The International Capital Markets Review

Sixth Edition

Editor
Jeffrey Golden

Law Business Research

The International Capital markets Review

Sixth Edition

Editor
Jeffrey Golden

Law Business Research Ltd

PUBLISHER
Gideon Roberton

SENIOR BUSINESS DEVELOPMENT MANAGER
Nick Barette

BUSINESS DEVELOPMENT MANAGER
Thomas Lee

SENIOR ACCOUNT MANAGERS
Felicity Bown, Joel Woods

ACCOUNT MANAGER
Jessica Parsons

MARKETING COORDINATOR
Rebecca Mogridge

EDITORIAL ASSISTANT
Gavin Jordan

HEAD OF PRODUCTION
Adam Myers

PRODUCTION EDITOR
Anne Borthwick

SUBEDITOR
Gina Mete

CHIEF EXECUTIVE OFFICER
Paul Howarth

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
© 2016 Law Business Research Ltd
www.TheLawReviews.co.uk
No photocopying: copyright licences do not apply.
The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of November 2016, be advised that this is a developing area.
Enquiries concerning reproduction should be sent to Law Business Research, at the address above. Enquiries concerning editorial content should be directed to the Publisher – gideon.roberton@lbresearch.com

ISBN 978-1-910813-35-5

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND
TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND
INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

THE INTELLECTUAL PROPERTY REVIEW

THE ASSET MANAGEMENT REVIEW

THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

THE MINING LAW REVIEW

THE EXECUTIVE REMUNERATION REVIEW

THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

THE CARTELS AND LENIENCY REVIEW

THE TAX DISPUTES AND LITIGATION REVIEW

THE LIFE SCIENCES LAW REVIEW

THE INSURANCE AND REINSURANCE LAW REVIEW

THE GOVERNMENT PROCUREMENT REVIEW

THE DOMINANCE AND MONOPOLIES REVIEW

THE AVIATION LAW REVIEW

THE FOREIGN INVESTMENT REGULATION REVIEW

THE ASSET TRACING AND RECOVERY REVIEW

THE INSOLVENCY REVIEW

THE OIL AND GAS LAW REVIEW

THE FRANCHISE LAW REVIEW

THE PRODUCT REGULATION AND LIABILITY REVIEW

THE SHIPPING LAW REVIEW

THE ACQUISITION AND LEVERAGED FINANCE REVIEW

THE PRIVACY, DATA PROTECTION AND CYBERSECURITY LAW REVIEW

THE PUBLIC-PRIVATE PARTNERSHIP LAW REVIEW

THE TRANSPORT FINANCE LAW REVIEW

THE SECURITIES LITIGATION REVIEW

THE LENDING AND SECURED FINANCE REVIEW

THE INTERNATIONAL TRADE LAW REVIEW

THE SPORTS LAW REVIEW

THE INVESTMENT TREATY ARBITRATION REVIEW

THE GAMBLING LAW REVIEW

THE INTELLECTUAL PROPERTY AND ANTITRUST REVIEW

THE REAL ESTATE, M&A AND PRIVATE EQUITY REVIEW

THE SHAREHOLDER RIGHTS AND ACTIVISM REVIEW

THE ISLAMIC FINANCE AND MARKETS LAW REVIEW

www.TheLawReviews.co.uk

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

AFRIDI & ANGELL LEGAL CONSULTANTS

ALLEN & OVERY

BHARUCHA & PARTNERS

BORENIUS ATTORNEYS LTD

DE PARDIEU BROCAS MAFFEI

DLA PIPER MARTÍNEZ BELTRÁN

FENXUN PARTNERS

G ELIAS & CO

HOGAN LOVELLS BSTL, SC

INTERNATIONAL COUNSEL BUREAU

KING & WOOD MALLESONS

KOLCUOĞLU DEMİRKAN KOÇAKLI ATTORNEYS AT LAW

MAPLES AND CALDER

MIRANDA & AMADO ABOGADOS

MKONO & CO ADVOCATES

MONASTYRSKY, ZYUBA, STEPANOV & PARTNERS

MORRISON & FOERSTER LLP / ITO & MITOMI

NIELSEN NØRAGER LAW FIRM LLP

PETER YUEN & ASSOCIATES IN ASSOCIATION WITH FANGDA PARTNERS

PINHEIRO NETO ADVOGADOS

P.R.I.M.E. FINANCE FOUNDATION

REED SMITH

RUSSELL MCVEAGH

SIDLEY AUSTIN LLP

SYCIP SALAZAR HERNANDEZ & GATMAITAN

TOKUSHEV AND PARTNERS

URÍA MENÉNDEZ ABOGADOS, SLP

VIEIRA DE ALMEIDA & ASSOCIADOS, SOCIEDADE DE ADVOGADOS, SP RL

CONTENTS

Editor's Prefaces vii
Jeffrey Golden

Chapter 1 AUSTRALIA 1
Ian Paterson

Chapter 2 BRAZIL 22
Ricardo Simões Russo, Gustavo Ferrari Chauffaille and Luiz Felipe Fleury Vaz Guimarães

Chapter 3 BULGARIA 30
Viktor Tokushev and Nataliya Petrova

Chapter 4 CHINA 40
Xusheng Yang

Chapter 5 COLOMBIA 56
Camilo Martínez Beltrán and Sebastian Celis Rodríguez

Chapter 6 DENMARK 66
Thomas Weisbjerg and Peter Lyck

Chapter 7 FINLAND 77
Juha Koponen, Janni Hiltunen, Mark Falcon and Matias Keso

Chapter 8 FRANCE 87
Antoine Maffei and Olivier Hubert

Chapter 9 GERMANY 115
Kai A Schaffelhuber

Chapter 10 HONG KONG 126
Vanessa Cheung

Chapter 11 INDIA 139
Vishnu Dutt U

Chapter 12 IRELAND 150
Nollaig Murphy

Chapter 13 JAPAN 173
Akihiro Wani and Reiko Omachi

Chapter 14 KUWAIT 187
Abdullah Al Kharafi and Abdullah Alharoun

Chapter 15 LUXEMBOURG 198
Frank Mausen and Henri Wagner

Chapter 16 MEXICO 220
René Arce Lozano, Mayuca Salazar Canales and Elías Muñoz García

Chapter 17 NEW ZEALAND 231
Deemple Budhia and John-Paul Rice

Chapter 18 NIGERIA 240
Fred Onuobia and Bibitayo Mimiko

Chapter 19 PERU 249
Nydia Guevara V and Álvaro del Valle R

Chapter 20 PHILIPPINES 256
Maria Teresa D Mercado-Ferrer, Joan Mae S To and Jo Marianni P Ocampo

Chapter 21 PORTUGAL 274
José Pedro Fazenda Martins, Orlando Vogler Guiné and Sandra Cardoso

Chapter 22 RUSSIA 286
Vladimir Khrenov

Chapter 23 SPAIN 301
David García-Ochoa Mayor and José María Eguía Moreno

Chapter 24 TANZANIA 312
Kenneth Mwasi Nzagi

Chapter 25 TURKEY 317
Umut Kolcuoğlu, Damla Doğancalı and Aslı Tamer

Chapter 26 UNITED ARAB EMIRATES 327
Gregory J Mayew and Silvia A Pretorius

Chapter 27 UNITED KINGDOM 341
Tamara Box, Ranajoy Basu, Claude Brown, Nick Stainthorpe, Caspar Fox, James Wilkinson, Jacqui Hatfield, Winston Penhall and Daniel Winterfeldt

Chapter 28 UNITED STATES 370
Mark Walsh and Michael Hyatte

Appendix 1 ABOUT THE AUTHORS 387

Appendix 2 CONTRIBUTING LAW FIRMS' CONTACT DETAILS 405

EDITOR'S PREFACE TO THE SIXTH EDITION

There is a lesson from the international capital markets that took me, as a young ICM lawyer, a measure of time to both comprehend and appreciate. It was namely this: in matters legal, market participants have a marked preference for certainty above almost anything else. Even sometimes ahead of justice!

Market participants need to know where they stand.

You see, you can trade or structure around a position that you know to be certain, however undesirable that position may be, and whether or not you believe it to be fair. What is abhorred is not knowing what your position is. Eventually being told by a court after months or years of litigation, for example, that you were correct in your earlier view does not give a lot of comfort if, waiting on that answer, you stood 'naked' to a market that has moved on and significantly against you while you remained uncertain whether, when and to what extent to hedge your exposure or otherwise move in reliance on the position you had previously assumed.

Let me give you an extreme example of this preference for certainty over justice as it is reflected in the terms widely used by the derivatives markets when structuring a trade under my favourite contract form, the ISDA Master Agreement. There, a library of product-specific definitional booklets provide various terms tied to particular product markets, including details of pricing sources, relevant market conventions, and fallbacks and adjustments for when a given source may not be available and for other market disruptions. Relevant booklets can be incorporated into the parties' trade confirmations and thus added to the parties' contract on an 'as and when needed' basis.

Many of these booklets include a provision that is widely embraced for trades that base their prices on published and displayed screen rates. It provides, for example, that where a relevant rate for a pricing date is based on information from certain sources such as a Reuters screen page the rate is, as you might expect, subject to corrections made by that source – but only if the correction is made within one hour of the time when the

relevant rate is first displayed.[1] After that, even if the displayed rate has an extra zero in it, and even if it is later corrected, the rate as it stood one hour out becomes the irrevocable basis for the relevant pricing of the transaction. That is the potentially harsh but, in order to ensure certainty, market-preferred position.

This desire for timely and reliable answers can also be seen by the considerable contractual privilege and discretion afforded, for example, to a non-defaulting party by allowing it to self-determine a close-out amount following its counterparty's default. That determination is subject to good faith and reasonableness. However, a conscious decision was taken that the number of issues subject to referral to court for determination, and the evidentiary basis on which those issues should be decided, would, in each case, be narrow. It was intended that it should be of no consequence if, perhaps with the benefit of hindsight, a better answer could be determined by the court. It was thought more important by the markets that an answer honestly derived by a party could be relied upon as final so that the party could move on.

Whether it is the measure of their claims following a default, the scope of their exposure to market risk, or the strength of their collateral credit support, market participants hate surprises. They need to know where they stand. They seek authoritative answers that can be relied upon. And they trust in the rule of law.

My former law partner, Philip Wood CBE, QC (Hon) recently published a fascinating book.[2] In it, Philip argues that the challenge set for our planet is survival, that the rule of law has supplanted religion in providing the basis for a morality that will be necessary to ensure that survival, and that it falls to lawyers to form a 'priesthood' capable of providing relevant answers, as well as preserving the certainty and order, that can contribute to that quest for survival.

And yet we look out at a marketplace with more than a little uncertainty at the moment (Brexit, a worrying US presidential election looming, equally worrying ongoing world political tensions and even conflict, a systemically relevant global financial institution facing crippling fines and a crisis of confidence, cyber insecurity, etc.). Perhaps not surprisingly then, the press reports that the value of initial public offerings has fallen by about a third this year when compared with last year in this period of market volatility and political uncertainty.

That is where this book comes in (with a new jurisdiction, Hong Kong, having been added). Our legal experts who have contributed have been tasked with promoting legal certainty through guidance about where matters relevant to the international capital markets stand in their home jurisdictions. They are our priests!

Join them, and take up Philip Wood's challenge. If you are reading this book, it is almost certainly because someone is looking to you for answers – looking to you to provide the legal certainty the capital markets seek.

1 See, e.g., 2006 ISDA Definitions, Section 7.6.

2 Philip R Wood, *The Fall of the Priests and the Rise of the Lawyers*, (Hart Publishing Ltd, 2016).

My admiration for our contributing experts continues, and of course I shall be glad if their collective effort proves helpful to our readers when facing the important challenge of framing the correct answers.[3]

Jeffrey Golden
P.R.I.M.E. Finance Foundation
The Hague
November 2016

3 Did I finally make it through a preface without mentioning the Global Financial Crisis?

Chapter 20

PHILIPPINES

Maria Teresa D Mercado-Ferrer, Joan Mae S To and Jo Marianni P Ocampo[1]

I INTRODUCTION

i The Securities Regulation Code[2] (SRC)

The SRC 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 to protect the investing public.

ii The Securities and Exchange Commission (SEC)

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

---

1 Maria Teresa D Mercado-Ferrer is a partner, Joan Mae S To is a senior associate and Jo Marianni P Ocampo is an associate at SyCip Salazar Hernandez & Gatmaitan. The authors would like to thank Ronald P De Vera, Carlos Manuel S Prado and Earla Kahlila Mikhaila C Langit, former associates of the firm, for their assistance in the preparation of this chapter.

2 Republic Act (RA) No. 8799.

3 Batas Pambansa Blg 178.

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. For instance, the SEC has promulgated:

a the Amended Implementing Rules and Regulations (Amended IRR) of the SRC;
b the 2015 Implementing Rules and Regulations (2015 IRR) of the SRC,[4] which amended the Amended IRR;
c the Revised Code of Corporate Governance;[5]
d the Rules Governing the Over the Counter Market;
e the Rules and Regulations on Alternative Trading Systems; and
f 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,[6] to the 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.

However, with regard to issues concerning or arising out of validation of proxies, the Supreme Court clarified that the power of the SEC to regulate proxies remains in place in instances when stockholders vote on matters other than the election of directors. Thus, if the proxies were solicited for the purpose of electing directors, the RTC has jurisdiction over the matter.[7]

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 Central Bank of the Philippines (BSP)

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

4 On 6 August 2015, the SEC released a copy of the 2015 IRR. Under Philippine law, the 2015 IRR of the SRC should take effect 15 days after its publication in a newspaper of general circulation. At the time of writing, the 2015 IRR of the SRC are not yet effective as they have not yet been published in a newspaper of general circulation.

5 As further amended by SEC Memorandum Circular No. 9, series of 2014.

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

7 *Securities and Exchange Commission v. Court of Appeals*, GR No. 187702 & 189014, 22 October 2014, citing *Government Service Insurance System v. Court of Appeals*, 603 Phil 676 (2009).

licences or permits[8] 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,[9] no person or entity shall engage itself as a bank or quasi-bank without authority from the BSP, which is 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.[10] 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.[11]

v Self-regulatory organisations (SROs), exchanges, clearing agencies and depositories

Under the Amended IRR of the SRC, an 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 that have been approved by the SEC, their members or participants.[12]

An exchange is an organised marketplace or facility that brings together buyers and sellers and that executes trade of securities or commodities.[13] Under the SRC, an exchange must be registered with the SEC.[14]

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.[15] 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.[16]

A clearing agency, on the other hand, is any person who acts as an intermediary in making deliveries upon payment to effect settlement in securities transactions.[17] Like an exchange, a clearing agency must be registered with the SEC.[18]

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

8 See www.sec.gov.ph/services-2/company-2/secondary-registration, last accessed on 8 November 2016.

9 RA 8791, Section 6.

10 Id., at Section 4.

11 RA 7653, Section 95.

12 Amended IRR of the SRC, Rule 3, 1(R).

13 RA 8799, Section 3.7.

14 Id., at Sections 32 and 33.

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

16 See www.sec.gov.ph/wp-content/uploads/2016/01/exchange-self-regulatory-organization-as-of-feb-2013.pdf, last accessed on 8 November 2016.

17 RA 8799, Section 3.6.

18 Id., at Sections 41 and 42.

process, the identity of the original parties disappears and the original contract is replaced by two new contracts, and […] becomes the buyer to every seller and seller to every buyer in all exchange trades.'[19]

A clearing agency may also provide for the central handling of securities so that transfers, loans, pledges and similar transactions can be made by a bookkeeping entry, or otherwise, to facilitate the settlement of securities transactions without physical delivery of securities certificates.[20] Such clearing agency acts as a securities depository. The Philippine Depository and Trust Corp is a securities depository registered with the SEC.[21] In February 2013, the SEC granted the SCCP a provisional licence to operate as a securities depository.[22]

vi Recent jurisprudence

In the case of *Securities and Exchange Commission v. Prosperity.Com, Inc*,[23] the Philippine Supreme Court adopted the *Howey* test, as enunciated in a ruling of the United States' Supreme Court,[24] in settling the issue of whether a particular transaction is an investment contract within the definition of securities under the SRC.[25]

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

The *Howey* test provides that an investment contract has the following elements:

a a contract, transaction or scheme;
b an investment of money;
c an investment is made in a common enterprise;
d expectation of profits; and
e profits arising primarily from the efforts of others.

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

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

21 See www.sec.gov.ph/wp-content/uploads/2016/01/exchange-self-regulatory-organization-as-of-feb-2013.pdf, last accessed on 8 November 2016.

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

23 GR No. 164197, 25 January 2012.

24 *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.

25 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, *inter alia*, 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.

The Supreme Court reversed the SEC ruling. It 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 websites do not invest money in PCI that it could use for running a business to generate profits for investors. The commission is merely an incentive for clients to bring in other customers and does not constitute profits as contemplated under the *Howey* test.

In a more recent case, the Court had occasion to rule on the participation and possible culpability under the SRC of a broker,[26] dealer,[27] or an associated person of a broker or dealer.[28] In *Securities and Exchange Commission v. Santos*,[29] the Court ruled that the fact that a person is not a signatory to an investment contract and is merely an 'information provider' is not enough to exculpate such person from criminal charges for violation of Section 28 of the SRC, which requires all brokers, dealers and their respective associated persons to be registered with the SEC.

II THE YEAR IN REVIEW

i Developments affecting debt and equity offerings

Amended Implementing Rules of the SRC

On 6 August 2015, the SEC released a copy of the 2015 IRR. It was published on 25 October 2015, and took effect on 9 November 2015.

Certain fundamental changes were adopted in the 2015 IRR. Among these are the reduction of minimum gross annual income or portfolio investments in registered securities of qualified individual buyers from 25 million Philippine pesos to 10 million pesos. Securities issued or guaranteed by multilateral financial entities (MFEs) established through a treaty or any other binding agreement to which the Philippines is a party or subsequently becomes a member (such as international financial institutions, multilateral development banks, development finance institutions or any other similar entities), or by facilities or funds established, administered and supported by MFEs, are also considered as exempt securities under the 2015 IRR (i.e., these securities can be offered or sold in the Philippines without a registration statement filed therefor with and declared effective by the SEC). In lieu of the registration statement, the issuer must file an offering circular or memorandum in a format prescribed by the SEC containing, *inter alia*, information about the issuer and the security to be issued, information about the MFE and information about the guarantee.

The 2015 IRR of the SRC also clarified the SEC's policy on granting relief from the registration requirement due to the limited character of the offering. More specifically,

26 'Broker' is a person engaged in the business of buying and selling securities for the account of others.

27 'Dealer' means [any] person who buys [and] sells securities for his/her own account in the ordinary course of business.

28 'Associated person of a broker or dealer' is an employee thereof that directly exercises control of supervisory authority, but does not include a salesperson, an agent or a person whose functions are solely clerical or ministerial.

29 GR No. 195542, 19 March 2014.

employer-issuers issuing stock options pursuant to an employee stock option plan are exempt from the registration requirement, as long as the securities will only be made available to the persons named in the application for exemption for a specified period.

Any person (or group of persons acting in concert) who intends to acquire 15 per cent of equity securities in a public company in one or more transactions within 12 months is also required to file a declaration to that effect with the SEC. Meanwhile, unlike the Amended IRR, the 2015 IRR allow underwriters and issuers to agree on a different plan of distribution, and not only on a firm commitment basis.

It is notable, however, that the 2015 IRR are silent on the filing of notices of exemption with respect to transactions that are exempt from the requirement of registration of securities, particularly the private placement and qualified buyer exemptions. The SEC has previously announced that it will issue a clarificatory circular on this matter. At the time of writing, however, the SEC has not yet released such clarificatory circular.

The SEC has also announced that it will issue amended Special Accounting Rules (SRC Rule 68) applicable to companies covered by the SRC. The proposed amendment should, *inter alia*, extend the effectiveness of the financial statements of issuers applying for registration of their respective securities from 135 to 180 days. Pending the issuance of the amended Special Accounting Rules (SRC Rule 68), the SEC issued Financial Reporting Bulleting No. 18 on 22 December 2015 extending the effectiveness of the financial statements of issuers applying for registration of their respective securities from 135 to 180 days.

The PSE Amended Rule on Minimum Public Ownership[30] (MPO Rule)

On 1 January 2012, the amendments to the PSE's MPO Rule, 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 (Board Listing Rules).[31] 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

30 PSE Memorandum No. CN-0003-12.

31 PSE Memorandum No. CN-0023-13.

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 (ETF Rules)

In 2012, the SEC issued the ETF Rules,[32] while the PSE Rules on Exchange Traded Funds (PSE ETF Rules) were approved by the SEC on 18 March 2013. The PSE ETF Rules must be read in conjunction with the ETF Rules.[33]

An 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 relative to the issuance and redemption in creation units shall be prescribed and disclosed in its registration statement.[34]

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.[35] 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.[36]

The Real Estate Investment Trust Act of 2009[37] ***(REIT Act)***

In 2009, the REIT Act 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 the 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.[38]

Investment in the REIT shall be by way of subscription to or the 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.[39] REITs must also satisfy requirements on, *inter alia*, minimum public ownership, capitalisation, and investment in income-generating real estate and property development activities.

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

33 PSE Memorandum Circular No. CN-0010-13, Re: PSE Rules on Exchange Traded Funds (Part A General Provisions and Part B Listing and Disclosure).

34 SEC Memorandum Circular No. 10, series of 2012, at Section 4.

35 Id., at Sections 7.1 and 10.

36 Id., at Section 7.2.

37 RA 9856. See also Implementing Rules and Regulations of the REIT Act.

38 Id., at Section 3(cc).

39 Id., at Section 7.

Prohibition on gambling

With respect to derivatives, it would be well to take into account Article 2018 of the Civil Code of the Philippines (Civil Code),[40] 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 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 are legitimate modes of extinguishing obligations of persons who in their own right are reciprocally debtors and creditors of each other.[41]

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 – that 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 the 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.

40 RA 386.

41 Id., at Article 1278.

iii Cases and dispute settlement

The Alternative Dispute Resolution Act of 2004 (ADR Act)[42]

Arbitration in the Philippines is governed primarily by the ADR Act. The ADR Act declares it state policy to actively promote party autonomy in the resolution of disputes and 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, including arbitration, mediation, conciliation, early neutral evaluation or mini-trial, or any combination thereof.[43]

The ADR Act provides that international commercial arbitration shall be governed by the Model Law on International Commercial Arbitration (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,[44] 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 (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, *inter alia*, 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.[45]

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 ADR, the Supreme Court issued the Special Rules of Court on Alternative Dispute Resolution in 2009.[46]

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

42 RA 9285.

43 Id., at Section 3(a).

44 RA 876.

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

46 Id.

provide that publicly listed companies that are non-compliant with the PSE's 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 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 (Tax Code).[47]

Tax on income from corporate bonds

In December 2012, the Bureau of Internal Revenue 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 and foreign exchange gains shall not be covered by an 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

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

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 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*[48] *(FRIA)

In 2010, the FRIA was enacted and repealed the Insolvency Law of 1909.[49] 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: court-supervised rehabilitation; pre-negotiated rehabilitation; and 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 that, 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.[50]

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

48 RA 10142.

49 Act No. 1956.

50 RA 10142, Section 136.

v Other relevant laws and regulations

Amendments to the Anti-Money Laundering Act of 2001*[51] *(AMLA)

In 2013, the AMLA was further amended,[52] 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.[53] On the other hand, suspicious transactions are transactions with covered institutions, regardless of the amounts involved, where certain circumstances exist,[54] 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:

a banks, quasi-banks and trust entities;

b securities dealers, brokers, salespeople, investment houses and other similar entities managing securities or rendering services as investment agent, adviser or consultant;

c mutual funds, close-end investment companies, common trust funds, pre-need companies and other similar entities; and

d 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, *inter alia*, persons who provide the service of managing clients' money, securities or other assets, as well as the management of bank, savings or securities accounts.[55] 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.[56]

Data Privacy Act

In 2012, the Philippine Data Privacy Act was enacted, which seeks to ensure the confidentiality of information. The Act applies to: 'the processing[57] of all types of personal information and to any natural and juridical person involved in personal information processing including those […] controllers and processors who, although not found or established in the Philippines, use equipment that is located in the Philippines, or those who maintain an office, branch or agency in the Philippines.'[58] However, 'personal information originally collected from

51 RA 9160, as further amended by RA 10365.

52 Id.

53 Id., at Section 3(b).

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

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

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

57 Under the Data Privacy Act, processing refers to any operation or any set of operations performed upon personal information including, but not limited to, the collection, recording, organisation, storage, updating or modification, retrieval, consultation, use, consolidation, blocking, erasure or destruction of data (see Section 4(j)).

58 Id., at Section 4.

residents of foreign jurisdictions in accordance with the laws of those foreign jurisdictions, including any applicable data privacy laws, which is being processed in the Philippines'[59] is excluded from the scope of the Data Privacy Act.

The Data Privacy Act also provides for extraterritorial application, and applies to an act done or practice engaged in and outside of the Philippines by an entity if:

a the act, practice or processing relates to personal information about a Philippine citizen or a resident;

b the entity has a link with the Philippines, and the entity is processing personal information in the Philippines or even if the processing is outside the Philippines as long as it is about Philippine citizens or residents;[60] and

c the entity has other links in the Philippines.[61]

Under the Data Privacy Act, the processing of personal information may be lawfully done, provided one of the following conditions exists:[62]

a the data subject has given his or her consent;

b the processing of personal information is necessary and is related to the fulfilment of a contract with the data subject or in order to take steps at the request of the data subject prior to entering into a contract;

c the processing is necessary for compliance with a legal obligation to which the personal information controller is subject;

d the processing is necessary to protect vitally important interests of the data subject, including life and health;

e the processing is necessary to respond to a national emergency, to comply with the requirements of public order and safety, or to fulfil functions of a public authority that necessarily include the processing of personal data for the fulfilment of its mandate; or

f the processing is necessary for the purposes of legitimate interests pursued by the personal information controller or by a third party or parties to whom the data are disclosed, except where such interests are overridden by fundamental rights and freedoms of the data subject that require protection under the Philippine Constitution.

59 Id., at Section 4(g).

60 Examples are where a contract is entered in the Philippines; where a juridical entity is unincorporated in the Philippines but has central management and control in the country; and where an entity that has a branch, agency, office or subsidiary in the Philippines and the parent or affiliate of the Philippine entity has access to personal information.

61 Examples are where the entity carries on business in the Philippines and the personal information was collected or held by an entity in the Philippines.

62 Id., at Section 12.

The Data Privacy Act also requires that a controller or processor establish certain measures to ensure that information about the data subject is kept confidential[63] and punishes, *inter alia*:

a the unauthorised processing of personal information and sensitive personal information;[64]

b accessing due to negligence;[65]

63 Id., at Section 20. The measures are as follows:

a the personal information controller must implement reasonable and appropriate organisational, physical and technical measures intended for the protection of personal information against any accidental or unlawful destruction, alteration and disclosure, as well as against any other unlawful processing;

b the personal information controller shall implement reasonable and appropriate measures to protect personal information against natural dangers such as accidental loss or destruction, and human dangers such as unlawful access, fraudulent misuse, unlawful destruction, alteration and contamination;

c the determination of the appropriate level of security must take into account the nature of the personal information to be protected, the risks represented by the processing, the size of the organisation and complexity of its operations, current data privacy best practices and the cost of security implementation;

d the personal information controller must further ensure that third parties processing personal information on its behalf shall implement the security measures required by this provision;

e the employees, agents or representatives of a personal information controller who are involved in the processing of personal information shall operate and hold personal information under strict confidentiality if the personal information is not intended for public disclosure (which obligation shall continue even after leaving the public service, transfer to another position or upon termination of employment or contractual relations); and

f the personal information controller shall promptly notify the National Privacy Commission (Commission) and affected data subjects when sensitive personal information or other information that may, under the circumstances, be used to enable identity fraud is reasonably believed to have been acquired by an unauthorised person, and the personal information controller or the Commission believes that such unauthorised acquisition is likely to give rise to a real risk of serious harm to any affected data subject.

64 Id., at Section 25. This is punishable by imprisonment for a period ranging from one to three years, and a fine of not less than 500,000 Philippine pesos but not more than 2 million Philippine pesos. If the processing is made without the consent of the data subject or without being authorised under the Data Privacy Act, by imprisonment for a period ranging from three years to six years, and a fine of not less than 500,000 Philippine pesos but not more than 4 million Philippine pesos.

65 Id., at Section 26. If personal information is accessed, by imprisonment for a period ranging from one year to three years, and a fine of not less than 500,000 Philippine pesos but not more than 2 million Philippine pesos. If sensitive personal information is accessed, by imprisonment for a period ranging from three years to six years, and a fine of not less than 500,000 Philippine pesos but not more than 4 million Philippine pesos.

c improper disposal;[66]
d processing for unauthorised purposes;[67]
e unauthorised access or intentional breach;[68]
f concealment of security breaches involving sensitive personal information;[69] and
g malicious or unauthorised disclosure.[70]

The Implementing Rules and Regulations of the Data Privacy Act (Data Privacy Act IRR) were published in the website of the Official Gazette of the Republic of the Philippines on 25 August 2016. Under Philippine law, the Data Privacy Act IRR should take effect 15 days after their publication in a newspaper of general circulation. To date, the Data Privacy Act IRR are not effective as they have not yet been published in a newspaper of general circulation.

The Philippine Competition Act*[71] *(PCA)

The PCA was approved by the President on 21 July 2015. The PCA provides that parties to an acquisition for control (as characterised under the PCA) the value of which exceeds 1 billion pesos are prohibited from consummating the transaction until 30 days after providing notification to the Philippine Competition Commission (PCC). However, the PCC may, prior to the lapse of such 30-day period, ask for further information. If such a request is made, the parties are prohibited from consummating the agreement until the lapse of 60 days from their receipt of the request for further information. However, the total period for the PCC's review from the date of the filing of the notice cannot exceed 90 days. As defined

66 Id., at Section 27. This is punishable by imprisonment for a period ranging from six months to two years, and a fine of not less than 100,000 Philippine pesos but not more than 500,000 Philippine pesos. If the information was knowingly or negligently disposed, discarded or abandoned in an area accessible to the public, or otherwise the personal information of an individual was placed in a container for trash collection, by imprisonment for a period ranging from one year to three years, and a fine of not less than 100,000 Philippine pesos but not more than 1 million Philippine pesos.

67 Id., at Section 28. This is punishable by imprisonment for a period ranging from one year and six months to five years, and a fine of not less than 500,000 Philippine pesos but not more than 2 million Philippine pesos. If the processing was made for purposes not authorised by the data subject, or otherwise authorised under the Data Privacy Act or under existing laws, by imprisonment for a period ranging from two years to seven years, and a fine of not less than 500,000 Philippine pesos but not more than 2 million Philippine pesos.

68 Id., at Section 29. This is punishable by imprisonment for a period ranging from one year to three years, and a fine of not less than 500,000 but not more than 2 million Philippine pesos.

69 Id., at Section 30. This is punishable by imprisonment for a period ranging from one year and six months to five years, and a fine of not less than 500,000 Philippine pesos but not more than 1 million Philippine pesos.

70 Id., at Section 31. This is punishable by imprisonment for a period ranging from one year to three years, and a fine of not less than 500,000 Philippine pesos but not more than 1 million Philippine pesos.

71 RA No. 10667.

under the PCA, 'acquisition' refers to the purchase of securities or assets, through contract or other means, for the purpose of obtaining control by one entity of the whole or part of another; two or more entities over another; or one or more entities over one or more entities.

The PCA took effect on 8 August 2015. The Implementing Rules and Regulations of the PCA took effect on 18 June 2016.

Act amending investment restrictions in specific laws governing adjustment, lending and financing companies and investment houses cited in the Foreign Investment Negative List and for other purposes

RA No. 10881, which took effect on 16 August 2016, amended Section 5 of the Investment Houses Law. Due to such amendment, an investment house, *inter alia*, may now be owned up to 100 per cent by foreign nationals. Foreign nationals may also now become members of the board of directors to the extent of the foreign participation in the equity of said enterprise.

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 the 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 and void, inoperative or incapable of being performed. This rule is applicable to both international commercial arbitration and domestic arbitration.[72]

As a general rule, a foreign corporation doing business in the Philippines, but without a licence, cannot sue before any local court.[73] However, in the case of *Tuna Processing Inc v. Philippine Kingford, Inc*,[74] the Philippine Supreme Court allowed a foreign corporation not licensed to do business in the Philippines, but that collects royalties from entities in the Philippines, to sue for the enforcement of a foreign arbitral award it obtained in its favour pursuant to an arbitration clause in the contract that formed the subject of the breach.

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).

72 RA 9285, Sections 24 and 33.

73 Batas Pambansa Blg 68, Section 133.

74 GR No. 185582, 29 February 2012.

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 interests 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.[75]

III OUTLOOK AND CONCLUSIONS

More than 12 years since the enactment of the SRC, the 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:

a 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;
b 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 to make it appear that the corporation complied with the net capital requirement; and
c 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 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.[76]

Furthermore, in a decision dated 8 July 2016,[77] the SEC *en banc* imposed a fine of 174 million pesos for the purchase of a company's shares at a discounted price while in possession of

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

76 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 14 October 2016.

77 *Roberto V Ongpin v. Enforcement and Investor Protection Department*, SEC En Banc Case No. 03-15-367, 8 July 2016.

non-public material information as a director of such company. The appellant was also disqualified from being an officer, a member of the board of directors or a person performing similar functions of a public company or a publicly listed company.

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, having recently received credit rating upgrades, and it has been forecast by reputable credit rating agencies to have real potential to increase much more in the future. In this regard, along with growth of the Philippines' capital market, government regulators must remain all the more 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.

Appendix 1

ABOUT THE AUTHORS

MARIA TERESA D MERCADO-FERRER

SyCip Salazar Hernandez & Gatmaitan

Maria Teresa D Mercado-Ferrer's areas of practice cover banking, finance and securities; intellectual property, including licensing and franchising; mergers and acquisitions; investments; and food and drugs.

Some of the transactions Ms Ferrer has 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.

She is a member of Licensing Executives Society International, Licensing Executives Society-Philippines and the UP Women Lawyers' Circle. She co-authored the Philippines chapter of CCH *Doing Business in Asia*.

JOAN MAE S TO

SyCip Salazar Hernandez & Gatmaitan

Joan Mae S To is a member of the firm's special projects and banking, finance and securities groups. Her practice areas include energy, investments, mergers and acquisitions, and banking, finance and securities.

Some of Ms To's significant transactions include the US$1.043 billion acquisition by a Swiss international food and beverage company of a leading Philippine infant formula manufacturer; a US$350 million syndicated loan to the Philippine's largest bank; and providing advice to various prospective investors and financing institutions on the corporate structuring and legal and regulatory framework for the energy sector, including renewable energy.

JO MARIANNI P OCAMPO

SyCip Salazar Hernandez & Gatmaitan

Jo Marianni P Ocampo is a member of the firm's special projects and banking, finance and securities groups.

SYCIP SALAZAR HERNANDEZ & GATMAITAN
SyCipLaw Center
105 Paseo de Roxas
Makati City 1226
Metro Manila
Philippines
Tel: +632 982 3500/3600/3700
Fax: +632 817 3145/3896
mtmferrer@syciplaw.com
jmsto@syciplaw.com
jmpocampo@syciplaw.com
www.syciplaw.com