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## **New Arbitration Law For The Philippines**

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### **1. Introduction**

The Philippines was one of the earliest countries, certainly in Asia, to have acceded to the New York Convention, 1958. It acceded to the Treaty in 1967. Like many other countries today, the Philippines, despite having acceded to the New York Convention, did not enact specific laws that would facilitate arbitration, in particular, international commercial arbitrations. Even Singapore did not previously have any specific arbitration laws that facilitated international commercial arbitration and gave effect to the principles and philosophy behind the Model Law under the New York Convention regime. Singapore only enacted a law specifically for international commercial arbitration in 1995 with the passing of the International Arbitration Act (Cap.143A). In February of this year, the Philippines eventually introduced into their laws a new arbitration law which included an entire section dealing specifically with international commercial arbitration.

### **2. Republic Act 9285 of the Philippines**

On 4 February 2004, the Republic Act 9285 (“the Act”), which was a consolidation of Senate Bill No. 2671 and House Bill No. 5654 was passed by the Senate and the House of Representatives. President Gloria Macapagal Arroyo, approved the Act on 2 April 2004. The Act bears the full name of Alternative Dispute Resolution Act of 2004. As the name suggests it covers the law relating to alternative dispute resolution which includes international commercial arbitration. Indeed the preamble to the Act describes it as “An Act to institutionalize the use of

An Alternative Dispute Resolution system in the Philippines and to establish the Office for Alternative Dispute Resolution, and for other purposes”.

As a statement of policy, section 2 of the Act contains a ‘Declaration of Policy’ which states inter alia, “...it is hereby declared the policy of the State to actively promote party autonomy in the resolution of disputes ...”It goes on to declare that “... the State shall encourage and actively promote the use of Alternative Dispute Resolution (ADR) as an important means to achieve speedy and impartial justice...”.

The Act, as the preamble suggests, deals with the different forms of ADR namely Mediation, commercial arbitration both domestic and international as well as Construction arbitrations within the purview of Executive Order 1008 known as the Construction Industry Arbitration Law (CIAC).

This brief paper is intended to discuss Chapter 4 of the Act dealing with International Commercial Arbitration and Chapter 7 of the same act dealing with the recognition and enforcement of Foreign Arbitral Awards.

### **3. Chapter 4 of the Republic Act 9285**

This is the Chapter which specifically deals with the law relating to International Commercial Arbitration. It is this section of the Act that would be of interest to international parties. This is the Chapter that will for the first time in the Philippines give effect to the philosophy and principles underpinning the UNCITRAL Model Law.

Significantly, Chapter 4 begins with the adoption of the Model Law. Thus Section 19 of the Act states that “International commercial arbitration shall be governed by the Model Law on International Commercial Arbitration (the “Model Law”) adopted by the United Nations Commission on International Trade Law on June 21, 1985...”.

#### **4. Selected Provisions in Chapter 4 of the Act.**

**Section 20** – Much like section 4 of Singapore’s International Arbitration Act and consonant with the approach of the United Nations in respect of legislative/treaty documents, section 20 makes clear that in interpreting the Model Law regard may be had to the travaux preparatoire...”.

**Section 21** – This section defines an arbitration as ‘commercial’ if it covers matters arising from all relationships of a commercial nature, whether contractual or not. As a definition it is doubtful if it goes any further than what would, in any event, be understood by businessmen as ‘commercial’. Further, the phrase ‘... whether contractual or not.’ seems unclear. Presumably, the intention is to cover relationships beyond contractual and in that sense one could think of quasi-contractual or possibly relationships imposed by the operation of law such as relationships which create duties in tort. The scope of the definition must obviously await judicial interpretation. Perhaps it would have been better for the legislators to have simply left the meaning of ‘commercial’ to the business community and avoid any definition. This is the case with Singapore’s International Arbitration Act where there is no definition.

**Section 23** – This section establishes the confidential nature of arbitration proceedings including the records, evidence and the arbitral award. It also sets out under what circumstances this cloak of confidentiality may be lifted. Many jurisdictions including Singapore does not legislate into their law this concept of confidentiality. This is perhaps because in

common law jurisdictions there are ample (though sometimes complicated) characterizations of arbitrations as being confidential in case law. The section is, it is submitted, useful in the light of the continuing concerns in common law jurisdictions as to whether arbitration proceedings and its attendant components are automatically confidential – see for example the controversy arising from the Australian case of *Esso Australia Resources Ltd and Others v. Plowman (Minister for Energy and Minerals) and Others* (1995) 128 ALR 391. (For a useful discussion of the issues surrounding confidentiality of commercial arbitrations see *Arbitration International*, Vol. 12, No. 3; an article by Patrick Neill QC).

**Section 24** – This section is obviously intended as a provision obliging the national court to stay ‘any action... which is the subject matter of an arbitration agreement...’ at the request of at least one party in favour of a reference to arbitration ‘...unless [the court] finds the arbitration agreement is null and void, inoperative or incapable of being performed.’ The language of section 24 appears to be based on Article 8(1) of the Model Law. Since the language used here follows Article 8(1), the provision does not deal with the consequential elements of a stay should a court following section 24 stay an action before it in favour of an arbitration. Singapore’s International Arbitration Act deals with these consequential elements in sections 6 and 7 of that act. In the Philippines, upon a stay the court will have to exercise its inherent or other statutory powers to deal with these matters. (The writer understands that the Supreme Court in the Philippines will as parts of the Act indicate be promulgating various rules for the implementation of the Act. See for example, Part B of Chapter 7 of the Act, which deals with the Recognition and Enforcement of Foreign Arbitral Awards.

**Section 25** – This section is interesting to the extent that it expressly reinforces the desire of the Philippines to favour arbitration. Thus, the first sentence of the section states unequivocally that “In interpreting the Act, the court shall have due regard to the policy of the law in favour of

arbitration.” Couple this statement with the Declaration of Policy (favouring ADR) in section 2 of the Act, the intent of the legislators to favour arbitration including international commercial arbitration is not in doubt. The edict requiring the court to have “due regard” to the state policy is admirable and in this writer’s view timely. Even, in jurisdictions where arbitration law may be said to have developed to a mature state, judges frequently need to be reminded of the place for arbitration within the State’s legal system. In a state like the Philippines where it is perhaps not unfair to say that the practice of international commercial arbitration is still nascent, it is useful to remind the courts as to the role and position of arbitration.

**Section 26** – This section defines the Appointing Authority within the meaning of the Model Law. The section does not appear controversial. The Appointing Authority is defined as the person or institution named as such in the arbitration agreement or where institutional rules are adopted by the parties, the arbitral institution. In ad hoc arbitrations where there is no agreement between the parties as to who shall be the appointing authority, then section 26 makes the National President of the Integrated Bar of the Philippines (IBP) or his duly authorized representative the appointing authority. In the Philippines where the Bar is generally influential as to State and public policies, it is not surprising that the default appointing powers are reposed in the leader of the Bar.

**Sections 28 and 29** – In these two provisions are contained interim and provisional as well as conservatory remedies, which are available to parties to an international commercial arbitration. Section 29 appear to extend and widen the scope of powers found in Section 28 although it is more a case of an elaboration of the powers set out in section 28. Section 29 specifically refers to the granting of preliminary injunctions but includes also the power to appoint a receiver, powers of detention and preservation and inspection of property, which is the subject matter of

the arbitration. Helpfully, section 29 makes clear that a party may seek the court's assistance in enforcing the interim orders of an arbitral tribunal.

**Section 30** – This section deals with the choice of the place of arbitration. This section is interesting in that in the absence of parties agreeing or the arbitral tribunal appointing the place of arbitration, it actually fixes the place to be in Metro Manila. This may have been necessitated by the vastness and 'spread-out' nature of the islands that make up the Philippines. In line with party autonomy, the provision does not however affect the parties ability to agree to meet anywhere however far-flung in the archipelago or elsewhere outside the Philippines. To that extent the provision is curious.

**5. Chapter 7 (Part B) of the Republic Act 9285  
– Recognition and Enforcement of Foreign Arbitral Awards**

Section 42 (Chapter 7 Part B) of the Act makes the New York Convention the governing regime for the recognition and enforcement of foreign arbitral awards. For the details therefore see Articles IV and V of the Convention. Section 42 also provides that an application for the recognition and enforcement of a foreign arbitral award should be filed with the regional trial court in accordance with the rules to be promulgated by the Supreme Court.

Section 43, which deals with the recognition and enforcement of non-New York convention awards is exemplary. Much like section 46(3) of Singapore's Arbitration Act (Cap10), it opens the door for the recognition of non-New York Convention awards. Section 43 is however more explicit in its reference to comity and reciprocity as grounds for recognition of awards. Arguably, a Singapore Court dealing with section 46(3) of the Arbitration Act (Cap10) would equally consider grounds of comity and reciprocity despite section 46 of that act being silent.

## 6. Foreign Arbitral Award Not Foreign Judgment

The characterisation of a Foreign Arbitral Award for the purposes of recognition and enforcement is to be found in section 44 of the Act.

On reading this provision, it is perhaps not surprising if the reader should wonder at its precise intent. It is useful to set out the entire provision below:

***“SEC. 44. Foreign Arbitral Award Not Foreign Judgment.** A foreign arbitral award when confirmed by a court of a foreign country, shall be recognized and enforced as a foreign arbitral award and not a judgment of a foreign court.”*

The first paragraph makes clear that a foreign arbitral award is not to be treated as a foreign judgment but a foreign arbitral award. This seems self-evident so it is difficult to understand the thinking behind the language of the paragraph.

The combined effect of the next two paragraphs are however, clear. The provisions allow foreign arbitral awards when confirmed by a regional trial court (presumably on an application for recognition and enforcement under section 42 – similar to the grant of leave under section 19 read with section 29 of the International Arbitration Act (Cap 143A) by the High Court in Singapore) to be enforced in the same manner as “...final and executory decisions of the courts of law of the Philippines.”

In view of the application of the Model Law under the Act, section 45 premises the right “...to oppose an application for recognition and enforcement of the arbitral award ... on those grounds

enumerated under Article V of the New York Convention.” Significantly, it also makes clear that “Any other ground raised shall be disregarded by the regional trial court.”

As indicated earlier, rules upon which applications are to be made in pursuance of the Act (implementing rules) have yet to be promulgated by the Supreme Court.

## **7. Appeals under the Act.**

Appeals from court decisions on Arbitral Awards are dealt with in section 46 of the Act. Again, a reproduction below of the section is useful:

*“SEC. 46. Appeal from Court Decisions on Arbitral Awards. – A decision of the regional trial court confirming, vacating, setting aside, modifying or correcting an arbitral award may be appealed to the Court of Appeals in accordance with the rules of procedure to be promulgated by the Supreme Court.*

*The losing party who appeals from the judgment of the court confirming an arbitral award shall be required by the appealant court to post counterbond executed in favor of the prevailing party to the amount of the award in accordance with the rules to be promulgated by the Supreme Court.*

The section prescribes that an appeal is available against the decision of the regional trial court “...confirming, vacating, setting aside, modifying or correcting an arbitral award...”. Read literally, it raises the alarming possibility of a very wide scope for appealing against arbitral awards. However, it is submitted that the very wide language set out above, must be read in

context and in light of the fact that the only grounds of challenge against recognition and enforcement is on those grounds found in Article V of the New York Convention.

## **8. General Comments**

There is no doubt that it is highly desirable and commendable on the part of the Philippine legislature to have written into Philippine law the Republic Act 9285 to give effect to the arbitral regime that is found in the UNCITRAL Model Law. As earlier mentioned, the Philippines was one of the first Asian countries to have acceded to the New York Convention in 1967. However, it is only now that an implementing law (as it were) is legislated into law. Again, as mentioned earlier, the lapse of time is not surprising since it has only been recently that Asian jurisdictions have become familiar (or more aptly comfortable) with international commercial arbitration as a means of resolving disputes.

Although, the Act is now in force the work is not fully done yet. As various parts of the Act itself state, implementing rules will have to be promulgated by the Supreme Court to give proper effect to the Act's provisions. We must await these.

Finally, the manner the Act will be implemented and its effectiveness will ultimately depend on the interpretation to be given to its various principal provisions and accompanying rules. This must in turn await the development and evolution of case law from the courts in the Philippines and eventually the Supreme Court. The advantage that the Philippines will have, in implementing the new arbitration law is that coming after the laws of many other Model Law jurisdictions, it can draw from these jurisdictions the experience of implementing similar

arbitration laws. Thus, the Philippines can draw from the experience and in some cases the jurisprudence of countries like Singapore for example.

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