

# Recognition and Enforcement of a Foreign Arbitral Award in the Philippines

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## *Introduction*

International arbitration as a system of resolving commercial disputes of an international character was recognized in the Philippines as early as 1967 when the Philippine Senate acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the 1958 “New York Convention”, under Senate Resolution No. 71. The New York Convention fundamentally provides for the reciprocal recognition and enforcement of foreign arbitral awards in signatory states. In practical terms this means that an arbitral award rendered in Contracting State A may be recognized as a final and executory decision in either of the state of the parties to arbitration, as if the foreign arbitral award were actually rendered by the domestic court of that country.

The New York Convention recognizes that each of the Contracting State may provide for the mechanism for the actual enforcement of the arbitral award. In 2004, the Philippines enacted Republic Act 9285, the “Alternative Dispute Resolution Act of 2004,”<sup>1</sup> which, among others, tasked the Secretary of Justice to convene a committee to formulate the appropriate rules and regulations for its implementation,<sup>2</sup> and the Supreme Court to promulgate rules of procedure for the recognition and enforcement of the foreign arbitral award.<sup>3</sup> It took another five (5) years, in 2009, for the committee to formulate the Implementing Rules and

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<sup>1</sup> RA. 9285 was passed by the Senate and the House of Representatives on 4 February 2004 and approved by President Gloria Macapagal Arroyo on 2 April 2004.

<sup>2</sup> See Section 52 of R.A. 9285.

<sup>3</sup> See Section 42 of R.A. 9285.

Regulations of the ADR Act (the “Rules”)<sup>4</sup> and for the Supreme Court to promulgate A.M. No. 07-11-08-SC, the Special Rules of Court on Alternative Dispute Resolution (“Special ADR Rules”)<sup>5</sup>. Insofar as it applies to a foreign arbitral award, the Rules is basically a consolidation of the salient provisions of R.A. 9285, the New York Convention, and the Special ADR Rules.

It is significant and certainly laudable that Republic Act 9285 and the Rules extend recognition and enforcement to foreign arbitral awards that are not covered by the New York Convention (“non-convention award”) on grounds of comity and reciprocity. Article 4.36 (B) (a) of the Rules went so far as to state that if no comity and reciprocity exists, the non-convention award is to be regarded as a “presumptive evidence of a right as between the parties in accordance with Section 48 of the Rules of Court”. In other words, the non-convention award may be recognized and enforced as a foreign judgment of a foreign court.

From 1967 until 2009, the Rules of Civil Procedure largely governed the recognition and enforcement of foreign arbitral awards, and thus, ironically, they became subject to the uncertainties, pitfalls, and complexities attributed to litigation. This article examines the extent to which the procedural rules make the recognition and enforcement of a foreign arbitral award either attractive or cumbersome for the party commencing proceedings in the Philippines.

*Foreign arbitral award differentiated from a judgment and an international commercial arbitral award*

Since specific procedural rules apply differently to the recognition and enforcement of a foreign arbitral award, an international commercial award and a foreign judgment, it is essential to distinguish one from the other.

A foreign arbitral award is rendered by an arbitrator or panel of arbitrators in a foreign country. The grounds for its recognition and enforcement in the Philippines are those exclusively found in Article V of the New York Convention and the procedural details are set out in Rule 13 of the Special ADR Rules.

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<sup>4</sup> Department Circular No. 98.

<sup>5</sup> Promulgated by the Supreme Court on 1 September 2009.

On the other hand, an international commercial arbitral award is rendered by an arbitrator or panel of arbitrators in the Philippines, the mechanics of which is largely governed by the Model Law on International Commercial Arbitration (the “Model Law”)<sup>6</sup>. The award is rendered pursuant to an international commercial arbitration conducted in the Philippines. The recognition and enforcement or setting aside of an international commercial arbitration award is largely governed by Rule 12 of the Special ADR Rules.

In both cases, the Regional Trial Court is required not to disturb the arbitrator’s or arbitral tribunal’s “determination of facts and/or interpretation of law.”<sup>7</sup>

Unlike a foreign arbitral award<sup>8</sup> and an international commercial arbitral award, the conditions for the recognition and enforcement of a foreign judgment are not based on a convention. Rather, the Rules of Court govern its enforcement. In particular, Section 48, Rule 39 of the 1997 Rules of Civil Procedure clearly provides that a foreign judgment merely constitutes *prima facie* evidence of the justness of the claim of a party and, as such, is subject to proof to the contrary.<sup>9</sup> It is merely a presumptive evidence of a right as between the parties and may be repelled by evidence of a want of jurisdiction of the issuing authority, want of notice to the party against whom it is enforced, collusion, fraud, or clear mistake of law or fact. Of particular interest is that the Regional Trial Court has authority to determine whether the foreign court committed mistakes of fact and law.

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<sup>6</sup> Section 19 of R.A 9285.

<sup>7</sup> See Rule 12.13 and Rule 13.11 of the Special ADR Rules.

<sup>8</sup> A convention award or a non-convention award rendered by a country that extends comity and reciprocity to an award rendered in the Philippines.

<sup>9</sup> See *Wolfgang O. Roehr v. Maria Carmen D. Rodriguez*, G.R. No. 142820, June 20, 2003; *St. Aviation Services Co. PTE Ltd., v. Grand International Airways, Inc.*, G.R. No. 140288, October 23, 2006.

A feature common to all three is that the party attacking the foreign arbitral award or international commercial award,<sup>10</sup> or foreign judgment has the burden of overcoming the presumption of its validity.<sup>11</sup>

*Procedure for recognition and enforcement of foreign arbitral awards*

*A. Venue*

A petition for the recognition and enforcement of foreign arbitral award is a *special proceeding*.<sup>12</sup> Under Rule 13.3 of the Special ADR Rules, the petition shall, at the petitioner's option, be filed with the Regional Trial Court (a) where the assets to be attached or levied upon is located, (b) where the act to be enjoined is being performed, (c) in the principal place of business in the Philippines of any of the parties, (d) if any of the parties is an individual, where any of the individual resides, or (e) in the National Capital Judicial Region. The denomination of the petition as a *special proceeding* as opposed to an ordinary civil action is consistent with the lawmakers' intent to make the recognition and enforcement of foreign arbitral awards non-litigious and summary in nature. This rule on venue applies with equal force to a non-convention award, which on the grounds of comity and reciprocity, may be recognized and enforced as a convention award, or one rendered under the regime of the New York Convention.

It appears that the special rule on venue under Rule 13.3 is restricted to petitions for recognition and enforcement of foreign arbitral awards. Should Rule 13.3 be similarly applied to a separate and independent application to vacate or set aside the foreign arbitral award?

Rule 13.3 of the Special ADR Rules contemplates a situation wherein a party to an international arbitration does not commence a separate proceeding to vacate or set aside the foreign arbitral award but that the opposition thereto is made in the special proceeding commenced by the petitioner.

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<sup>10</sup> See Rule 12.12 and Rule 13.11 of the Special ADR Rules.

<sup>11</sup> See *Northwest Orient Airlines, Inc. v. Court of Appeals*, 241 SCRA 192, 199 [1995]; *Oil and Natural Gas Commission v. Court of Appeals and Pacific Cement Company, Inc.*, G.R. No. 114323, July 23, 1998; *Asiavest Merchant bankers (M) Berhad v. Court of Appeals*, G.R. No. 110263, July 20, 2001.

<sup>12</sup> See Rule 1.2 of the Special ADR Rules.

Rule 13.3 should not be confused with Rules 12.1 and 12.2. While Rule 13.3 refers to an arbitral award rendered in a foreign country, Rules 12.1 and 12.2 refer to a commercial award rendered in an international commercial arbitration proceeding in the Philippines.

And, even if venue is regarded as improperly laid, a motion to dismiss cannot be filed by the opposing party as it is considered a prohibited pleading under Rule 1.6 of the Special ADR Rules.

*B. Contents of and documents accompanying the petition*

There are technicalities involved in the filing of the petition for recognition and enforcement of a foreign arbitral award.

For instance, Rule 1.4 of the Special ADR Rules requires that the petition be duly verified by a statement that the “affiant has read the same and that the factual allegations therein are true and correct of his own personal knowledge or based on authentic records.” Rule 1.5 requires that the petition should be accompanied by a Certification Against Forum Shopping. Also, to avoid any dispute, the requisite board resolution or Secretary’s Certificate should be appended to the petition as evidence of the authority of the affiant to verify the petition and execute the Certificate Against Forum Shopping for and on behalf of the party seeking to recognize and enforce the arbitral award in the Philippines.

An issue may arise on whether the Certification Against Forum Shopping is required to be authenticated by a secretary of the embassy or legation, consul general, consul, vice consul, or consular agent or by any other officer in the foreign service of the Philippines stationed in the foreign country in which the record is kept. This issue may however be promptly be nipped in the bud by citing Rule 22.1 of the Special ADR Rules which promotes the liberal application of the Rules of Evidence “to achieve the objectives of the Special ADR Rules.” The ruling in *Heirs of the Deceased Spouses Vicente S. Arcilla and Josefa Asuncio Arcilla v. Ma. Lourdes Teodoro*<sup>13</sup> is also on point. The Supreme Court ruled therein that the certification of non-forum shopping executed in a foreign country is not covered by Section 24, Rule 132 of the Rules of Court,<sup>14</sup> which does not include

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<sup>13</sup> G.R. No. 162886, August 11, 2008.

<sup>14</sup> Sec. 24. *Proof of official record.* - The record of public documents referred to in paragraph (a) of Section 19, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having legal custody of the

documents acknowledged before a notary public abroad. The Supreme Court went on to point out that “It cannot be overemphasized that the required certification of an officer in the foreign service under Section 24 refers only to the documents enumerated in Section 19(a), to wit: written official acts or records of the official acts of the sovereign authority, official bodies and tribunals, and public officers of the Philippines or of a foreign country. The Court agrees with the CA that had the Court intended to include notarial documents as one of the public documents contemplated by the provisions of Section 24, it should not have specified only the documents referred to under paragraph (a) of Section 19.”

Rule 13.5 of the Special ADR Rules further requires that the petitioner plead in the petition the (i) addresses of the parties to arbitration, (ii) the country where the arbitral award was made and whether such country is a signatory to the New York Convention, and (iii) the relief sought. The petitioner is likewise required to attach to the petition (i) an authentic copy of the arbitration agreement; and (ii) an authentic copy of the arbitral award. The petitioner may elect to submit the original arbitral award and the original arbitration agreement, as provided in Section 42 of Republic Act 9285 and Article 4.35 (c) of the Rules. If the arbitration agreement and arbitral award are not in English, its official translation,

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record, or by his deputy, and accompanied, if the record is not kept in the Philippines, with a certificate that such officer has the custody. If the office in which the record is kept is in a foreign country, the certificate may be made by a secretary of the embassy or legation, consul general, consul, vice consul or consular agent or by any officer in the foreign service of the Philippines stationed in the foreign country in which the record is kept, and authenticated by the seal of his office. (Emphasis supplied)

Section 19 (a) of Rule 132 provides:

“Sec. 19. Classes of documents – For the purpose of their presentation in evidence, documents are either public or private.

Public documents are:

- (a) The written official acts or records of the official acts of the sovereign authority, official bodies and tribunals, and public officers, whether of the Philippines or of a foreign country;
- (b) Documents acknowledged before notary public except last wills and testament; and
- (c) Public records, kept in the Philippines, of private documents required by law to be entered therein.

All other writings are private.”

certified by an official or sworn translator or by a diplomatic or consular agent, is required to be attached in the petition. Subsequent pleadings and written submissions are required by Rule 1.4 to be supported by verified statement “that the affiant has read the same and that the factual allegations therein are true and correct of his own personal knowledge or based on authentic records”. These may be filed and served on the other party by electronic transmission upon agreement of the parties and with the court’s approval<sup>15</sup>.

### *C. Filing fee*

In general, the practice has been that the filing fee in an action for sum of money is based on the amount pleaded in the complaint. The same rule has been observed in proceedings for recognition and enforcement of foreign judgments and foreign arbitral awards. However, in 2005, the Supreme Court was confronted with the issue on whether the action for the recognition and enforcement of a foreign judgment is one incapable of pecuniary estimation as to warrant the payment only of a minimal filing fee. This was the case of *Priscilla C. Mijares v. Hon. Santiago Javier Ranada*,<sup>16</sup> which involved an action filed by the victims of human rights violations for the recognition and enforcement of a money judgment in the amount of over Two and a Quarter Billion US Dollars (US\$2.25 Billion) rendered in their favor by the United States District Court (US District Court), District of Hawaii against the Marcos estate.

In the petition before the trial court, the Marcos estate moved for the dismissal of the case since petitioners paid only a minimal filing and docket fee of Four Hundred Ten Pesos (P410.00). The lower court dismissed the case on the proposition that the subject matter of the complaint was indeed capable of pecuniary estimation, as it involved “a judgment rendered by a foreign court ordering the payment of definite sums of money, allowing for easy determination of the value of the foreign judgment”. The lower court applied the schematic table in Section 7 (a) of Rule 141 of the Rules of Civil Procedure and estimated that petitioners should have paid as filing fee Four Hundred Seventy-Two Million Pesos (P472,000,000.00) based on the money judgment.

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<sup>15</sup> Rule 1.8 (c).

<sup>16</sup> G.R. No. 139325, April 12, 2005.

The Supreme Court ruled that the action for recognition and enforcement of the foreign judgment is incapable of pecuniary estimation since the subject matter of the action is the foreign judgment itself, and for purposes of the computation of the filing fee, the foreign judgment falls within the class of "*all other actions not involving property.*" The Supreme Court went on to state that if the rule were otherwise, foreign judgments would be virtually unenforceable in the Philippines involving as it does exorbitant filing fees. The Supreme Court ruled on this wise:

“The preclusion of an action for enforcement of a foreign judgment in this country merely due to an exorbitant assessment of docket fees is alien to generally accepted practices and principles in international law. Indeed, there are grave concerns in conditioning the amount of the filing fee on the pecuniary award or the value of the property subject of the foreign decision. Such pecuniary award will almost certainly be in foreign denomination, computed in accordance with the applicable laws and standards of the forum. The vagaries of inflation, as well as the relative low-income capacity of the Filipino, to date may very well translate into an award virtually unenforceable in this country, despite its integral validity, if the docket fees for the enforcement thereof were predicated on the amount of the award sought to be enforced. The theory adopted by respondent judge and the Marcos Estate may even lead to absurdities, such as if applied to an award involving real property situated in places such as the United States or Scandinavia where real property values are inexorably high. We cannot very well require that the filing fee be computed based on the value of the foreign property as determined by the standards of the country where it is located”.

Rule 20.2 of the Special ADR Rules followed the ruling in *Mijares* insofar as it applies to the recognition and enforcement of foreign arbitral awards under the New York Convention. It provides that:

“The minimal filing fee payable in “all other actions not involving property” shall be paid by the petitioner

seeking to enforce foreign arbitral awards under the New York Convention in the Philippines.

The Supreme Court however did not apply the *Mijares* ruling in petitions or counter-petitions to confirm or enforce, vacate or set aside an arbitral award in domestic arbitration or in an international commercial arbitration. The schedule of fees set out in Rule 20.1 of the Special ADR Rules applies in such cases.

In respect of non-convention awards, one may argue for the applicability of the *Mijares* ruling, as it is the foreign arbitral award itself that is the subject matter of the action. Also, a non-convention award, just like the final judgment rendered by the US District Court in *Mijares*, is similarly treated by Article 4.36 (B)(a) of the Rules as a mere presumptive evidence of a right against the parties.

#### *D. Notices and summons*

Under Rule 13.6 of the Special ADR Rules, upon receipt of the petition, the court shall initially determine whether it is sufficient in form and in substance. Once that has been made, the court shall cause the service of a copy of the petition upon the respondent. The service upon the respondent shall be made, under Rule 1.8 either by personal service or courier. Resort to registered mail is allowed only when courier services are not available.

The Special ADR Rules does away with the service of summons upon the respondent. The technical rules of summons do not apply.<sup>17</sup> What is essential is that the service of the copy of the petition and notice of initial hearing was made in such a manner as to “reasonably ensure receipt thereof by the respondent to satisfy the requirement of due process.”<sup>18</sup>

Under Rules 13.6 and 13.7, the court sends a notice to the respondent in the proceeding for the recognition and enforcement of foreign arbitral award to file a verified opposition within thirty (30) days from receipt of the notice and petition. This thirty (30) day period is non-extendible since a motion for extension is a prohibited pleading under Rule 1.6.

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<sup>17</sup> Rule 1.9.

<sup>18</sup> Rule 1.9 (b).

Under Rule 1.9, the court “acquires authority to act on the petition or motion upon proof of jurisdictional facts, i.e. that the respondent was furnished with a copy of the petition and the notice of hearing.” The burden of proof lies with the petitioner.<sup>19</sup>

The hearing referred to in Rule 1.9 is the initial hearing to prove the jurisdictional facts. In the absence of proof of jurisdictional facts, the proceedings may be held null and void. In *The Government of the Philippines v. Victoriano Aballe*<sup>20</sup> the Supreme Court held the proceedings null and void on account of the party’s failure to prove the jurisdictional facts of publication, posting and mailing of notices. The Court held that person asserting fact of service has the burden of proof and that if sent by registered mail, the registry return receipts and the affidavit must be presented, viz:

“When service of notice is an issue, the rule is that the person alleging that the notice was served must prove the fact of service. The burden of proving notice rests upon the party asserting its existence. In civil cases, service made through registered mail is proved by the *registry receipt issued by the mailing office and an affidavit of the person mailing*. Absent one or the other, or worse both, there is no proof of service. In *Petition for Habeas Corpus of Benjamin Vergara v. Gedorio, Jr.*, the Court held that:

“When service of notice is an issue, the rule is that the person alleging that the notice was served must prove the fact of service. The burden of proving notice rests upon the party asserting its existence. In civil cases, service made through registered mail is proved by the registry receipt issued by the mailing office and an affidavit of the person mailing of facts showing compliance with Section 7 of Rule 13. In the present case, as proof that petitioners were served with copies of the omnibus motion submitting an inventory of the estate of deceased Allers, respondent Bolaño presented photocopies of the motion with a certification by counsel that service was made by registered

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<sup>19</sup> Ibid.

<sup>20</sup> G.R. No. 147212, March 24, 2006.

mail, together with the registry receipts. While the affidavit and the registry receipts proved that petitioners were served with copies of the motion, it does not follow, however, that petitioners in fact received the motion. Respondent Bolaño failed to present the registry return cards showing that petitioners actually received the motion. Receipts for registered letters and return receipts do not prove themselves, they must be properly authenticated in order to serve as proof of receipt of the letters. Respondent also failed to present a certification of the postmaster that notice was duly issued and delivered to petitioners such that service by registered mail may be deemed completed”.

Wee asserts that the registry return receipts are attached to the records of this case. It must be stressed, however, that the registry receipts alone are not sufficient to prove that notice was made to the adjoining owners. The law clearly states that it is the *registry receipt issued by the mailing office and the affidavit of the person mailing*, which proves service made through registered mail.

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Substantial compliance with the jurisdictional requirements laid down in Sections 12 and 13 of R.A. No. 26 is not enough; the trial court’s acquisition of jurisdiction over the reconstitution case is hinged on a *strict compliance* with the requirements of the law. xxx

Where the authority to proceed is conferred by a statute and the manner of obtaining jurisdiction is mandatory, the same must be strictly complied with, or the proceedings will be utterly void. As such, the court upon which the petition for reconstitution of title is filed is duty-bound to examine thoroughly the petition for reconstitution of title and review the record and the legal provisions laying down the germane jurisdictional requirements.

In view of Wee’s failure to adequately prove that notices of hearing were sent to the adjoining owners of the property subject of the reconstitution case, the RTC,

therefore, did not acquire jurisdiction over the case, and any proceedings held thereon are null and void". (Emphasis supplied)

*E. Proceedings after the initial hearing*

The notice of initial hearing contains a directive for the respondent to file an opposition to the petition for recognition and enforcement of the foreign arbitral award.

Respondent's failure to submit an opposition shall not be cause for a declaration of default, as this is again, a prohibited pleading under Rule 1.6 (g). In addition, a party cannot delay proceedings on the ground that any of the matters alleged in the petition is not alleged with sufficient definiteness or particularity, as a motion for a bill of particulars is a prohibited pleading under Rule 1.6 (b).

Once the respondent has filed its opposition, the court determines whether the issue between the parties is one of law or fact.

Under Rule 13.8 of the Special ADR Rules, if the issue is mainly one of law, the court will require the submission of a brief of legal arguments not more than thirty (30) days from receipt of the order. Under Rule 1.4, the legal brief is required to be verified by the lawyer submitting it. The verification shall contain the statement that "he personally prepared the pleading/motion, that there is sufficient factual basis for the statements of fact stated therein, that there is sufficient basis in the facts and the law to support the prayer for relief stated therein, and that the pleading/motion is filed in good faith and is not interposed for delay."

On the other hand, if there are issues of fact on grounds relied upon for the court to refuse recognition and enforcement, the court, in accordance with Rule 13.8, shall, *motu proprio*, or upon the request of a party, require the parties to simultaneously submit the affidavits of their respective witnesses within a period of not less than fifteen (15) days nor more than thirty (30) days from receipt of the order. The filing of a reply affidavit is not automatic as a request to do so must be made to the court. If granted, the party has a period of not less than fifteen (15) days nor more than thirty (30) days from receipt of the order granting said request.

Under Rule 13.9 of the Special ADR Rules, if the court determines that a hearing is called for, the affidavits of witnesses take the place of their direct testimonies in court and they shall be immediately subject to cross-examination.

A practical difficulty arises when a witness who resides outside the Philippines, or is otherwise not available for cross-examination in the Philippines executes the affidavit referred to in Rule 13.8. As the foreign arbitral award was rendered in a foreign jurisdiction, it necessarily involved foreign witnesses who, owing to practical difficulties and financial constraints, may not be able to travel in the Philippines and testify. In such a situation, a party may opt to avail of a deposition upon oral examination in a foreign country under Rule 23 of the 1997 Revised Rules of Procedure.

#### *F. Interim or conservatory measures of protection*

The interim measures of protection that a court may grant under Rule 5 of the Special ADR Rules include a preliminary injunction, preliminary attachment, appointment of a receiver, detention, preservation, delivery or inspection of property or assistance in the enforcement of an interim measure of protection granted by the arbitral tribunal which the latter cannot enforce effectively.

The Special ADR Rules does not directly and specifically provide that interim measures of protection are available in proceedings for the recognition and enforcement of foreign arbitral awards. Indeed, it is arguable whether a party can invoke Rule 5 of the Special ADR Rules as it restricts the period within which to file the petition for an interim measure of protection before and in the course of arbitration proceedings.

Rule 13.10 of the Special ADR Rules, substantially reproduced in Article 4.35 of the Rules, may however provide guidance. The court may, upon the application of the petitioner, require the respondent to provide suitable security during the pendency of the proceedings in one instance only, i.e. when the court has decided to adjourn or defer rendering a decision on the petition for recognition and enforcement of foreign arbitral award if, in the meantime, an application to set aside or suspend the foreign arbitral award has been filed in the country where the foreign arbitral award was rendered.

### *G. Costs*

The petitioner need not plead the costs at the time of the filing of the petition for recognition and enforcement of the foreign arbitral award. Rule 21.3 of the Special ADR Rules allows the petitioner to submit, at the time the case is submitted to the court for decision, a statement under oath confirming the costs incurred in the proceedings in the Philippines for the recognition and enforcement of the foreign arbitral award. The costs include the attorney's fees that a party has paid or is contractually committed to pay to the counsel of record.

### *Grounds for enforcement and denial*

Section 45 of Republic Act 9285 is quite emphatic. No other grounds, other than those enumerated in Article V of the New York Convention, shall be considered by the Regional Trial Court in determining whether the foreign arbitral award shall be recognized and enforced in the Philippines.<sup>21</sup> The Regional Trial Court is required to disregard any other ground other than those enumerated in Article V of the New York Convention.<sup>22</sup>

Article V of the New York Convention was grafted into Rule 13.4 of the Special ADR Rules. Under Rule 13.4 (a), the Regional Trial Court shall refuse recognition and enforcement of the foreign arbitral award only if the party making the application to refuse its recognition and enforcement provides proof that:

- 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 the law of the country where the award was made; or
- The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
- The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or

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<sup>21</sup> Article 4.36, Department Circular No. 98.

<sup>22</sup> Rule 13.4, Special ADR Rules.

contains decisions on matters beyond the scope of the submission to arbitration; provided that, if the decision on matters submitted to arbitration can be separated from those matters not so submitted, only that part of the award which contains on matters not submitted to arbitration may be set aside; or

- The composition of the arbitral award or the arbitral procedure was not in accordance with the agreement of the parties; or failing such agreement, was not in accordance with the law of the country where arbitration took place; or
- 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.

Rule 13.4 (b) further provides that the foreign arbitral award may be refused recognition and enforcement by the court if it finds that:

- The subject-matter of the dispute is not capable of settlement or resolution by arbitration in the Philippines; or
- The recognition or enforcement of the award would be contrary to public policy.

Section 6 of Republic Act 9285 sets out the disputes that cannot be the subject of arbitration. These include: (a) labor disputes covered by the Labor Code of the Philippines; (b) the civil status of persons; (c) the validity of a marriage; (d) any ground for legal separation; (e) the jurisdiction of courts; (f) future legitime; (g) criminal liability; and (h) those which by law cannot be compromised.

Rule 13.11 of the Special ADR Rules went a step further. 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 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”. (Emphasis supplied)

The court is not tasked to determine whether the foreign arbitral award is valid or not. The foreign arbitral award remains VALID whether or not the Regional Trial Court denies or refuses its recognition and enforcement in this jurisdiction. This is because the primary authority to declare that the foreign arbitral award is invalid is vested in the court of the State in which the arbitral award is rendered. Thus, the 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).

The Regional Trial Court shall not allow any subterfuge by the party making the application to refuse recognition and enforcement of the foreign arbitral award for the Court to try, re-litigate, and delve into the facts giving rise to the arbitral dispute between the parties ostensibly because it falls into any of the grounds under Article V of the New York Convention and Rule 13.4 of the Special ADR Rules. The Regional Trial Court is prohibited from re-interpreting and determining anew the legal issues that the foreign arbitral tribunal already dealt with, which may involve the application and interpretation of a foreign law. The limitation on judicial review of a foreign arbitral award is in consonance with the policy to limit repetitive litigation on claims and issues. Otherwise, the court will be faced with never-ending litigation of the same disputes. Indeed, if every foreign arbitral award were reviewable on the merits, the claimant would be constrained to defend his/her original cause of action all over again, and thus render as superfluous the previously concluded litigation. The court should thus be wary of the strategy adopted by adverse parties in ostensibly invoking the grounds set out in Rule 13.11 but which would otherwise involve disturbing the arbitral tribunal's determination of facts and interpretation of law.

Consistent with the trial court's lack of authority to set aside a foreign arbitral award, Rule 13.10 of the Special ADR Rules recognizes the jurisdiction of the competent authority in the foreign country in which the foreign arbitral was rendered to set aside the said foreign arbitral award. It is provided that:

"The court before which a petition to recognize and enforce a foreign arbitral award is pending, may adjourn or defer rendering a decision thereon, if, in the meantime, an application for the setting aside or suspension of the award

has been made with a competent authority in the country where the award was made. xxx”. (Emphasis supplied)

In resolving the petition, the Regional Trial Court shall limit itself to the determination of whether any of the grounds under Article V of the New York Convention and Rule 13.4 of the Special ADR Rules exist as to warrant the denial of the petition for the recognition and enforcement of the foreign arbitral award. The Regional Trial Court is mandated “to recognize and enforce a foreign arbitral award unless a ground to refuse recognition or enforcement of the foreign arbitral award under this rule is fully established.” The duty to establish any of those grounds falls on the party opposing the recognition and enforcement of the foreign arbitral award. In other words, the burden of proof is not on the party applying for recognition and enforcement of the foreign arbitral award. Rule 13.11 is emphatic:

“It is presumed that a foreign arbitral award was made and released in due course of arbitration and is subject to enforcement by the court”.

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.

#### *Judicial review by the Court of Appeals and the Supreme Court*

A party may file a motion for reconsideration of a Regional Trial Court’s decision recognizing and/or enforcing a foreign arbitral award, or refusing recognition and/or enforcement of the same.<sup>23</sup> The fifteen (15) day period to file the motion is non-extendible and commences to run from receipt of the decision.

Consistent with the policy to expedite the resolution of petitions for recognition and enforcement of foreign arbitral award, a party is prohibited under Rule 19.6 of the Special ADR Rules from filing a second motion for reconsideration. A Regional Trial Court’s decision is not an interlocutory order as to warrant the filing of a second motion for

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<sup>23</sup> Rule 19.1, Special ADR Rules.

reconsideration, which is a fairly common dilatory tactic in the litigation of civil actions. A party is likewise not allowed to file motions for new trial or reopening of trial or even a petition for relief from judgment.<sup>24</sup>

The Regional Trial Court is mandated to resolve the motion for reconsideration within thirty (30) days from receipt of the opposition or comment or upon the expiration of the period to file the opposition or comment. Although Rule 19.4 does not mention the filing of a reply, a party may be allowed by the court to do as it is not considered a prohibited pleading under Rule 1.6 of the Special ADR Rules. However, a rejoinder to the reply is a prohibited pleading under Rule 1.6 (f).

An order denying a party's motion for reconsideration is appealable to the Court of Appeals. The mode of appeal is by way of a petition for review to be filed within fifteen (15) days from notice of the decision of the Regional Trial Court or the denial of the petitioner's motion for reconsideration. Docket fees and costs in the amount of Php4,000.00 shall be paid at the time of the filing of the petition for review.

Rule 19.16 requires the petition for review to contain (a) a statement of the full names of the parties to the case, without impleading the court or agencies either as petitioner or respondent; (b) a concise statement of the facts and issues involved and the grounds relied upon for review; (c) clearly legible duplicate original or certified true copy of the decision or resolution of the Regional Trial Court appealed from, together with true copies of such material portions of the record and supporting documents; (d) a sworn Certification Against Forum Shopping; and (e) material dates showing that it was filed within the allowable period.

A feature that makes the commencement of a petition for recognition and enforcement of a foreign arbitral award in the Philippines particularly appealing is the requirement of the posting of a bond during the pendency of the appeal. Section 46 of Republic Act 9285 requires the losing party to post a counter-bond during the pendency of the appeal on the decision of the Regional Trial Court confirming the foreign arbitral award. To reinforce the substantive law, under Rule 19.25 of the Special ADR Rules, the Court of Appeals shall, within fifteen (15) days from receipt of the petition for review, require the party appealing the Regional

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<sup>24</sup> Rule 1.6 of the Special ADR Rules.

Trial Court's decision to post a bond executed in favor of the prevailing party equal to the amount of the award. The failure of the petitioner to post a bond is ground for the dismissal of the appeal.<sup>25</sup>

Is a special civil action for certiorari available to dispute a decision of the Regional Trial Court either recognizing and enforcing a foreign arbitral award, or denying the enforcement of the same? Rule 19.26 (j) of the Special ADR Rules provides for only one instance wherein a party can do so, i.e. a Regional Trial Court's decision allowing a party to enforce a foreign arbitral award pending appeal. However, a party is not allowed to lodge an appeal and at the same time resort to a petition for certiorari. Under Rule 19.9. "recourse to one remedy shall preclude recourse to the other."

Instead of the customary sixty (60) day period under Rule 65 of the 1997 Rules of Civil Procedure, the petitioner shall file the verified petition for certiorari within a non-extendible period of fifteen (15) days from notice of the Regional Trial Court's decision. No extension of time to file the petition is allowed.

In case resort to a petition for certiorari with the Court of Appeals is availed of, the petitioner shall not include the arbitral tribunal even as a nominal party in the proceedings. The petitioner is required only by Rule 19.29 of the Special ADR Rules to notify the arbitral tribunal of the proceedings and furnish it with court processes.

A Court of Appeals' decision may be taken to the Supreme Court by way of a verified petition for review within fifteen (15) days from notice of the decision or judgment or denial of the motion for reconsideration. Rule 19.36 of the Special ADR Rules provides the parameters for the Supreme Court's review of the Court of Appeals' decision. The grounds enumerated in Rule 19.36 indicate the restrictive nature of the grounds that will warrant the Supreme Court's discretionary powers. These are when the Court of Appeals:

- "a. Failed to apply the applicable standard or test for judicial review prescribed in these Special ADR Rules

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<sup>25</sup> Rule 19.25 of the Special ADR Rules.

- in arriving at its decision resulting in substantial prejudice to the aggrieved party;
- b. Erred in upholding a final order or decision despite the lack of jurisdiction of the court that rendered such final order or decision;
  - c. Failed to apply any provision, principle, policy or rule contained in these Special ADR Rules resulting in substantial prejudice to the aggrieved party; and
  - d. Committed an error so egregious and harmful to a party as to amount to an undeniable excess of jurisdiction”.

A general averment in the petition for review that “the Court of Appeals has committed serious and substantial error or that it has acted with grave abuse of discretion resulting in substantial prejudice to the petitioner without indicating with specificity the nature of such error or abuse of discretion and the serious prejudice suffered by the petitioner on account thereof, shall constitute sufficient ground for the Supreme Court to dismiss outright the petition”<sup>26</sup>.

#### *Executory nature of the Regional Trial Court’s Decision*

Another feature that makes the proceeding for the recognition and enforcement of the foreign arbitral award in the Philippines particularly attractive is that the decision of the Regional Trial Court is immediately executory (Rule 13.11 of the Special ADR Rules). It ensures that the foreign arbitral award is not defeated or rendered illusory during the pendency of the appeal, especially when the losing party has taken measures to frustrate the enforcement of the foreign arbitral award. 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”.

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<sup>26</sup> Rule 19.36 of the Special ADR Rules.

### *Conclusion*

The recognition and enforcement of a foreign arbitral award in the Philippines is particularly attractive as long as it is strictly observed and creative dilatory tactics by the respondent and its counsel are promptly struck down. The nature of the proceedings, the minimal filing fees, the prohibition against the filing of a motion to dismiss and other dilatory motions, the ease in the filing and service of pleadings, the execution of the Regional Trial Court's decision recognizing and enforcing the foreign arbitral award pending appeal, the prohibition on a re-trial of the facts and law which had already been determined and passed upon in the arbitration proceedings, and the requirement of the posting of a counter-bond on appeal ensure the speedy and efficient resolution of the issues submitted to the Regional Trial Court.

The recognition and enforcement of a foreign arbitral award is however still faced with myriad challenges. While the ADR Rules practically enjoin the Regional Trial Court from setting aside or vacating the foreign arbitral award, the absence of a clear prohibition against the filing of a petition to set aside a foreign arbitral award will allow adverse parties to creatively stymie the recognition and enforcement of such award. The adverse party is not prevented from filing such a petition to set aside the foreign arbitral award as a preemptive and cunning maneuver to pre-empt the filing of a petition for recognition and enforcement of the foreign arbitral award and thus frustrate the said proceedings in the long run.

Confusion may also result in respect of the applicability of the Special ADR Rules to a proceeding for the recognition and enforcement of a foreign arbitral award which was filed before and was still pending when the Special Rules took effect. While Rule 24.1 of the Special ADR Rules states that it shall apply to "all pending arbitration, mediation or other ADR forms covered by the ADR Act," it nonetheless provides a caveat --- that it shall "not prejudice or impair vested rights in accordance with law".

Also, while a trial court's decision recognizing and enforcing a foreign arbitral award is immediately executory, its execution may be hampered when an application is lodged with the Court of Appeals by the losing party to avoid its execution pending appeal. Under Rule 19.22, the Court of Appeals may otherwise direct the stay of the foreign arbitral award.

Indeed, in theory, the recognition and enforcement of a foreign arbitral award in this jurisdiction appears to be relatively simple, but in practice, the proceedings may still be hampered not only by ingenious legal issues raised by the adverse party but also by the Regional Trial Courts' and the parties' lack of familiarity with R.A. 9285, the Rules, and the Special ADR Rules.

It thus remains to be seen whether the challenges facing litigants in a proceeding for the recognition and enforcement of a foreign arbitral award in the Philippines will eventually be overcome.