953. While the Arbitration Law was a good law, it was still seldom used.

Some five decades later, recognizing the need to unclog court dockets, the Philippine legislature enacted the Republic Act No. 9285 on 4 February 2004. This was to encourage and promote the use of alternative dispute resolution as an efficient mechanism to aid the parties in the resolution of disputes. Republic Act No. 9285, otherwise known as “The Alternative Dispute Resolution of 2004” (“**ADR Law**”) is presently the principal law that governs commercial arbitration in the Philippines.

The ADR Law recognized that international commercial arbitration in the Philippines should be governed by the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985 (“**Model Law**”), while providing for the applicability of the New York Convention on the recognition and enforcement of foreign arbitral awards (“**New York Convention**”).

To add flesh to the ADR Law, the Department of Justice promulgated Department Order No. 98 otherwise known as the “Implementing Rules and Regulations of the Alternative Dispute Resolution Act of 2004” (“**IRR**”), five years after the enactment of the ADR Law. The IRR lays down the procedures and guidelines for the implementation of the ADR Law.

The Arbitration Law, as amended by the ADR Law and subject to specific provisions of the Model Law, continues to govern domestic commercial arbitration, while Executive Order No. 1008 covers arbitration of construction disputes.

Thereafter, in 2009, the Supreme Court issued A.M. No. 07-11-08-SC or the Special Rules of Court on Alternative Dispute Resolution (“**Special ADR Rules**”) which sets out, among others, the procedure for the appointment, mandate, termination of the arbitrator’s mandate, applications for interim relief, the recognition, enforcement of arbitral awards, and limitation on the judicial review of arbitral awards.

## Why Arbitration over Litigation?

Philippines court litigation has historically been a marathon and required endurance,

and we place emphasis on the term historically.

A simple example will assist. It used to be that a plaintiff could face numerous interlocutory motions to dismiss, but thankfully, rules have been introduced to limit a defendant to one motion to dismiss. However, one tradition that has not been changed, is the question of recovery of costs and attorney's fees. In the court system, the rule is that each litigant bears his own costs and attorney's fees. So going back to that simple example, the losing party in the interlocutory motion suffers no penalty by having to pay opponents costs, but has managed to delay the plaintiff's cause.

Thankfully, the Arbitration Law and the ADR Law has remedied that small injustice because the arbitrators have been given the power to award costs and attorney's fees, and they do so from first hand experience. We and our clients have been the beneficiaries of that change.

There are other changes especially in the shipping field. In January 2020, Administrative Matter No. 19-08-14-SC, otherwise known as "The Rules of Procedure for Admiralty Cases" ("**Admiralty Rules**"), took effect. The Admiralty Rules is the Philippines' first procedural issuance specifically relating to maritime and admiralty matters such as, *inter alia*, vessel arrest and limitation action. Under the Admiralty Rules, a defendant is not allowed to file a motion to dismiss. Court litigants are still unable to recover cost and attorney's fees, but for shipping lawyers in court, the motion to dismiss is dead and buried.

Overall, dispute resolution through arbitration instead of litigation has had a profound impact due to the allowance of recovery of legal costs.

## **Overview of Maritime Law in the Philippines**

The law on the domestic carriage of goods and passengers are part of the Civil Code. The Code of Commerce (which is a copy of Spanish Code approximately at end of the

19<sup>th</sup> century) has remained largely unchanged, especially in respect of the maritime and shipping chapters.

The Code of Commerce includes chapters on maritime commerce, collision liability, and limitation of liability, while the rules on cargo damage claims can be found in both the Civil Code and the Code of Commerce. The applicable rules on tort and damages are contained in the Civil Code. Of course, the United States also influenced Philippine shipping law and it was during the Commonwealth era that the United States Carriage of Goods by Sea Act ("**COGSA**") was enacted into law in the Philippines. The Philippine COGSA is very similar to the Hague Rules.

## **Enforceability of Foreign Awards in the Philippines**

The recognition and enforcement of a foreign arbitral award is provided for in Sections 42 to 48 of the ADR Law and Rule 13 of the Special ADR Rules. The grounds to refuse recognition and enforcement are those provided for in the New York Convention. The grounds under Article V of the New York Convention are set out and incorporated in Rule 13.4 (a) and (b) of the Special ADR Rules.

In respect of non-convention awards rendered by a country that does not extend comity and reciprocity to awards rendered in the Philippines, Rule 13.12 of the Special ADR Rules provides that the Regional Trial Court may treat such award as a foreign judgment under Section 48, Rule 39 of the Rules of Court. It will be a challenge to enforce a non-convention award in the Philippines because it will require a trial with witnesses. Contrast that with an award from a New York Convention country where the enforcement procedure is easier and the proceedings are summary in nature. Generally, no witnesses are needed in the latter.

The Philippines generally adheres to a pro-arbitration policy. This is evident in Section 45 of the ADR Law which mandates that the Regional Trial Court disregard any other ground other than those enumerated

in Article V of the New York Convention and Rule 13.11 of the Special ADR Rules which provide for the presumption that an arbitral award is subject to recognition and enforcement by a Philippine court. Indeed, when faced with a petition for recognition and enforcement of a foreign arbitral award, the Regional Trial Court's role is pretty much straightforward, either to (a) recognize and/or enforce or (b) refuse to recognize and enforce the foreign arbitral award. In other words, the Regional Trial Court is not allowed to substitute its own judgment for that of the foreign arbitral tribunal. This is clear from Rule 19.11 of the Special ADR Rules which provides:

**"The court can deny recognition and enforcement of a foreign arbitral award but shall have no power to vacate or set aside a foreign arbitral award".**

The Regional Trial Court's role is limited in the sense that it cannot determine whether the foreign arbitral award is valid or not. This issue is left to the court of the State in which the arbitral award is rendered, as provided in Rule 13.10 of the Special ADR Rules. The Philippine court's inquiry is limited to the determination of the existence of those grounds set out in Rule 13.4 which is subject to a caveat:

**"The court shall not disturb the arbitral tribunals' determination of facts and/or interpretation of the law"** (Rule 13.11 of the Special Rules of Court).

In *Tuna Processing, Inc. v. Philippine Kingford, Inc* (G.R. No. 185582, February 29, 2012), the Supreme Court rejected a party's defence for lack of legal capacity to sue as a ground to dismiss the foreign corporation's petition for the recognition and enforcement of the foreign arbitral award.

In *Mabuhay Holdings Corporation v. Sembcorp Logistics Limited* (G.R. No. 212734, Dec. 5, 2018), the Supreme Court rejected the Regional Trial Court's decision which refused recognition and enforcement of the foreign arbitral award rendered by an

arbitrator in accordance with the ICC Rules. The Regional Trial Court found the dispute to be an intra-corporate controversy, which is not arbitrable under the parties' arbitration agreement. The Court also found that the award of 12% interest was contrary to law and public policy. The Supreme Court pointed out that since the sole arbitrator already ruled out an intra-corporate controversy, the Regional Trial Court should not have determined the facts anew, which directly contradicted those of the arbitrator's factual findings.

The decision in *Mabuhay* is particularly significant because it is in this case that the Supreme Court defined public policy as a ground to challenge the arbitral award. The Supreme Court ruled that "*mere errors in the interpretation of the law or factual findings would not suffice to warrant refusal of enforcement under the public policy ground*". In particular, the Supreme Court categorically stated that:

**"The illegality or immorality of the award must reach a certain threshold such that, enforcement of the same would be against our State's fundamental tenets of justice and morality, or would blatantly be injurious to the public, or the interests of the society."**

Applying this narrow approach to public policy, the Supreme Court debunked *Mabuhay's* claim that a violation of Article 1799 of the Civil Code (stating that "*a stipulation which excludes one or more partners from any share in the profits or losses is void*") is necessarily a violation of public policy, as not all violations of law would be deemed contrary to public policy.

On the issue of interest, the Supreme Court ruled that even the arbitrator's imposition of 12% interest from the date of the Final Award is not a ground to refuse recognition and enforcement. This is because "*mere incompatibility of a foreign arbitral award with domestic mandatory rules on interest rates does not amount to a breach of public policy*".

The Supreme Court did not consider the 12% interest as unreasonably high or unconscionable that would violate the State's fundamental notions of justice.

A trial court's decision recognizing and enforcing the foreign arbitral awards is immediately executory (Rule 13.11 of the Special ADR Rules). This provision ensures that the decision on the foreign arbitral award is not defeated or rendered illusory during the pendency of the appeal. To reinforce this policy, Rule 19.22 of the Special ADR Rules categorically states that:

"The appeal shall not stay the award, judgment, final order or resolution sought to be reviewed unless the Court of Appeals directs otherwise upon such terms as it may deem just".

The Court of Appeals may require the party appealing the court's judgment on the arbitral award to post a bond in favor of the prevailing party equal to the amount of the award (Rule 19.25 of the Special ADR Rules). Failure to post a bond will warrant the dismissal of the appeal.

Interestingly, the Regional Trial Court shall award costs to the prevailing party which shall include reasonable attorney's fees (Rule 21.3 of the Special ADR Rules). The Regional Trial Court shall determine the reasonableness of the attorney's fees.

### **Institutional vs Ad Hoc Arbitration – Filipino Perspectives**

Institutional arbitration may be conducted under the auspices of the Philippine Dispute Resolution Center, Inc. (PDRCI) and the Philippine International Center for Conflict Resolution (PICCR), which was established in 2019, with the support of the Integrated Bar of the Philippines. Construction disputes, on the other hand, are under the original and exclusive jurisdiction of the Construction Industry Arbitration Commission (CIAC) created under Executive Order No. 1008.

Under the IRR of the ADR Law (Rule 2 Article 1.6 (D) (1)), an ad hoc domestic arbitration conducted through an institution may still be considered as ad hoc if the institution is not a permanent or regular institution in the Philippines. In the absence of an agreement, the President of the Integrated Bar of the Philippines is considered the appointing authority of the tribunal in an ad hoc arbitration.

Institutional arbitration provides a more structured arbitration process than an ad hoc arbitration because of the established rules of procedure and the administrative mechanism in place for the conduct of arbitration. In an ad hoc arbitration, the parties may opt to follow the UNCITRAL Arbitration Rules and the IBA Rules of Evidence for example. In default of an agreement, the parties may follow the arbitration procedure set out in Article 5.23 of the IRR of the ADR Law and the Arbitration Law.

### **Status of SCMA Awards in the Philippines**

Maritime arbitral awards rendered by the SCMA will be considered as a foreign arbitral award under the ADR Law and its enforcement and recognition shall be subject to the procedure set out under the Special ADR Rules and the grounds to refuse recognition and enforcement will be as provided by the New York Convention.

### **Conclusion**

The impact of the Arbitration Law and the ADR Law has had a long gestation period, but we hope that the developments made throughout the years will encourage parties to take advantage of the arbitral process in place in the Philippines.

What we also see as reassuring would be the changes wrought by a simple but significant amendment to the cost recovery regime in order to assist to deliver true justice, and encourage the wider use of ADR for dispute resolution.

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Valeriano del Rosario is a specialist shipping lawyer based in the Philippines. He obtained his LLM in shipping law and policy from the University of Wales Institute of Science and Technology in 1983. He started his shipping career in London at Sinclair Roche and Temperley, and was heavily involved in LOF arbitration. He returned to the Philippines in 1987 and joined the law firm which his father established soon after the War in 1949. His father's firm was organized as V.E. del Rosario & Associates, and the firm was known by the initials VERA. Valeriano is the managing partner of VeraLaw.

Maria Theresa Gonzales has over 25 years of legal experience focused on commercial litigation, arbitration, and intellectual property. In addition to her economics and law degrees from the Philippines, she read for her masters in International Commercial Law from the University of Nottingham in England. Theresa was formerly the Chair of the Board of Trustees of the Maritime Law Association of the Philippines (MARLAW) from October 2011 to October 2012 and President from October 2010 to October 2011. She was a member of the Technical Working Group (TWG) of the House Transportation Committee of the Philippine Congress in drafting the Proposed Maritime Code. As resource person, Theresa provided inputs on Ship Mortgage, Maritime Liens, Maritime Arbitration, and International and Domestic Carriage of Goods. She is a co-author of the Philippine chapter on the key maritime issues/developments in the shipping industry in the Philippines published in The Shipping Law Review in the United Kingdom by the Law Business Research. Theresa wrote an article on the "Recognition and Enforcement of a Foreign Arbitral Award in the Philippines" for a Philippine law journal. She had also been invited several times as a speaker on this topic. As a seasoned commercial litigator, she has contributed to jurisprudence on arbitration, employee termination, intra-corporate dispute, and criminal procedure as several of the cases she handled at the trial court level were upheld by the Philippine Supreme Court.



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