The International Capital Markets Review

Third Edition

Editor
Jeffrey Golden

Law Business Research

The International Capital Markets Review

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Third Edition

Editor
Jeffrey Golden

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THE PRIVATE COMPETITION ENFORCEMENT REVIEW

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EDITOR'S PREFACE TO THE THIRD EDITION

As I write the preface to this third edition of *The International Capital Markets Review*, my morning newspaper reports that one of the major global banks, having shrunk its workforce by more than 40,000 employees over the past two years, will now embark on a hiring spree to add at least 3,000 additional compliance officers.

It would be nice if the creation of these new jobs evidenced new confidence that capital markets activity is on the rise in a way that will justify more hands on deck. In other words, capital markets lawyers will have something to celebrate if this bolstering of the ranks was thought necessary to ensure that requisite regulatory approvals and transactional paperwork would be in place for a projected expansion in deal flow.

And, indeed, my morning newspaper also reports a new transaction of some significance, namely, Twitter's filing for a multi-billion dollar international public offering, accompanied by a tweet, of course – but with a true sign-of-the-times disclosure: 'This Tweet does not constitute an offer of any securities for sale'!

Yes, confirmation of an uptick in deal flow – especially 'big deals' flow – would be nice. In the preface to the last edition of this work, I speculated that there were 'signs that any 'big freeze' on post-crisis capital markets transactional work may be thawing'. All the better if the current newspaper reports provide continued and further support for that inference. After all, when our first edition appeared a little over two years ago, the newspapers were saying terrible things about the capital markets.

What is more likely, however, is that this increased staffing aims to cope with regulatory complexity that will now impact the financial markets regardless of any growth and perhaps may even have been designed to slow down the business being done there. That complexity, but also just the scale of recently promulgated new regulation and the practitioner's resulting challenge in 'keeping up' have all encouraged this new third edition. The 8,843 pages of Dodd-Frank rule-making that I reported in my preface to the last edition have now grown to more than 14,000 pages at this time of writing – and approximately 60 per cent of the job remains unfinished. Other key jurisdictions have been catching up. Plus the rules are purposive and aim to change the way things have been done. If compliance and even ethics in the capital markets were ever instinctual, rather than matters to be taught and studied, that is probably a thing of the past.

The thickness of this volume has grown as well because of the increased number of pages and coverage in it. Nine new contributors (Finland, Indonesia, Italy, the Netherlands, the Philippines, Spain, Switzerland, Tanzania and the UAE) and an overview of EU Directives have been added. Banks are lending less to corporates, which in turn are having to issue more to meet liquidity needs. Moreover, with the low interest rate environment of quantitative easing, central banks are encouraging risk-taking rather than hoarding. For investors, risk-free assets have become very expensive. So we see a growing willingness to get off the traditional highway in search of yield. Investment banks are, as a result, often taking their clients (and their clients' regular outside counsel) to difficult, or at least less well-known, geographies.

Having a pool of country experts and jurisdictional surveys that facilitate comparative law analysis can be very helpful in this instance. That is exactly what this volume aims to provide: a 'virtual' legal network and global road map to help the reader navigate varying, and increasingly difficult, terrain to arrive at right places.

There has been much relevant change in the legal landscape surveyed in the pages that follow. However, what has not changed is our criteria for authors. The invitation to contribute continues to go to 'first in class' capital market specialists from leading law firms. I shall be glad if, as a result, the biographical notes and contact details of the contributing firms prove a useful resource as well.

The International Capital Markets Review is not a novel. Impressed I might be, but I would certainly also be surprised by anyone picking up and reading this volume from cover to cover. What I expect instead, and what is certainly the publisher's intention, is that this work will prove a valuable resource on your shelf. And I hope that you will have plenty of opportunities to take it off the shelf and lots of excuses to draw on the comparative jurisdictional wisdom it offers.

Let me again express my sincere gratitude to our authors for their commitment to the task and their contributions. It remains a privilege to serve as their editor and a source of great pride to keep their company in the pages of this book.

Jeffrey Golden
P.R.I.M.E. Finance Foundation
The Hague
October 2013

EDITOR'S PREFACE TO THE SECOND EDITION

It was my thought that we should also include in this second edition of *The International Capital Markets Review* my preface to the first edition. Written less than a year ago, it captures relevant background and sets out the rationale for this volume in the series. The contemporary importance of the global capital marketplace (and indeed you must again admire its resilience), the staggering volume of trading and the complexity of the products offered in it, and the increased scrutiny being given to such activity by the courts all continue. And, of course, so does the role of the individual – the difference that an informed practitioner can make in the mix, and the risk that follows from not staying up to date.

However, I was delighted, following the interest generated by our first edition, by the publisher's decision to bring out a second edition so quickly and to expand it. There were several reasons for this. The picture on the regulatory front is much clearer for practitioners than it was a year ago – but no less daunting. According to one recent commentary, in the United States alone, rule-making under the Dodd-Frank report has seen 848 pages of statutory text (which we had before us when the first edition appeared) expand to 8,843 pages of regulation, with only 30 per cent of the required regulation thus far achieved. Incomplete though the picture may look, the timing seems right to take a gulp of what we have got rather than wait for what may be a very long time and perhaps then only to choke on what may be more than any one person can swallow in one go! Regulatory debate and reform in Europe and affecting other key financial centres has been similarly dramatic. Moreover, these are no longer matters of interest to local law practitioners only. Indeed, the extraterritorial reach of the new financial rules in the United States has risen to a global level of attention and has been the stuff of newspaper headlines at the time of writing.

There are also signs that any 'big freeze' on post-crisis capital markets transactional work may be thawing. In the debt markets, the search for yield continues. Equities are seen as a potential form of protection in the face of growing concerns about inflation. Participants are coming off the sidelines. Parties can be found to be taking risks. They are not oblivious to risk. They are taking risks grudgingly. But they are taking them. And derivatives (also covered in this volume) are seen as a relevant tool for managing that risk.

Most importantly, it is a big world, and international capital markets work hugs a bigger chunk of it than do most practice areas. By expanding our coverage in this second edition to include six new jurisdictions, we also, by virtue of three of them, complete our coverage of the important BRIC countries with the addition of reporting from Brazil, Russia and China. Three other important pieces to the international capital markets puzzle – Belgium, the Czech Republic and New Zealand – also fall into place.

The picture now on offer in these pages is therefore more complete. None of the 24 jurisdictions now surveyed has a monopoly on market innovation, the risks associated with it or the attempts to regulate it. In light of this, international practitioners benefit from this access to a comparative view of relevant law and practice. Providing that benefit – offering sophisticated business-focused analysis of key legal issues in the most significant jurisdictions – remains the inspiration for this volume.

As part of the wider regulatory debate, there have been calls to curtail risk-taking and even innovation itself. This wishful thinking seems to miss the point that, if they are not human rights, risk-taking and innovation are hardwired into human nature. More logical would be to keep up, think laterally from the collective experience of others, learn from the attention given to key issues by the courts (and from our mistakes) and 'cherry-pick' best practices wherever these can be identified and demonstrated to be effective.

Once again, I want to thank sincerely and congratulate our authors. They have been selected to contribute to this work based on their professional standing and peer approvals. Their willingness to share with us the benefits of their knowledge and experience is a true professional courtesy. Of course, it is an honour and a privilege to continue to serve as their editor in compiling this edition.

Jeffrey Golden
London School of Economics and Political Science
London
November 2012

EDITOR'S PREFACE TO THE FIRST EDITION

Since the recent financial markets crisis (or crises, depending on your point of view), international capital markets (ICM) law and practice are no longer the esoteric topics that arguably they once were.

It used to be that there was no greater 'show-stopper' to a cocktail party or dinner conversation than to announce oneself to be an ICM lawyer. Nowadays, however, it is not unusual for such conversations to focus – at the initiation of others and in an animated way – on matters such as derivatives or sovereign debt. Indeed, even taxi drivers seem to have a strong view on the way the global capital markets function (or at least on the compensation of investment bankers). ICM lawyers, as a result, can stand tall in more social settings. Their views are thought to be particularly relevant, and so we should not be surprised if they are suddenly seen as the centre of attention – 'holding court', so to speak. This edition is designed to help ICM lawyers speak authoritatively on such occasions.

In part, the interest in what ICM lawyers have to say stems from the fact that the amounts represented by current ICM activities are staggering. The volume of outstanding over-the-counter derivatives contracts alone was last reported by the Bank for International Settlements (BIS) as exceeding $700 trillion. Add to this the fact that the BIS reported combined notional outstandings of more than $180 trillion for derivative financial instruments (futures and options) traded on organised exchanges. Crisis or crises notwithstanding, ICM transactions continue apace: one has to admire the resilience. At the time of writing, it is reported that the 'IPO machine is set to roar back into life', with 11 flotations due in the United States in the space of a single week. As Gandhi said: 'Capital in some form or another will always be needed.'

The current interest in the subject also stems from the fact that our newspapers are full of the stuff too. No longer confined to the back pages of pink-sheet issues, stories from the ICM vie for our attention on the front pages of our most widely read editions. Much attention of late has been given to regulation, and much of the coverage in the pages of this book will also report on relevant regulation and regulatory developments; but regulation is merely 'preventive medicine'. To continue the analogy, the courts are our 'hospitals'. Accordingly, we have also asked our contributors to comment on any lessons to be learned from the courts in their home jurisdictions. Have the judges got it right? Judges who understand finance can, by fleshing out laws and regulations and applying them to

facts perhaps unforeseen, help in the battle to mitigate systemic risk. Judges who do not understand finance – given the increase in financial regulation, the amounts involved, and the considerable reliance on standard contracts and terms (and the need therefore for a uniform reading of these) – may themselves be a source of systemic risk.

ICM lawyers are receiving greater attention because there is no denying that many capital market products that are being offered are complex, and some would argue that the trend is towards increasing complexity. These changing financing practices, combined with technological, regulatory and political changes, account for the considerable challenge that the ICM lawyer faces.

ICM activity by definition shows little respect for national or jurisdictional boundaries. The complete ICM lawyer needs familiarity with comparative law and practice. It would not be surprising if many ICM practitioners felt a measure of insecurity given the pace of change; things are complex and the rules of the game are changing fast – and the transactions can be highly technical. This volume aims to assuage that concern by gathering in one place the insights of leading practitioners on relevant capital market developments in the jurisdictions in which they practise.

The book's scope on capital markets takes in debt and equity, derivatives, high-yield products, structured finance, repackaging and securitisation. There is a particular focus on international capital markets, with coverage of topics of particular relevance to those carrying out cross-border transactions and practising in global financial markets.

Of course, ICM transactions, technical though they may be, do not take place in a purely mechanical fashion – a human element is involved: someone makes the decision to structure and market the product and someone makes the decision to invest. The thought leadership and experience of individuals makes a difference; this is why we selected the leading practitioners from the jurisdictions surveyed in this volume and gave them this platform to share their insights. The collective experience and reputation of our authors is the hallmark of this work.

The International Capital Markets Review is a guide to current practice in the international capital markets in the most significant jurisdictions worldwide, and it attempts to put relevant law and practice into context. It is designed to help practitioners navigate the complexities of foreign or transnational capital markets matters. With all the pressure – both professional and social – to be up to date and knowledgeable about context and to get things right, we think that there is a space to be filled for an analytical review of the key issues faced by ICM lawyers in each of the important capital market jurisdictions, capturing recent developments but putting them in the context of the jurisdiction's legal and regulatory structure and selecting the most important matters for comment. This volume, to which leading capital markets practitioners around the world have made valuable contributions, seeks to fill that space.

We hope that lawyers in private practice, in-house counsel and academics will all find it helpful, and I would be remiss if I did not sincerely thank our talented group of authors for their dedicated efforts and excellent work in compiling this edition.

Jeffrey Golden
London School of Economics and Political Science
London
November 2011

Chapter 21

PHILIPPINES

Maria Teresa D Mercado-Ferrer, Ronald P De Vera and Carlos Manuel S Prado[1]

I INTRODUCTION

i The Securities Regulation Code

The Securities Regulation Code (SRC)[2] is the primary legislation governing the regulation of capital markets in the Philippines. Enacted in 2000, the SRC repealed the Revised Securities Act (RSA),[3] which had been effective since 1982, and further strengthened the regulatory structure of the RSA in order to protect the investing public.

ii The Securities and Exchange Commission

The Securities and Exchange Commission (SEC) is the primary administrative agency tasked with the implementation of the SRC. The SEC has the following powers and functions, among others: jurisdiction and supervision over all corporations, partnerships or associations that are grantees of primary franchises and licences or permits issued by the Philippine government; preparation, approval, amendment and repeal of rules, regulations and orders; and the imposition of sanctions for the violation of the same.

Pursuant to its functions, the SEC issues rules and regulations, memorandum circulars, opinions and other issuances to clarify and implement the SRC and related laws, such as the Corporation Code of the Philippines, the Securitisation Act of 2004, the Real Estate Investment Trust Act of 2009, the Investment Houses Law, and the Investment Company Act, among others. For instance, the SEC has promulgated the Amended Implementing Rules and Regulations of the SRC (the Amended IRR), the Revised Code of Corporate Governance, Rules Governing the Over the Counter Market, Rules and

1 Maria Teresa D Mercado-Ferrer is a partner and Carlos Manuel S Prado is an associate at SyCip Salazar Hernandez & Gatmaitan. Ronald P De Vera was an associate at the firm.

2 Republic Act (RA) No. 8799.

3 Batas Pambansa Blg. 178.

Regulations on Alternative Trading Systems, and the Omnibus Rules and Regulations for Investment Houses and Universal Banks Registered as Underwriters of Securities.

iii The SEC and the Philippine courts

To enable the SEC to focus on its primary function as a market regulator, the SRC mandates the transfer of the quasi-judicial functions of the SEC, as provided for in a prior law,[4] to Philippine courts of general jurisdiction or the regional trial courts (RTCs). In this regard, the Supreme Court of the Philippines, the highest court in the jurisdiction, has promulgated several issuances designating certain branches of the RTCs as 'special commercial courts' tasked with handling intra-corporate disputes and corporate rehabilitation cases formerly cognisable by the SEC.

Decisions of the RTCs in intra-corporate disputes and corporate rehabilitation cases may be appealed to the appellate court or the Court of Appeals, whose decisions, in turn, may be challenged by filing the appropriate petition before the Supreme Court, in accordance with the Rules of Court. Decisions of the Supreme Court are final and binding on all parties in a particular case, including the lower courts whose decisions were under review.

iv The SEC and the Bangko Sentral ng Pilipinas

Aside from having jurisdiction and supervision over all grantees of primary franchise, or the right to exist as a corporation, the SEC also has supervision over grantees of certain secondary licences or permits[5] that grant the holders thereof the right to engage in a particular business. However, where secondary licences or permits are required by law to be granted by other government agencies or entities, such agencies or entities shall also have jurisdiction and supervision over the grantees with respect to their secondary franchise.

Thus, under the General Banking Law of 2000,[6] no person or entity shall engage itself as a bank or quasi-bank without authority from the Bangko Sentral ng Pilipinas (BSP), the Philippine central monetary authority. Quasi-banks refer to entities engaged in the borrowing of funds through the issuance, endorsement, or assignment with recourse or acceptance of deposit substitutes.[7] Meanwhile, deposit substitutes are defined under the New Central Bank Act as alternative forms of obtaining funds from the public, other than deposits, through the issuance, endorsement or acceptance of debt instruments for the borrower's own account, for the purpose of re-lending or purchasing of receivables and other obligations.[8]

4 Presidential Decree No. 902-A, as amended, Section 5.

5 See www.sec.gov.ph/gsr/secondary/secondaryreg.html, last accessed 29 August 2013.

6 RA 8791, Section 6.

7 Id., at Section 4.

8 RA 7653, Section 95.

v Self-regulatory organisations, exchanges, clearing agencies and depositories

Under the Amended IRR of the SRC, a self-regulatory organisation (SRO) is an organised exchange, registered clearing agency, or any organisation or association registered as an SRO to enforce compliance with relevant provisions of the SRC and related rules and regulations, and mandated to make and enforce its own rules, which have been approved by the SEC, their members and/or participants.[9]

An exchange is an organised marketplace or facility that brings together buyers and sellers and executes trade of securities and/or commodities.[10] Under the SRC, an exchange must be registered with the SEC.[11]

At present, there is only one registered stock exchange in the Philippines, the Philippine Stock Exchange (PSE), which is the result of the merger in 1994 of the Manila Stock Exchange and the Makati Stock Exchange.[12] Another exchange registered with the SEC is the Philippine Dealing and Exchange Corp (PDEx). The PSE is a registered SRO for the equities market, while the PDEx is a registered SRO for the fixed-income market.[13]

A clearing agency, on the other hand, is any person who acts as intermediary in making deliveries upon payment to effect settlement in securities transactions.[14] Like an exchange, a clearing agency must be registered with the SEC.[15]

The trades at the PSE are cleared and settled through the Securities Clearing Corporation of the Philippines (SCCP), a registered clearing agency. According to the SEC, the SCCP 'acts as the central counterparty to all trades that are eligible for settlement. In the netting process, the identity of the original parties disappears and the original contract is replaced by two new contracts, and SCCP becomes the buyer to every seller and seller to every buyer in all exchange trades.'[16]

A clearing agency may also provide for the central handling of securities so that transfers, loans, pledges and similar transactions can be made by bookkeeping entry, or otherwise, to facilitate the settlement of securities transactions without physical delivery of securities certificates.[17] Such clearing agency acts as a securities depository. The Philippine Depository and Trust Corp is a securities depository registered with the

9 Amended Implementing Rules and Regulations of the SRC, Rule 3, 1(R).

10 RA 8799, Section 3.7.

11 Id., at Sections 32 and 33.

12 Morales, R, The Philippine Securities Regulation Code (Annotated) (2005), p. 231.

13 See www.sec.gov.ph/investorinfo/registeredentity/exchange%20self%20regulatory%20organization%20as%20of%20feb%202013.pdf, last accessed 16 September 2013.

14 RA 8799, Section 3.6.

15 Id., at Sections 41 and 42.

16 SEC-Market Regulation Department Opinion No. 1, series of 2008, 28 July 2008, p. 2, citing the 2006 SCCP Rules and Operating Procedures.

17 Amended IRR of the SRC, Rule 3.6(C).

SEC.[18] In February 2013, the SEC granted the SCCP a provisional licence to operate as a securities depository.[19]

vi Recent jurisprudence

In the case of *Securities and Exchange Commission v. Prosperity.Com, Inc*,[20] the Philippine Supreme Court adopted the Howey Test, as enunciated in a ruling of the United States' Supreme Court,[21] in settling the issue of whether a particular transaction is an investment contract within the definition of securities under the SRC.[22]

The case concerns the transactions of Prosperity.Com, Inc (PCI), in which, for a certain price, a buyer could acquire from it an internet website. By referring to PCI his or her own down-line buyers, a first-time buyer could earn commissions. According to the SEC, PCI's scheme constitutes an investment contract, which must be registered under the SRC.

The Howey Test provides that an investment contract has the following elements: (1) a contract, transaction or scheme; (2) an investment of money; (3) investment is made in a common enterprise; (4) expectation of profits; and (5) profits arising primarily from the efforts of others. The Supreme Court reversed the SEC, ruled in favour of PCI and held that the scheme was not an investment contract because PCI's clients do not make investments, but rather purchase products, which, in this case, are the websites. The buyers of the website do not invest money in PCI that it could use for running a business to generate profits for investors. The commissions are merely incentives for clients to bring in other customers and are not the profits contemplated under the Howey Test.

18 See www.sec.gov.ph/investorinfo/registeredentity/exchange%20self%20regulatory%20organization%20as%20of%20feb%202013.pdf, last accessed 16 September 2013.

19 See SEC-Market Regulation Department Order No. 3, series of 2013, 19 February 2013.

20 GR No. 164197, 25 January 2012.

21 *Securities and Exchange Commission v. WJ Howey Co*, 328 US 293 (1946); US jurisprudence on securities regulations are not binding in the Philippines, but they enjoy some degree of persuasiveness given that the predecessor to the Revised Securities Act, Commonwealth Act No. 83 or the Securities Act of 1936, was patterned after the US Securities Act of 1933 and the US Securities Exchange Act of 1934; see Morales, R, The Philippine Securities Regulation Code (Annotated) (2005), pp. 2–7.

22 RA 8799, Section 3.1 defines securities as shares, participation or interests in a corporation or in a commercial enterprise or profit-making venture and evidenced by certificates, contracts or instruments, whether written or electronic in character. It includes, among others, shares of stocks, bonds, debentures, notes, evidences of indebtedness, asset-backed securities, investment contracts, certificates of interest or participation in a profit sharing agreement, derivatives, and other instruments as may in the future be determined by the SEC.

II THE YEAR IN REVIEW

i Developments affecting debt and equity offerings

The PSE Amended Rule on Minimum Public Ownership

On 1 January 2012, the amendments to the PSE's Rule on Minimum Public Ownership (the MPO Rule),[23] as approved by the SEC, became effective. Under the MPO Rule, companies listed with the PSE shall, at all times, maintain a minimum percentage of listed securities held by the public equivalent to 10 per cent of the listed companies' issued and outstanding shares, exclusive of any treasury shares.

Companies that are non-compliant may be granted a grace period within which to comply with the MPO Rule. After the grace period, the PSE shall impose a trading suspension for a period of not more than six months. If, after the lapse of the suspension period, a listed company remains non-compliant with the MPO Rule, it shall automatically be delisted.

Listing Rules for the Main and SME Boards of the PSE

In May 2013, the SEC approved the proposed Rules for Listing in the Main and Small, Medium and Emerging (SME) Boards of the PSE (the Board Listing Rules).[24] The Board Listing Rules provide for the replacement of the PSE's three boards (First Board, Second Board, and the SME Board) with only two boards – the Main Board and the SME Board.

The Board Listing Rules are designed to ensure the viability of the companies listing in the PSE. In this regard, companies applying for listing in the Main Board must have a minimum authorised capital stock of 500 million pesos, of which a minimum of 25 per cent must be subscribed and fully paid, as well as a minimum of 1,000 stockholders, each owning stocks equivalent to at least one board lot of the securities of the applicant company. On the other hand, companies applying for listing in the SME Board must have a minimum authorised capital stock of at least 100 million pesos, of which at least 25 per cent must be subscribed and fully paid, as well as a minimum of 200 stockholders, each holding at least one board lot of the securities of the applicant company.

ii Developments affecting derivatives, securitisations and other structured products

SEC Rules and Regulations on Exchange Traded Funds

In 2012, the SEC issued the Rules and Regulations on Exchange Traded Funds (the ETF Rules).[25] An exchange traded fund (ETF) is a new investment product determined by the SEC to be a type of an open-end investment company, but whose operation differs significantly from the more common type of open-end investment company generally known as a mutual fund. An ETF continuously issues and redeems its shares of stock in creation units in exchange for delivery of a basket of securities representing an index whose performance the ETF endeavours to track, provided that the terms and conditions

23 PSE Memorandum No. CN-0003-12.

24 PSE Memorandum No. CN-0023-13.

25 SEC Memorandum Circular No. 10, series of 2012.

relative to the issuance and redemption in creation units shall be prescribed and disclosed in its registration statement.[26]

The ETF Rules list the requirements for the incorporation and registration of ETFs. They further provide that no person shall sell or offer for sale or distribute the shares of stock of an ETF, and no exchange shall accept the listing of the shares of stock of an ETF, unless such shares have been registered in accordance with the SRC.[27] On the other hand, no shares of stock of an ETF shall be registered pursuant to the SRC unless the assets of the corporation shall be primarily in baskets of securities comprising the index that it represents to track.[28]

The Real Estate Investment Trust Act of 2009

In 2009, the Real Estate Investment Trust Act (the REIT Act)[29] was enacted to govern the formation and operation of real estate investment trusts (REITs), defined as stock corporations established for the purpose of owning income-generating real estate assets. However, the REIT, although designated as a 'trust', does not have the same technical meaning as 'trust' under existing laws and regulations, but is used in the REIT Act for the sole purpose of adopting the internationally accepted description of the company in accordance with global best practices.[30]

Investment in the REIT shall be by way of subscription to or purchase of shares of stock of the REIT. REITs must distribute annually at least 90 per cent of their distributable income as dividends to their shareholders.[31] REITs must also satisfy requirements on minimum public ownership, capitalisation, investment in income-generating real estate and property development activities, among others.

Prohibition on gambling

With respect to derivatives, it would be well to take into account Article 2018 of the Civil Code of the Philippines (the Civil Code),[32] which reads as follows:

> *If a contract which purports to be for the delivery of goods, securities or shares of stock is entered into with the intention that the difference between the price stipulated and the exchange or market price at the time of the pretended delivery shall be paid by the loser to the winner, the transaction is null and void. The loser may recover what he has paid.*

Article 2018 of the Civil Code will not apply where the object of a derivative transaction is the sale or exchange of currencies or monetary obligations (as in foreign exchange contracts, and currency and interest rate swaps). Article 2018 covers only transactions

26 Id., at Section 4.

27 Id., at Sections 7.1 and 10.

28 Id., at Section 7.2.

29 RA 9856.

30 Id., at Section 3(cc).

31 Id., at Section 7.

32 RA 386.

that 'purport' to be for delivery of goods. Therefore, it would have no application to, for instance, an interest rate or currency swap transaction where the written contract evidencing the agreement of the parties reflects an intention to make actual delivery of the object of the contract on settlement date. The settlement of a transaction by the netting of an amount mutually owing to the counterparties precisely evidences delivery of the object of the transaction. The fact that the transactions are settled by netting amounts due and owing between the parties would not subject it to the coverage of Article 2018. Under Philippine law, compensation or netting is a legitimate mode of extinguishing obligations of persons who in their own right are reciprocally debtors and creditors of each other.[33]

However, Article 2018 of the Civil Code will apply if the underlying transaction involves a purported future sale or delivery of goods or securities (other than money), such as physical delivery of shares, bonds or commodities in exchange for cash, but where in fact no delivery is intended.

This is not to say, however, that derivative transactions outside the purview of Article 2018 are necessarily valid and enforceable. The use of derivative transactions to speculate on interest or exchange rate movements may characterise the arrangements as a game of chance. This statement is meant to apply to all derivative transactions including rate protection transactions – whether or not covered by Article 2018 of the Civil Code – which are entered into for speculation and not for hedging or other legitimate business purposes. A game of chance (or gambling) is one that depends more on chance or hazard than on skill or ability. Under Article 2013 of the Civil Code, in case of doubt as to the nature of a gaming contract, the presumption is that the transaction is one of chance.

While a game of chance is not illegal *per se*, Article 2014 of the Civil Code provides that no action can be maintained by the winner to collect what he or she has won, but it permits the loser to recover his or her losses, with legal interest from the time of payment of the amount lost.

iii Cases and dispute settlement

The Alternative Dispute Resolution Act of 2004

Arbitration in the Philippines is governed primarily by the Alternative Dispute Resolution Act (the ADR Act).[34] The ADR Act declares it a state policy to actively promote party autonomy in the resolution of disputes or the freedom of the parties to make their own arrangements to resolve their disputes. The law seeks to encourage the use of ADR, meaning any process or procedure used to resolve a dispute or controversy, other than by adjudication by a presiding judge of a court or an officer of a government agency, in which a neutral third party participates to assist in the resolution of issues, which includes arbitration, mediation, conciliation, early neutral evaluation, mini-trial, or any combination thereof.[35]

33 Id., at Article 1278.

34 RA 9285.

35 Id., at Section 3(a).

The ADR Act provides that international commercial arbitration shall be governed by the Model Law on International Commercial Arbitration (the Model Law) adopted by the United Nations Commission on International Trade Law (UNCITRAL). Article 35 of the Model Law governs the recognition and enforcement of an award in an international commercial arbitration. On the other hand, domestic arbitration continues to be governed primarily by the Arbitration Law enacted in 1953,[36] although certain provisions of the Model Law are expressly made applicable also to domestic arbitration. When confirmed by an RTC, a domestic arbitral award shall be enforced in the same manner as final and executory decisions of the court.

The New York Convention

The Philippines is also a signatory to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). Thus, a foreign arbitral award is enforceable in the Philippines through the filing of a petition with the RTC by any of the parties to the foreign arbitration, at any time after the receipt of the foreign arbitral award. The RTC may deny the petition if, among others, it finds that the subject matter of the dispute is not capable of settlement or resolution by arbitration under Philippine law or the recognition or enforcement of the award would be contrary to public policy.[37]

Special Rules of Court on Alternative Dispute Resolution

The ADR Act provides that the recognition and enforcement of foreign arbitral awards covered by the New York Convention, as well as the confirmation of domestic arbitral awards, shall be done in accordance with rules of procedure to be promulgated by the Supreme Court. In this regard, and in line with the state policy to promote alternative dispute resolution, the Supreme Court issued the Special Rules of Court on Alternative Dispute Resolution in 2009.[38]

iv Relevant tax and insolvency law

Tax implications of non-compliance with the Rule on Minimum Public Ownership

In November 2012, the Secretary of Finance, with the recommending approval of the Commissioner of Internal Revenue, issued Revenue Regulations No. 16-2012, which provides that publicly listed companies which are non-compliant with the PSE MPO Rule as of 31 December 2011 and those whose public ownership levels subsequently fall below the required minimum percentage at any time prior to 31 December 2012 may be allowed up to 31 December 2012 to comply with the MPO Rule. If a publicly listed company still fails to meet the MPO Rule after the lapse of the grace period, then the sale, transfer or assignment of its shares shall be subject to final tax at the rate of 5 or

36 RA 876.

37 AM No. 07-11-08-SC, Rule 13.4(b).

38 Id.

10 per cent on the net capital gains, apart from documentary stamp taxes, as prescribed under the National Internal Revenue Code of 1997, as amended (the Tax Code).[39]

Tax on income from corporate bonds

In December 2012, the Bureau of Internal Revenue (BIR) issued Revenue Memorandum Circular No. 81-2012 (RMC 81-2012), which clarifies certain provisions of Revenue Regulations No. 14-2012 (RR 14-2012) regarding the proper tax treatment of interest income earnings on financial instruments and other related transactions.

Under RR 14-2012, a long-term deposit or investment certificate, as defined in the Tax Code, shall be exempt from income tax provided that the following characteristics or conditions are present:

a the depositor or investor is an individual citizen (resident or non-resident), a resident alien or a non-resident alien engaged in trade or business in the Philippines;

b the long-term deposits or investment certificates should be under the name of the individual and not under the name of the corporation or the bank or the trust department or unit of the bank;

c the long-term deposits or investments must be in the form of savings, common or individual trust funds, deposit substitutes, investment management accounts and other investments evidenced by certificates in such form prescribed by the BSP;

d the long-term deposits or investments must be issued by banks only and not by other financial institutions;

e the long-term deposits or investments must have a maturity period of not less than five years;

f the long-term deposits or investments must be in denominations of 10,000 pesos and other denominations as may be prescribed by the BSP;

g the long-term deposits or investments should not be terminated by the investor before the fifth year, otherwise they shall be subjected to the graduated rates of 5, 12 or 20 per cent on interest income earnings; and

h except those specifically exempted by law or regulations, any other income such as gains from trading, foreign exchange gain shall not be covered by income tax exemption.

Under Section 22(FF) of the Tax Code, a long-term deposit or investment certificate refers to a certificate of time deposit or investment in the form of savings, common or individual trust funds, deposit substitutes, investment management accounts and other investments with a maturity period of not less than five years, the form of which shall be prescribed by the BSP and issued by banks only (not by non-bank financial intermediaries and finance companies) to individuals in denominations of 10,000 pesos and other denominations as may be prescribed by the BSP.

RMC 81-2012 clarifies the foregoing and provides that, for interest income derived by individuals investing in common or individual trust funds or investment

39 RA 8424, Sections 24(C) and 27(D)(2).

management accounts to be exempt from income tax, the following additional characteristics or conditions must all be present:

a the investment of the individual investor in the common or individual trust fund or investment management account must be held or managed by the bank (which should be duly licensed as such by the BSP) for at least five years;

b the underlying investments of the common or individual trust account or investment management accounts must comply with the requirements of Section 22(FF) of the Tax Code, as well as the requirements under RR 14-2012 mentioned above; and

c the common or individual trust account or investment management account must hold on to such underlying investment for at least five years.

Accordingly, a bond, promissory note or any other type of debt instrument issued by a non-bank corporation as an underlying instrument will not meet the requirements of Section 22(FF) of the Tax Code and the conditions set forth in RR 14-2012 as clarified by RMC 81-2012, as it is not issued by a bank. Thus, an individual investor's interest income from a trust agreement will not be exempt from final withholding tax if the underlying investment is a corporate bond. Further, the holding period for both the individual investor in the trust agreement and the trust in the underlying instrument must be at least five years for the tax exemption to be applicable.

The Financial Rehabilitation and Insolvency Act of 2010

In 2010, the Financial Rehabilitation and Insolvency Act (FRIA)[40] was enacted and repealed the Insolvency Law of 1909.[41] Under the FRIA, a debtor is insolvent if it is generally unable to pay its liabilities as they fall due in the ordinary course of business or has liabilities that are greater than its assets. The FRIA provides for the following modes of rehabilitation: (1) court-supervised rehabilitation; (2) pre-negotiated rehabilitation; and (3) out-of-court or informal restructuring agreements or rehabilitation plans. For court-supervised rehabilitation, proceedings may be voluntary or involuntary. The FRIA also provides for the voluntary or involuntary liquidation of insolvent debtors through the filing of a petition for liquidation with the court.

Notably, a regulatory agency or self-regulatory organisation may liquidate trade-related claims of clients or customers of a securities market participant which, for purposes of investor protection, are deemed to have absolute priority over other claims of whatever nature or kind insofar as trade-related assets are concerned.[42]

For cross-border insolvency proceedings, the FRIA adopts the UNCITRAL Model Law on Cross-Border Insolvency.

40 RA 10142.

41 Act No. 1956.

42 RA 10142, Section 136.

v Other relevant laws and regulations

Amendments to the Anti-Money Laundering Act of 2001

In 2013, the Anti-Money Laundering Act (AMLA) was further amended,[43] expanding the definition of covered persons who are mandated to establish and record the true identities of their clients and to report covered and suspicious transactions to the Anti-Money Laundering Council (AMLC). Covered transactions are those involving cash or equivalent monetary instruments with a total amount in excess of 500,000 pesos within one banking day.[44] On the other hand, suspicious transactions are transactions with covered institutions, regardless of the amounts involved, where certain circumstances exist,[45] such as when the transaction is related to an unlawful activity or offence as defined under the AMLA.

Before the amendment, the AMLA already included the following covered institutions: banks, quasi-banks and trust entities; securities dealers, brokers, salesmen, investment houses and other similar entities managing securities or rendering services as investment agent, adviser or consultant; mutual funds, close-end investment companies, common trust funds, pre-need companies and other similar entities; and other entities administering or otherwise dealing in currency, commodities or financial derivatives. After the amendment, the list of covered persons was further revised and now also includes, among others, persons who provide the service of managing clients' money, securities or other assets, as well as the management of bank, savings or securities accounts.[46] However, lawyers and accountants authorised to practise in the Philippines and who act as independent legal professionals are not required to report covered and suspicious transactions if the relevant information was obtained in circumstances where they are subject to professional secrecy or legal professional privilege.[47]

vi Other strategic considerations

Arbitration clause

It may be prudent to provide for binding arbitration in commercial contracts. Binding arbitration can be a faster mode of dispute resolution compared to a full-blown trial in case of litigation. A stipulation that the arbitration venue shall be outside the Philippines is not unusual, and the same avoids any 'home court' advantage to the Philippine counterparty.

Where an action is brought concerning a matter that is the subject of an arbitration agreement, the court shall refer the parties to arbitration, if at least one party so requests not later than the pretrial conference, or upon the request of both parties thereafter. The exception is when the court finds that the arbitration agreement is null

43 RA 9160, as further amended by RA 10365.

44 Id., at Section 3(b).

45 Id., at Section 3(b-1).

46 Id., at Section 3(a)(7)(i-ii).

47 Id., at Sections 9(c) and 3(a).

and void, inoperative, or incapable of being performed. This rule is applicable to both international commercial arbitration and domestic arbitration.[48]

Choice of law clause

Parties to a contract are generally free to stipulate a choice of law. Such choice will generally be respected by Philippine courts provided that there are substantive contacts that justify the choice of foreign law (as when the elements of a transaction have taken place in the jurisdiction of the place of the chosen law).

However, notwithstanding the choice of a foreign law as the governing law, a Philippine court may, in disregard of any provision of the foreign law, apply the laws of the Philippines when:

a the foreign law is contrary to an important public policy of the forum;
b the foreign law is penal in nature;
c the foreign law is procedural in nature;
d the foreign law is purely fiscal or administrative in nature;
e the application of the foreign law will work undeniable injustice to the citizens of the forum;
f the case involves real or personal property situated in the forum;
g the application of the foreign law might endanger the vital interest of the state;
h the foreign law is contrary to good morals;
i Philippine law expressly decrees application of the domestic law; and
j the foreign law is not properly pleaded and proved.[49]

III OUTLOOK AND CONCLUSIONS

After more than 12 years since the enactment of the SRC, the Philippine government finally secured its first conviction for securities fraud. In a decision dated 19 March 2013, the RTC convicted a former president of a corporation for committing violations of the SRC, in particular: (1) Section 26 on fraudulent transactions, for employing a scheme to defraud clients and the investing public by using fictitious and dummy accounts in the buying transactions of securities, and for committing fraudulent and deceitful acts of selling and trading shares belonging to clients without their knowledge and consent and without delivering the proceeds of the sale to the said clients; (2) Section 49.1 on restrictions on borrowings by members, brokers and dealers, for using a personal loan to augment the reported assets of the corporation in order to make it appear that the corporation complied with the net capital requirement; and (3) Section 52.1 on accounts and records, for maintaining two sets of books, one containing the corporation's actual negative position and an altered database projecting a positive position to show alleged compliance with the audit requirements of the PSE and the SEC, all to the damage and

48 RA 9285, Sections 24 and 33.

49 Coquia, J and Pangalangan, E, *Conflict of Laws: Cases, Materials and Comments* (2000).

prejudice of the corporation's clients and the investing public. The RTC sentenced the former president to pay a total fine of 2.1 million pesos.[50]

With the advent of globalisation and constantly evolving information technology, the Philippine capital market continues to thrive and evolve. It is currently one of the better performing capital markets in the world, recently received credit rating upgrades, and has been forecasted by reputable credit rating agencies to have real potential to increase much further in the coming years. In this regard, along with growth of the Philippines' capital market, government regulators must all the more remain vigilant, adaptable and forward-looking in devising ways to prevent unscrupulous individuals from implementing schemes to circumvent the law and to defraud legitimate investors and the market participants.

50 Department of Justice, Gov't Secures First Conviction Under The Securities Regulation Code, 26 March 2013, www.doj.gov.ph/news.html?title=Gov%27t%20Secures%20First%20Conviction%20Under%20The%20Securities%20Regulation%20Code&newsid=172, last accessed 30 August 2013.

Appendix 1

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Some of the transactions Ms Ferrer handled include the public offering of 75 billion pesos worth of series 2 preferred shares by San Miguel Corporation in 2012; the acquisition of Digital Telecommunications by Philippine Long Distance Company in 2011; and the acquisition of e-Telecare by Stream International in 2009.

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