THE ICCA REPORTS

PHILIPPINES

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a. Parties’ Right to a Physical Hearing in the *Lex Arbitri*

1. *Does the lex arbitri of your jurisdiction expressly provide for a right to a physical hearing in arbitration? If so, what are its requirements (e.g., can witness testimony be given remotely, etc.)?*

Short answer: No.

Neither Republic Act No. (“R.A. No.”) 876¹ nor R.A. No. 9285² provides for the right to a physical hearing. R.A. No. 876, as amended,³ is the law governing domestic and foreign arbitration⁴ in the Philippines while R.A. No. 9285 is the law governing international commercial arbitration⁵ in the Philippines.

Both laws appear to contemplate that hearings are an integral part of the arbitral process. However, both laws are silent as to how hearings should be conducted.

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³ Section 33 of R.A. No. 9285 (which was introduced in 2004) states that: “Article 8, 10, 11, 12, 13, 14, 18 and 19 and 29 to 32 of the [1985 UNCITRAL] Model Law […] shall apply to domestic arbitration”.

⁴ In the Philippines, an arbitration may either be “domestic” or “foreign” depending on the place of arbitration.

⁵ The Philippines has adopted the 1985 UNCITRAL Model Law in its entirety in R.A. No. 9285. Hence, an arbitration is deemed an “international commercial arbitration” in the Philippines if it contains (i) an international element as provided in Article 1(3) of the 1985 UNCITRAL Model Law; and (ii) a commercial element as provided in the footnote of Article 1(1) of the 1985 UNCITRAL Model Law.
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In domestic arbitrations, hearings are regulated by Section 12 of R.A. No. 876, which requires “[a]rbitrators to […] set a time and place for the hearing of the matters submitted to them, and must cause notice thereof to be given to each of the parties”. However, Section 12 does not provide the parties with a right to request that the hearing be held in a physical venue.

As to international arbitration, R.A. No. 9285 adopted in its entirety the 1985 United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (the “1985 UNCITRAL Model Law”). Hence, the 1985 UNCITRAL Model Law provisions on equal treatment of parties (Article 18), determination of rules of procedure (Article 19), and hearings and written proceedings (Article 24) are applicable. The Implementing Rules and Regulations of R.A. No. 9285 have similar provisions on equal treatment of the parties, determination of the rules of procedure, place of arbitration and hearings, and written proceedings. None of these

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7 Section 30 of R.A. No. 9285 (“Place of Arbitration”) provides: “(1) The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be in Metro Manila, unless the arbitral tribunal, having regard to the circumstances of the case, including the convenience of the parties shall decide on a different place of arbitration. (2) The arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts, or the parties, or for inspection of goods, other property or documents”.


9 Article 4.18 (“Equal Treatment of Parties”): “The parties shall be treated with equality and each shall be given a full opportunity of presenting his/her case”; Article 4.19 (“Determination of the Rules of Procedure”): “(a) Subject to the provisions of this Chapter, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. (b) Failing such agreement, the arbitral tribunal may, subject to this Chapter, conduct the arbitration in such manner as it considers appropriate. Unless the arbitral tribunal considers it inappropriate, the UNCITRAL Arbitration Rules adopted by the UNCITRAL on 28 April 1976 and the UN General Assembly on 15 December 1976 shall apply subject to the following clarification: All references to the ‘Secretary-General of the Permanent Court of Arbitration at the Hague’ shall be deemed to refer to the appointing authority. (c) The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence”; Article 4.20 (“Place of Arbitration”): “(a) The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be in Metro Manila unless the arbitral tribunal, having regard to the circumstances of the case, including the convenience of the parties, shall
provisions expressly provide for the right of the parties to request that hearings take place physically.

2. If not, can a right to a physical hearing in arbitration be inferred or excluded by way of interpretation of other procedural rules of your jurisdiction’s lex arbitri (e.g., a rule providing for the arbitration hearings to be “oral”; a rule allowing the tribunal to decide the case solely on the documents submitted by the parties)?

Short answer: Probably not.

Although both laws appear to assume that hearings are to be done physically, a right to a physical hearing may not be inferred. In fact, an opposite inference seems to be more fairly tenable. This is primarily because the parties and, in the absence of their agreement, tribunals are allowed to choose the procedure they may deem appropriate with the only consideration that the proceedings be conducted without undue delay and with due regard to due process considerations. In the absence of an express provision granting the parties a right to a physical hearing, whether the hearing shall be held remotely or physically falls within the wide procedural discretion attributed to the arbitral tribunal.

Since R.A. No. 9285 adopted the 1985 UNCITRAL Model law, Article 18 (affording the parties equality and full opportunity to present their case) and Article 19 (allowing the parties to freely agree on the procedure to be followed by the arbitral tribunal and, failing such agreement, allowing the arbitral tribunal to conduct the proceedings in such manner as it considers appropriate) are applicable. The Implementing Rules and Regulations of R.A. No. 9285 have similar provisions on equal treatment of the parties (Article 4.18) and determination of the rules of procedure (Article 4.19).

The Special Rules of Court on Alternative Dispute Resolution, i.e., the rules to govern court proceedings relating to alternative dispute resolution, enacted by the

decide on a different place of arbitration. (b) Notwithstanding the rule stated in paragraph (a) of this provision, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents”; Article 4.24 (“Hearing and Written Proceedings”): “(a) Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings at an appropriate stage of the proceedings, if so requested by a party. […]”.


11 Section 5(5), Article VIII of the 1987 Philippine Constitution states: “The [Philippine] Supreme Court shall have the following powers: […] (5) Promulgate rules concerning the
Philippine Supreme Court, similarly state that: “The parties are free to agree on the procedure to be followed in the conduct of arbitral proceedings. Failing such agreement, the arbitral tribunal may conduct arbitration in the manner it considers appropriate”.

This wide discretion should be exercised with due regard that arbitration proceedings should be conducted without delay and with due regard to due process considerations. This is in line with the State’s policy of encouraging and actively promoting the use of Alternative Dispute Resolution as an important means to achieve speedy and impartial justice and to declog court dockets.\(^{12}\) Article 4.32\(^{13}\) of the Implementing Rules and Regulations of R.A. No. 9285 further supports the intent to give way to flexibility of proceedings provided it is conducted with expediency and within the limits of due process considerations. To this end, it might be interpreted that, a physical hearing may be dispensed with if it would cause undue delay to the arbitration proceedings.

Further, R.A. No. 9285 and its implementing rules\(^{14}\) adopted Article 24 of the 1985 UNCITRAL Model Law which states: “Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party. […]”.

While there has not been any instance where this particular provision has been interpreted in this context in the Philippines, an appreciation of the Philippine Supreme Court’s liberality towards hearings via electronic means in recent years and common

\(^{12}\) Section 2, R.A. No. 9285. See also Department of Affairs v. BCA International Corporation et al., G.R. No. 225051, July 19, 2017.

\(^{13}\) Article 4.23 (“Statements of Claim and Defense”): “(a) Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his/her/its claim, the points at issue and the relief or remedy sought, and the respondent shall state his/her/its defense in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements. The parties may submit with their statements, all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit. (b) Unless otherwise agreed by the parties, either party may amend or supplement his/her claim or defense during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it”.

\(^{14}\) See Article 4.24, Implementing Rules and Regulations of R.A. No. 9285.
practice locally suggests that the fact that parties can request an “oral” hearing does not translate into a right to a physical hearing in international arbitration proceedings seated in the Philippines.

b. Parties’ Right to a Physical Hearing in Litigation and its Potential Application to Arbitration

3. In case the lex arbitri does not offer a conclusive answer to the question whether a right to a physical hearing in arbitration exists or can be excluded, does your jurisdiction, either expressly or by inference, provide for a right to a physical hearing in the general rules of civil procedure?

Short answer: A right to a physical hearing in civil proceedings may be inferred, with such inferred right being subject to noteworthy exceptions.

There is no question that in the Philippine rules of civil procedure there is an absolute right to be heard as this is a due process consideration. However, this right does not altogether translate to a right to physical hearing in civil proceedings. The case of Dy Teban Trading, Inc. v. Dy et al. explains:

“Trial courts successfully perform their duty to afford a party his or her right to due process when he or she is granted meaningful and sufficient opportunity to participate in the proceedings. Trial courts, however, do not have the duty to submit to unreasonable, dilatory, or negligent acts of the parties in handling their own cases. While parties to a case possess the right to due process, they have the correlative duty to exercise it properly and not use it as an excuse for their negligence or deliberate tactics to delay a case”.

The wordings of the applicable provisions give wide discretion to the courts in determining how the parties would be heard. The Special Rules of Court on Alternative Dispute Resolution, issued by the Philippine Supreme Court to govern court proceedings relating to alternative dispute resolution, advance this view.

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16 G.R. No. 185647, July 26, 2017. See also Frias v. Alcayde, G.R. No. 194262, February 28, 2018, which stated: “The essence of due process lies in the reasonable opportunity to be heard and to submit any evidence the defendant may have in support of her defense, the petitioner must be properly served the summons of the court”.
17 A.M. No. 07-11-08-SC, September 1, 2009.
18 Section 5(5), Article VIII of the 1987 Philippine Constitution, fn. 11 above.
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On the matter of hearings for recognition and enforcement or setting aside of an international commercial arbitration award, the Special Rules of Court on Alternative Dispute Resolution state that: “If on the basis of the petition, the opposition, the affidavits and reply affidavits of the parties, the court finds that there is a need to conduct an oral hearing, the court shall set the case for hearing […].”19 Thus, the necessity of conducting an oral hearing is left to the determination of the courts after reviewing the pleadings submitted to it. This will a fortiori hold true for the necessity to conduct a physical hearing.

Further, an application for a court-ordered interim measure requires a hearing “only if there is a need for clarification or further agreement” determined after the court has review of the submission of the parties.20 Notably, the provision merely refers to a “hearing” but does not specify how such hearing may be conducted. Likewise, the Special Rules of Court on Alternative Dispute Resolution indicate that the courts would resolve petitions for appointment of arbitrators,21 challenge to appointment of arbitrators22 and termination of the mandate of arbitrators,23 merely “after hearing” without any qualifications.

The 2019 amendments to the Philippines’ Rules of Civil Procedure and Revised Rules on Evidence do not particularly specify what type of hearings are required.

However, the Revised Rules on Evidence seem to imply that the general rule is that witness evidence should be collected orally in open court. Section 1, Rule 132 of the Revised Rules on Evidence state that “examination of witnesses presented in a trial or hearing shall be done in open court, and under oath or affirmation. Unless the witness is incapacitated to speak, or the question calls for a different mode of answer, the answers of the witness shall be given orally”. Likewise, in explaining the use of written depositions, the Rule states:

“The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (1) that the witness is dead; or (2) that the witness resides at a distance more than one hundred (100) kilometers from the place of trial or hearing, or is out of the Philippines, unless it appears that his or her absence was procured by the party offering the deposition; or (3) that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or (4) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (5) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the

19 Rule 12.10, Special Rules of Court on Alternative Dispute Resolution. There is a similar provision on the confirmation, correction or vacation of a domestic award in Rule 11.8.
20 Rule 5.9, Special Rules of Court on Alternative Dispute Resolution.
21 Rule 6.7, Special Rules of Court on Alternative Dispute Resolution.
22 Rule 7.7, Special Rules of Court on Alternative Dispute Resolution.
23 Rule 8.6, Special Rules of Court on Alternative Dispute Resolution.
importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used [...]”. 24

Apart from the foregoing provisions that explicitly mention certain evidence taking to be conducted “orally in court”, there are also occasional references to merely “oral examination” 25 throughout the Revised Rules on Evidence.

Though it may be inferred from the foregoing that the Rules contemplate a physical hearing, it is submitted that this is merely because this has been the main mode of conducting hearings in the past years.

To the contrary, throughout the years, the Philippine Supreme Court has issued rules rendering admissible electronic evidence and recognizing the necessity of videoconferencing for remote witness evidence in particular circumstances. 26 The earliest being the Rules on Electronic Evidence 27 which, inter alia, allows the presentation of witness evidence through electronic means, which may necessarily include videoconference, if necessary in civil cases. 28

When COVID-19 forced the physical closure of courts in March 2020, the Philippine Supreme Court designated pilot courts authorized to conduct hearings through videoconferencing in both criminal and civil cases “in order to address the effects of the restraint on the movement and travel of court users for court proceedings”. 29 Considering the commendable results of the pilot courts, the Philippine Supreme Court subsequently issued Guidelines on the Conduct of Videoconferencing 30 which primarily state: “The

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24 Section 4(c), Rule 23, 2019 Rules of Civil Procedure (emphasis added).
25 Section 35, Rule 132, Revised Rules on Evidence: “All evidence must be offered orally”; Section 36, Rule 132, Revised Rules on Evidence: “Objection to offer of evidence must be made orally immediately after the offer is made. Objection to the testimony of a witness for lack of a formal offer must be made as soon as the witness begins to testify. Objection to a question propounded in the course of the oral examination of a witness must be made as soon as the grounds therefor become reasonably apparent”; Section 8, Rule 133, Revised Rules on Evidence: “When a motion is based on facts not appearing of record, the court may hear the matter on affidavits or depositions presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions”.
28 Section 1, Rule 10, Rules on Electronic Evidence. In 2002, it issued the Rule on Examination of a Child Witness (A.M. No. 01-7-01-SC, September 24, 2002) which authorized the use of live-link television in criminal cases involving child victims.
conduct of videoconferencing shall be considered as an alternative mode to in-court proceedings, which remains to be the primary mode in hearing cases”.

The foregoing may be interpreted as the Philippine Supreme Court’s implied acknowledgment that there is no right to physical hearing when insistence on such would impede the speedy disposition of civil cases.

4. If yes, does such right extend to arbitration? To what extent (e.g., does it also bar witness testimony from being given remotely)?

Short answer: Probably not.

As previously stated, the right to physical hearing in Philippine litigation is not explicit and, to the extent that it may be inferred, it is guarded with significant exceptions.

To the extent that it may be inferred, such right would appear to only apply to civil litigation and could not be interpreted as extending to arbitration. The Philippine Supreme Court has held:

“Arbitration is an alternative mode of dispute resolution outside of the regular court system. Although adversarial in character, arbitration is technically not litigation. It is a voluntary process in which one or more arbitrators – appointed according to the parties’ agreement or according to the applicable rules of the Alternative Dispute Resolution (ADR) Law – resolve a dispute by rendering an award.

 […]

The contractual nature of arbitral proceedings affords the parties substantial autonomy over the proceedings. The parties are free to agree on the procedure to be observed during the proceedings. This lends considerable flexibility to arbitration proceedings as compared to court litigation governed by the Rules of Court”.

Numerous Philippine Supreme Court decisions have clearly distinguished arbitration and court proceedings in the context of the courts’ lack of power to decide on simple errors of fact, law, or fact and law committed by the arbitral tribunal. The Philippine Supreme Court has stated:

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32 Ibid. (emphasis in the original). See also Mabuhay Holdings Corporation vs. Sembcorp Logistics Limited, G.R. No. 212734, December 5, 2018.
“As a rule, the award of an arbitrator cannot be set aside for mere errors of judgment either as to the law or as to the facts. Courts are without power to amend or overrule merely because of disagreement with matters of law or facts determined by the arbitrators. They will not review the findings of law and fact contained in an award, and will not undertake to substitute their judgment for that of the arbitrators, since any other rule would make an award the commencement, not the end, of litigation. Errors of law and fact, or an erroneous decision of matters submitted to the judgment of the arbitrators, are insufficient to invalidate an award fairly and honestly made. Judicial review of an arbitration is, thus, more limited than judicial review of a trial.”

Philippine Supreme Court decisions have also adhered to the international arbitration doctrine confining court authority only to the determination of whether or not there is an agreement in writing providing for arbitration.

The Philippine Supreme Court’s consistent subscription to the delineation between arbitration and court proceedings may be interpreted as a policy of the inapplicability of civil procedure to arbitration proceedings.

The case of Fruehauf Electronics Philippines Corporation, v. Technology Electronics Assembly and Management Pacific Corporation states:

“Lastly, the Special ADR Rules are a self-contained body of rules. The parties cannot invoke remedies and other provisions from the Rules of Court unless they were incorporated in the Special ADR Rules:
‘Rule 22.1. Applicability of Rules of Court. – The provisions of the Rules of Court that are applicable to the proceedings enumerated in Rule 1.1 of these Special ADR Rules have either been included and incorporated in these Special ADR Rules or specifically referred to herein’.
In connection with the above proceedings, the Rules of Evidence shall be liberally construed to achieve the objectives of the Special ADR Rules.”

The case of Department of Environment and Natural Resources v. United Planners Consultants, Inc. further states:

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36 Emphasis in the original.
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“Further, let it be clarified that – contrary to petitioner’s stance – resort to the Rules of Court even in a suppletory capacity is not allowed. Rule 22.1 of the Special ADR Rules explicitly provides that ‘[t]he provisions of the Rules of Court that are applicable to the proceedings enumerated in Rule 1.1 of these Special ADR Rules have either been included and incorporated in these Special ADR Rules or specifically referred to herein’. Besides, Rule 1.13 thereof provides that ‘[i]n situations where no specific rule is provided under the Special ADR Rules, the court shall resolve such matter summarily and be guided by the spirit and intent of the Special ADR Rules and the ADR Laws’.”

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**c. Mandatory v. Default Rule and Inherent Powers of the Arbitral Tribunal**

5. *To the extent that a right to a physical hearing in arbitration does exist in your jurisdiction, could the parties waive such right (including by adopting institutional rules that allow remote hearings) and can they do so in advance of the dispute?*

**Short answer:** N/A

As clarified above, a right to a physical hearing in arbitration does not exist in the Philippines. Therefore, the parties would certainly be free to agree to have a remote hearing.

This is even more apparent if one considers that both laws allow the tribunal to decide an arbitration case solely on the documents submitted by the parties, provided that neither party objects.

In international arbitration, this would follow from the provision of Article 24 of the 1985 UNCITRAL Model Law. In domestic arbitration, Section 18 of R.A. No. 876 states: “The parties to a submission or contract to arbitrate may, by written agreement, submit their dispute to arbitration by other than oral hearing […]”.

6. *To the extent that a right to a physical hearing in arbitration is not mandatory or does not exist in your jurisdiction, could the arbitral tribunal decide to hold a remote hearing even if the parties had agreed to a physical hearing? What would be the legal consequences of such an order?*

**Short answer:** It would appear that the arbitral tribunal could not decide to hold a remote hearing in the event that the parties have agreed to a physical hearing.

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38 Emphasis in the original.
The Philippines adopts a pro-arbitration policy\textsuperscript{39} and would most likely require the arbitral tribunal to respect in their entirety the parties’ contractual stipulations either in their arbitration agreement or settlement agreement.

Moreover, the very nature of arbitration – that the Philippines adheres to – is that parties are allowed to agree on a procedure they may deem appropriate with the only consideration that the proceedings be conducted without undue delay.

These principles have been recognized by the Philippine Supreme Court in its decisions. The case of \textit{Mabuhay Holdings Corporation v. Sembcorp Logistics Limited}\textsuperscript{40} states:

“It bears stressing that the pro-arbitration policy of the State includes its policy to respect party autonomy. Thus, Rule 2.3 of the Special ADR Rules provides that the parties are free to agree on the procedure to be followed in the conduct of arbitral proceedings”.

The case of \textit{Fruehauf Electronics Philippines Corporation v. Technology Electronics Assembly and Management Pacific Corporation}\textsuperscript{41} further holds:

“The contractual nature of arbitral proceedings affords the parties substantial autonomy over the proceedings. The parties are free to agree on the procedure to be observed during the proceedings. This lends considerable flexibility to arbitration proceedings as compared to court litigation governed by the Rules of Court”\textsuperscript{42}.

\textsuperscript{39} The case of \textit{Lanuza, Jr. v. BF Corporation, et al.} (G.R. No. 204197, November 23, 2016) states: “This jurisdiction adopts a policy in favor of arbitration. Arbitration allows the parties to avoid litigation and settle disputes amicably and more expeditiously by themselves and through their choice of arbitrators. [...] The policy in favor of arbitration has been affirmed in our Civil Code, which was approved as early as 1949. It was later institutionalized by the approval of Republic Act No. 876, which expressly authorized, made valid, enforceable, and irrevocable parties’ decision to submit their controversies, including incidental issues, to arbitration”. \textit{Bases Conversion Development Authority v. DMCI Project Developers, Inc.} (G.R. No. 173137, January 11, 2016) further states: \textquote{The state adopts a policy in favor of arbitration. Republic Act No. 9285 expresses this policy [...] Our policy in favor of party autonomy in resolving disputes has been reflected in our laws as early as 1949 when our Civil Code was approved. Republic Act No. 876 later explicitly recognized the validity and enforceability of parties’ decision to submit disputes and related issues to arbitration. Arbitration agreements are liberally construed in favor of proceeding to arbitration. We adopt the interpretation that would render effective an arbitration clause if the terms of the agreement allow for such interpretation} (emphasis in the original). See also \textit{Luzon Iron Development Group Corporation and Consolidated Iron Sands, Ltd. v. Bridestone Mining and Development Corporation et al.}, G.R. No. 220546, December 7, 2016.

\textsuperscript{40} G.R. No. 212734, December 5, 2018.

\textsuperscript{41} G.R. No. 204197, November 23, 2016.

\textsuperscript{42} Emphasis added.
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The case of *Koppel, Inc. v. Makati Rotary Club Foundation, Inc.*\(^{43}\) emphasized the autonomy of the parties to stipulate arbitration clauses in their contracts and the spirit behind the stipulation:

“A pivotal feature of arbitration as an alternative mode of dispute resolution is that it is, first and foremost, a product of party autonomy or the freedom of the parties to ‘make their own arrangements to resolve their own disputes’. Arbitration agreements manifest not only the desire of the parties in conflict for an expeditious resolution of their dispute. They also represent, if not more so, the parties’ mutual aspiration to achieve such resolution outside of judicial auspices, in a more informal and less antagonistic environment under the terms of their choosing”\(^{44}\).

Consistently with this approach, Rule 2.3 of the Special Rules of Court on Alternative Dispute Resolution provides that “the parties are free to agree on the procedure to be followed in the conduct of arbitral proceedings”. The choices of places of arbitration and hearing are among the procedural rules that may be agreed upon by the parties. Hence, the parties’ choice should be respected.

A review of all the applicable provisions as discussed above will reveal that the law dictates that parties are free to agree on how arbitration proceedings will be conducted and it is only when the parties have failed to agree on the matter may the tribunal decide on such procedural matters taking into consideration the substance of the case.

Moreover, a violation of the parties’ agreement would be in contravention of Article (V)(1)(d) of the New York Convention,\(^{45}\) and, hence, the award subsequently rendered may be refused recognition and enforcement in any signatory country of the Convention. Notably, the same provision has been written into Rules 12.4(a)(iv) and 13.4(a)(iv) of the Philippine Special Rules of Court on Alternative Dispute Resolution and Article 4.36, Rule 6 of the Implementing Rules and Regulations of R.A. No. 9285 thereby making the award subsequently rendered subject to a petition to set aside in the Philippine courts.\(^{46}\)

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\(^{43}\) G.R. No. 198075, September 4, 2013.


\(^{45}\) Article V(1)(d) of the New York Convention: “Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: […] (d) The composition of the arbitral authority 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 the arbitration took place”.

**d. Setting Aside Proceedings**

7. *If a party fails to raise a breach of the abovementioned right to a physical hearing during the arbitral proceeding, does that failure prevent that party from using it as a ground for challenging the award in your jurisdiction?*

**Short answer:** Likely yes.

As clarified above, the Philippine *lex arbitri* does not recognize a right to a physical hearing. However, assuming that such right existed in a specific circumstance, the failure of a party to raise a breach of its right prevents that party from relying on it as ground to challenge the award subsequently. Non-objection within the course of the proceedings may be considered as a waiver and as a submission to the discretion of the arbitral tribunal on how proceedings would be conducted. This is in accordance with the principle in Article 4 (providing that a party who is aware of a procedural irregularity and yet proceeds with the arbitration without promptly stating his objection thereto shall be deemed to have waived its right to object) read together with Article 19 (allowing the parties to freely agree on the procedure to be followed by the arbitral tribunal and, failing such agreement, allowing the arbitral tribunal to conduct the proceedings in such manner as it considers appropriate) of the UNCITRAL Model Law. As previously discussed, the Implementing Rules and Regulations of R.A. No. 9285 and Special Rules of Court on Alternative Dispute Resolution in the Philippines have similar provisions allowing the tribunal to conduct the arbitration in the manner it deems appropriate, failing the parties’ agreement.

8. *To the extent that your jurisdiction recognizes a right to a physical hearing, does a breach thereof constitute per se a ground for setting aside (e.g., does it constitute per se a violation of public policy or of the due process principle) or must the party prove that such breach has translated into a material violation of the public policy/due process principle, or has otherwise caused actual prejudice?*

**Short answer:** If there was such a right, a party would likely need to prove that such breach amounted to material violations that are considered as grounds for setting aside in the 1985 UNCITRAL Model Law.

As clarified above, a right to a physical hearing is not expressly provided by, nor can be inferred from, the Philippine *lex arbitri*. However, if there was such a right, any allegation of violation for the purposes of setting aside the award should be alleged and, thereby, proved along the lines of violations of the principles of public policy or due process or of the parties’ agreement. Hence, the award may be subject to a petition to set aside in the Philippine courts if the arbitral procedure was not in accordance with the
agreement of the parties or if the parties were unable to present their case because of a denial to a right to a physical hearing.

9. In case a right to a physical hearing in arbitration is not provided for in your jurisdiction, could the failure to conduct a physical hearing by the arbitral tribunal nevertheless constitute a basis for setting aside the award?

Short answer: To a certain extent, yes.

Since there is no explicit or inferred right to a physical hearing, the basis for the set aside would necessarily be anchored on violations of the principles of due process (Article 34(2)(a)(ii) of the 1985 UNCITRAL Model Law) or public policy (Article 34(2)(b)(ii) of the 1985 UNCITRAL Model Law) or on the non-compliance with the agreement of parties as to the procedure governing the arbitration proceedings (Article 34(2)(a)(iv) of the 1985 UNCITRAL Model Law).

The Philippine courts have vacated domestic awards on violations of the principle of due process. There was a finding of a due process violation when an arbitrator furnished a copy of an article that reflected in advance the disposition of the tribunal towards the dispute. It was held that “due process dictates the cold neutrality and impartiality” of the arbitrator and that a showing to the contrary is against fundamental fairness due to the parties. Another domestic award was vacated when, after examination of the record, it was revealed that there was absolutely no support for the arbitrators’ determination in their award.

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48 Philippine Law (Sections 23-24, R.A. No. 876) provides different grounds for vacating and refusal of confirmation of domestic awards, but discussions may be relevant to determine the jurisdiction’s appreciation of the concept of due process. However, Article 34 of the UNCITRAL Model Law was incorporated in Chapter 4 of the Implementing Rules and Regulations of R.A. No. 9285 thereby making it applicable to domestic awards as well. See Fruehauf Electronics Philippines Corporation v. Technology Electronics Assembly and Management Pacific Corporation, G.R. No. 204197, November 23, 2016.


50 Asset Privatization Trust v. Court of Appeals, et al., G.R. No. 121171, December 29, 1998. In vacating the award, the Philippine Supreme Court cited Section 24(d) of R.A. No. 876: “SEC. 24. Grounds for vacating award. – In any one of the following cases, the court must make an order vacating the award upon the petition of any party to the controversy when such party proves affirmatively that in the arbitration proceedings: (d) That the arbitrators
It may be argued that a set aside may be granted if the Philippine courts find out that the award is in conflict with Philippine public policy. The case of *Mabuhay Holdings Corporation vs. Sembcorp Logistics Limited* defines Philippine public policy in the following manner:

“In our jurisdiction, the Court has yet to define public policy and what is deemed contrary to public policy in an arbitration case. However, in an old case, the Court, through Justice Laurel, elucidated on the term ‘public policy’ for purposes of declaring a contract void:

‘[…] At any rate, courts should not rashly extend the rule which holds that a contract is void as against public policy. The term ‘public policy’ is vague and uncertain in meaning, floating and changeable in connotation. It may be said, however, that, in general, a contract which is neither prohibited by law nor condemned by judicial decision, nor contrary to public morals, contravenes no public policy. In the absence of express legislation or constitutional prohibition, a court, in order to declare a contract void as against public policy, must find that the contract as to the consideration or thing to be done, has a tendency to injure the public, is against the public good, or contravenes some established interests of society, or is inconsistent with sound policy and good morals, or tends clearly to undermine the security of individual rights, whether of personal liability or of private property’.

An older case, *Ferrazzini v. Gsell*, defined public policy for purposes of determining whether that part of the contract under consideration is against public policy:

‘By ‘public policy’, as defined by the courts in the United States and England, is intended that principle of the law which holds that no subject or citizen can lawfully do that which has a tendency to be injurious to the public or against the public good, which may be termed the ‘policy of the law’, or ‘public policy in relation to the administration of the law’. Public policy is the principle under which freedom of contract or private dealing is restricted by law for the good of the public. In determining whether a contract is contrary to public policy the nature of the subject matter determines the source from which such question is to be solved’.

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\[52\] G.R. No. 212734, December 5, 2018.
DOES A RIGHT TO A PHYSICAL HEARING EXIST IN INTERNATIONAL ARBITRATION?

In light of the foregoing and pursuant to the State’s policy in favor of arbitration and enforcement of arbitral awards, the Court adopts the majority and narrow approach in determining whether enforcement of an award is contrary to Our public policy. Mere errors in the interpretation of the law or factual findings would not suffice to warrant refusal of enforcement under the public policy ground. 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”.

Based on this definition of public policy, it is argued that conducting virtual hearings in contravention of a contestable implicit right to a physical hearing especially taking into consideration the current travel restraints of the pandemic will not contravene Philippine public policy.

In sum, it may be argued that the parties may seek a set aside for the following reasons: (i) the arbitral procedure was not in accordance with agreement of the parties; (ii) a particular party was unable to present its case; or (iii) that it is contravention of Philippine public policy.

e. Recognition/Enforcement

10. Would a breach of a right to a physical hearing (irrespective of whether the breach is assessed pursuant to the law of your jurisdiction or otherwise) constitute in your jurisdiction a ground for refusing recognition and enforcement of a foreign award under Articles V(1)(b) (right of the party to present its case), V(1)(d) (irregularity in the procedure) and/or V(2)(b) (violation of public policy of the country where enforcement is sought) of the New York Convention?

Short answer: Yes, if the circumstances fall squarely under any of the grounds for refusal of recognition or enforcement in the New York Convention.

Article (V) of the New York Convention has been written into Rules 12.4(a)(iv) and 13.4(a)(iv) of the Philippine Special Rules of Court on Alternative Dispute Resolution.

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53 Emphasis added (emphasis and citations of the original deleted).
55 Article 34(2)(a)(ii) of the 1985 UNCITRAL Model Law.
56 Article 34(2)(b)(ii) of the 1985 UNCITRAL Model Law.
57 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: […]
Resolution and Article 4.36, Rule 6 of the Implementing Rules and Regulations of R.A. No. 9285.

The Philippine Supreme Court has held that the grounds enumerated in the New York Convention are exclusive grounds and that, since the Philippines adopts the same provisions, it will grant a petition to set aside based strictly on these enumerated grounds.58 This is because the Philippines adopts a policy in favor of arbitration.59 The R.A. No. 9285 and the Philippine Special Rules of Court on Alternative Dispute Resolution both declare as a policy that the State shall encourage and actively promote the use of alternative dispute resolution, such as arbitration, as an important means to achieve speedy and impartial justice and declog court dockets.60 This pro-arbitration policy is further evidenced by the rule on presumption in favor of enforcement.61

Given the presumption in favour of enforcement of arbitral awards in the Philippine jurisdiction, it is submitted that the failure to conduct a physical hearing would not per se constitute a ground for refusing recognition and enforcement of a foreign award. Instead, the party invoking such breach would need to substantially prove actual prejudice that would amount to any of the grounds enumerated in the New York Convention.

As discussed previously, the threshold in Philippine jurisdiction of a violation of public policy is the following: “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”.62 In this case, the Philippine Supreme Court held that (i) mere violation of the Philippine Civil Code, the applicable domestic law, is not a violation of public policy; and (ii) mere incompatibility of a foreign arbitral award with domestic mandatory rules on interest rates does not amount to breach of public policy.

To the opposite, there are no cases decided by the Philippine Supreme Court discussing violations of due process and procedural irregularities in the context of Article V(1)(b) of V(1)(d) of the New York Convention.

f. COVID-Specific Initiatives

11. To the extent not otherwise addressed above, how has your jurisdiction addressed the challenges presented to holding physical hearings during the

(d) The composition of the arbitral authority 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 the arbitration took place […]”

60 Ibid.
61 Ibid.
62 Ibid.
COVID pandemic? Are there any interesting initiatives or innovations in the legal order that stand out?

Short answer: Yes, there are.

As previously discussed, the Philippine Supreme Court has issued rules rendering electronic evidence admissible and recognizing the necessity of videoconferencing for remote witness evidence in particular exceptional circumstances even before the COVID-19 pandemic. When the COVID-19 Pandemic hit, the Philippine Supreme Court issued the Guidelines on the Conduct of Videoconferencing which primarily state: “The conduct of videoconferencing shall be considered as an alternative mode to in-court proceedings, which remains to be the primary mode in hearing cases”.

The guidelines apply to “all actions and proceedings[…] in whatever stage thereof, as provided in the Rules of Court when, based on the attending circumstances, the court finds that the conduct of videoconferencing will be beneficial to the fair, speedy, and efficient administration of justice”. It shall be applicable “during the duration of the current pandemic and thereafter, unless revoked or modified by the Philippine Supreme Court. The courts may sua sponte order hearings and proceedings be conducted through videoconferencing in some cases”.

The Philippine Supreme Court has likewise issued a number of circulars mandating the physical closure of courts and reducing substantially business in the physical courts in order to address the still increasing number of COVID-19 cases in the country. Particularly, the Philippine Supreme Court has been recently issuing administrative circulars authorizing lower court judges to “conduct fully remote videoconference hearings on pending cases and other matters, whether urgent or not, regardless of their physical location and without prior permission from the Office of the Court Administrator”.

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65 Ibid. Sections 1 and 2, Chapter II.