

Conflicts in Implementing the UNCITRAL Model Law on Insolvency as Adopted By the FRIA

Ma. Mercedes Leanne B. Torrijos*

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I. INTRODUCTION

National insolvency laws have been staggering behind the progression of global expansion of trade and investment.¹ Cross-border insolvency cases have multiplied in number, while local laws have been unsuccessful at keeping suit in addressing cases of such nature.² Because of this, legal approaches have been said to be inadequate and inharmonious, hampering the rescue of financially troubled businesses that are unable to afford “fair and efficient administration of cross-border insolvencies, impede the

protection of the assets of the insolvent debtor against dissipation[,] and hinder maximization of the value of those assets.”³

Due process requires that parties be afforded means of stimulating their course throughout the legal process.⁴ Without the proper regulations as to the courses of action and specific methodology of handling a cross-border proceeding, the result is a crippling of capital flow across borders.⁵ Absent a sense of predictability in the handling of a cross-border insolvency case, a slight disincentive towards investment is unduly created.⁶ This is highlighted by the fact that fraud by insolvent debtors has become an increasing problem in both *frequency* and *magnitude*.⁷ This is because impecunious debtors are able to either conceal their assets or transfer assets into foreign jurisdictions beyond the reach of the Forum by taking advantage of the lack of communication and coordination among courts,⁸ resulting in a situation where “assets would be dissipated, fraudulently concealed, or possibly liquidated without reference to other more advantageous solutions.”⁹ It had been noted by the Working Group of the United Nations that

[a]s a result, not only is the ability of creditors to receive payment diminished, but so is the possibility of rescuing financially viable businesses and saving jobs. By contrast, mechanisms in national legislation for coordinated administration of cases of cross-border insolvency make it possible to adopt solutions that are sensible and in the best interest of the creditors and the debtor; the presence of such mechanisms in the law of a State is therefore perceived as advantageous for foreign investment and trade in that State.¹⁰

Due to this, the United Nations Commission on International Trade Law (UNCITRAL) created a Model Law on Cross-Border Insolvency¹¹ to promote the objectives of (1) cooperation between courts of different jurisdictions,¹² (2) predictability for trade and investment,¹³ (3) better

* '13 J.D. cand., Ateneo de Manila University School of Law. Member, Board of Editors, *Ateneo Law Journal*. The Author was Associate Lead Editor for the fourth issue of the 55th volume. She previously wrote *Cross-Border Practice in the Legal Profession: Precautions for a Transnational Lawyer*, 56 *ATENEO L.J.* 737 (2011).

Cite as 56 *ATENEO L.J.* 996 (2012).

1. U.N. Commission on Int'l Trade Law, *Cross-Border Insolvency: Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, ¶ 13, U.N. Doc. No. A/CN.9/442 (May 12-30, 1997).
2. Fernando del Castillo et al., *The Law of Cross-Border Insolvency Proceedings: A Brief of its Sources, Development and Present Status*, available at <http://www.terralex.org/publication/4e0f8da0de> (last accessed Feb. 29, 2012).

3. *Cross-Border Insolvency: Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, supra note 1, at ¶ 13.
4. *Id.* ¶ 120.
5. *Id.* ¶ 13.
6. *Id.*
7. *Id.* ¶ 14.
8. *Id.* ¶ 17.
9. *Cross-Border Insolvency: Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, supra note 1, at ¶ 17.
10. *Id.*
11. Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law, G.A. Res. 52/158, U.N. Doc. A/RES/52/158 (Jan. 30, 1998).
12. *Id.* pmbl.

administration of cross-border insolvency proceedings,¹⁴ (4) the maximization of the debtor's remaining assets,¹⁵ and (5) the protection of investment and employment.¹⁶

Yet, without the Model Law, it could be said that a coordinated administration of cases on cross-border insolvency could be achieved in other ways. One could find relief through the international doctrines of comity¹⁷ or *exequatur*.¹⁸ While these doctrines could provide palliative resolutions at the most, an argument against them shows that they are unable to provide "the same degree of predictability and reliability as can be provided by specific legislation, such as the one contained in the Model Law

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. Comity does not have a definite meaning. One view states that:

comity is not a legal concept at all, but rather that it simply encapsulates the rules of politeness, convenience[,] and goodwill that are observed by states in their mutual dealings without being legally bound by them.

...

When a foreign judgment is given effect in the enforcing state, either through direct enforcement or when the enforcing state grants a complimentary judgment without inquiring into the factual or legal merits of the foreign judgment, the enforcing state is applying foreign law within its territory, rather than its own law.

David R. Wingfield, *Comity and the Enforcement of Foreign Judgments* (A Presentation to the OECS Bar Association 5th Regional Law Fair) 1 & 2, available at http://www.eccourts.org/jei_doc/2008/cpr2000/ComityandtheEnforcementofForeignJudgmentsbyDavidWingfield.pdf (last accessed Feb. 29, 2012) (citing 1 OPPENHEIM'S INTERNATIONAL LAW 50-51 (Robert Jennings & Arthur Watts eds., 9th ed. 1992)).

18. *Exequatur*, on the other hand, is described as follows.

In many civil law tradition countries, recognition of a foreign insolvency case may be possible by utilizing local civil law to obtain an enabling order (an *exequatur*). In effect, this is like recognition of a judgment. This type of legislation will usually enable access to a court to possibly obtain recognition of the opening of a foreign insolvency case in respect of the debtor.

ASIAN DEVELOPMENT BANK, PROMOTING REGIONAL COOPERATION IN THE DEVELOPMENT OF INSOLVENCY LAW REFORMS 27 (2008), available at <http://www.adb.org/Documents/Reports/Insolvency-Law-Final-Report/parto4.pdf> (last accessed Feb. 29, 2012).

on judicial cooperation, recognition of foreign insolvency proceedings[,] and access for foreign representatives to courts."¹⁹

While national laws on insolvency should serve as a fortification for those who have an interest in rehabilitation proceedings, the incorporation of the Model Law should strengthen these defenses due to its outstretched approach in appreciating the current realities behind the global expansion of trade and investment.²⁰

In the Philippines, the first insolvency law was passed in 1909.²¹ From this law, there have been many attempts at modernizing the law, especially during the 1980s when Presidential Decrees were permitted.²² These attempts include the amendments of the Corporation Code²³ and the Securities Act,²⁴ although there was hardly any emphasis towards updating Liquidation and Dissolution of Corporations.²⁵ It was observed that at the time, the country was "stuck with the old-fashioned type of either liquidating the corporation, letting it die slowly[,] or killing its potential or

19. *Cross-Border Insolvency: Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, supra note 1, ¶ 16. To illustrate:

For example, in a given legal system general legislation on reciprocal recognition of judgments, including *exequatur*, might be confined to enforcement of specific money judgments or money orders in two-party disputes, thus excluding decisions opening collective insolvency proceedings. Furthermore, recognition of foreign insolvency proceedings might not be considered as a matter of recognizing a foreign "judgment," for example, if the foreign bankruptcy order is considered to be merely a declaration of status of the debtor or if the order is considered not to be final:

Id.

20. *Id.* ¶ 13.

21. An Act Providing for the Suspension of Payments, the Relief of Insolvent Debtors, the Protection of Creditors, and the Punishment of Fraudulent Debtors [The Insolvency Law], Act No. 1956 (1909).

22. See generally Reorganization of the Securities and Exchange Commission with Additional Power and Placing the Said Agency Under the Administrative Supervision of the Office of the President, Presidential Decree No. 902-A (1976); Amending Further Sections 2, 3, 5, 6, and 8 of Presidential Decree No. 902-A, Presidential Decree No. 1758 (1981); and Amending Further Section 6 of Presidential Decree No. 902-A, Presidential Decree No. 1799 (1981).

23. The Corporation Code of the Philippines [CORPORATION CODE], Batas Pambansa Blg. 68 (1980).

24. The Revised Securities Act [Revised Securities Act], Batas Pambansa Blg. 178 (1982).

25. S. JOURNAL Sess. No. 13, at 375, 14th Cong., 3d Reg. Sess. (Aug. 26, 2009).

capacity to create jobs through a very protracted process.”²⁶ It was only in 2010 that a comprehensive insolvency law was created. Before ending its 14th session, Congress enacted on 2 February 2010, the Financial Rehabilitation and Insolvency Act (FRIA)²⁷ or Republic Act 10142. In addressing the need for recognizing cross-border insolvency, the FRIA, in Section 139, adopted the UNCITRAL Model Law on Cross-Border Insolvency, particularly stating that

Section 139. *Adoption of Uncitral Model Law on Cross-Border Insolvency.* — Subject to the provision of Section 136 hereof and the rules of procedure that may be adopted by the Supreme Court, the Model Law on Cross-Border Insolvency of the United Nations Center for International Trade and Development is hereby adopted as part of this Act.²⁸

In the senate floor deliberations, Senate Bill No. 61²⁹ (later on passed into FRIA) was primarily silent on the adoption of the UNCITRAL Model Law. The said bill contained a provision on the *Petition by Foreign Entity* stating that “[t]he Court shall set a hearing in connection with an insolvency or rehabilitation proceeding taking place in a foreign jurisdiction, upon the submission of a petition by the representative of the foreign entity that is the subject of the foreign proceeding.”³⁰ It was during the period of committee amendments that the entire Section 93 of the Senate Bill was deleted and replaced by the “Adoption of UNCITRAL Model Law on Cross Border Insolvency” as it appears now in the FRIA.³¹

II. A TREATMENT FOR COORDINATION

The UNCITRAL Model Law, like any other model law, is a “legislative text that is recommended to States for incorporation into their national law.”³² By the incorporation of the Model Law, the Philippines maintains the ultimate discretion in determining which provisions it deems suitable for

26. *Id.*

27. An Act Providing for the Rehabilitation or Liquidation of Financially Distressed Enterprises and Individuals, [Financial Rehabilitation and Insolvency Act (FRIA) of 2010], Republic Act No. 10142 (2010).

28. *Id.* § 139.

29. An Act Providing for the Rehabilitation or Liquidation of Financially Distressed Enterprises, S.B. No. 61, 14th Cong., 1st Reg. Sess. (2009), available at <http://www.senate.gov.ph/lisdata/41163531!.pdf> (last accessed Feb. 29, 2012).

30. S.B. No. 61, § 93.

31. S. JOURNAL Sess. No. 23, at 678, 14th Cong., 3d Reg. Sess. (Sep. 28, 2009).

32. *Cross-Border Insolvency: Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, supra note 1, ¶ 11.

application in its jurisdiction.³³ Yet, in the text of the FRIA, particularly Section 139 thereof, the Philippines adopted the UNCITRAL Model Law with the only condition that it shall be subject to the “rules of procedure that may be adopted by the Supreme Court,”³⁴ which, up to the present, have not yet been established.

The basic policy objective of the Model Law is to give a “general orientation” for users of the Model Law and to assist in its interpretation.³⁵ The application of the Model Law may be admitted in a number of cross-border insolvency situations including the following:

- (1) The case of inward-bound request for recognition of a foreign proceeding;³⁶
- (2) An outward-bound request from a court or administrator in the enacting State for recognition of an insolvency proceeding commenced under the laws of the enacting State;³⁷
- (3) Coordination of concurrent proceedings in two or more States; and³⁸
- (4) Participation of foreign creditors in insolvency proceedings taking place in the enacting State.³⁹

The Model Law avoids the need to rely on cumbersome and time-consuming forms of diplomatic or consular communications that are called for in the specific jurisdiction.⁴⁰ The process of “aligning relief” resulting from recognizing a foreign proceeding with the relief available in a comparable proceeding in the forum is in line with “fitting the model law into existing national law.”⁴¹

33. *Id.* ¶ 12. The Paragraph states in part that “[i]n incorporating the text of the model law into its system, a State may modify or leave out some of its provisions.” *Id.*

34. Financial Rehabilitation and Insolvency Act (FRIA) of 2010, §139.

35. *Cross-Border Insolvency: Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, supra note 1, ¶ 54.

36. *Id.* ¶ 22.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* ¶ 28.

41. *Cross-Border Insolvency: Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, supra note 1, ¶¶ 20 & 21.

The Model Law deals with coordination between local and foreign proceedings.⁴² Three treatments of *coordination* are generally found under the Model law. The *first* states that there must be coordination between local and foreign proceedings concerning the same debtor.⁴³ In this situation, the provision aims to foster coordinated decisions that could “best achieve the objectives of *both proceedings*.”⁴⁴ This contemplates the maximization of assets by finding the most advantageous means of restructuring or rehabilitating the enterprise.⁴⁵ The direction is to cooperate to the maximum extent possible with foreign courts and the foreign representatives.⁴⁶ The *second* treatment of coordination involves a local insolvency proceeding that is already pending at the time of application for recognition of the foreign proceeding.⁴⁷ Because of the pending local proceeding, Article 20 of the Model Law⁴⁸

42. G.A. Res. 52/158, *supra* note 11, art. 1. The Article states that the Model Law applies where:

- (a) Assistance is sought in this State by a foreign court or a foreign representative in connection with a foreign proceeding; or
- (b) Assistance is sought in a foreign State in connection with a proceeding under [*identify laws of the enacting State relating to insolvency*]; or
- (c) A foreign proceeding and a proceeding under [*identify laws of the enacting State relating to insolvency*] in respect of the same debtor are taking place concurrently; or
- (d) Creditors or other interested persons in a foreign State have an interest requesting the commencement of, or participating in, a proceeding under [*identify the laws of the enacting state relating to insolvency*].

Id. The italicized text in the brackets represent the laws of the enacting State that are to be filled in by legislators in the process of creating a cross-border insolvency law in their State.

43. *Cross-Border Insolvency: Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, *supra* note 1, ¶ 44. See G.A. Res. 52/158, *supra* note 11, art. 29.

44. *Cross-Border Insolvency: Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, *supra* note 1, ¶ 44 (emphasis supplied).

45. *Id.*

46. *Id.* See G.A. Res. 52/158, *supra* note 11, arts. 25 & 30.

47. *Cross-Border Insolvency: Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, *supra* note 1, ¶ 45.

48. Article 20 of the UNCITRAL Model Law on Cross-Border Insolvency provides, among others, that “(a) Commencement or continuation of individual actions or individual proceedings concerning the debtor’s assets, rights, obligations or liabilities is stayed; (b) Execution against the debtor’s assets is stayed; and (c) The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.” G.A. Res. 52/158, *supra* note 11, art. 20.

shall no longer be applicable.⁴⁹ The bar on the operation of Article 20 is due to the fact that there is no longer a need to stay the individual actions or enforcement proceedings against the debtor and a suspension of the debtor’s right to transfer or encumber assets.⁵⁰ These reliefs are aptly granted under Section 16 of the FRIA.⁵¹ The *third* treatment of coordination materializes when the court is faced with more than one foreign proceeding before it.⁵² This calls for the implementation of Article 30⁵³ which requires that the court “tailor[] relief in such a way that will facilitate coordination of the foreign proceedings[.]”⁵⁴

III. A VEHICLE FOR THE HARMONIZATION OF LAWS

As the Model Law aims to harmonize boundaries created between borders,⁵⁵ there is still a need to address certain creases or wrinkles in the application of this law with our local law. The Author points out two possible avenues of conflict upon implementing the UNCITRAL Model Law in the jurisdiction of our local courts. The two areas of conflict, namely 1) Exclusions and 2) Access shall be discussed below.

A. Exclusions from the Coverage

The scope of the Model Law is limited to cases involving “foreign proceedings” and “foreign representatives.”⁵⁶ By looking at the definitions in Article 2 of the Model Law, these terms are detailed as follows —

(a) “Foreign proceeding” means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation;

...

(d) “Foreign representative” means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to

49. *Cross-Border Insolvency: Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, *supra* note 1, ¶ 45.

50. *Id.*

51. Financial Rehabilitation and Insolvency Act (FRIA) of 2010, § 16.

52. *Cross-Border Insolvency: Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, *supra* note 1, ¶ 47.

53. G.A. Res. 52/158, *supra* note 11, art. 30.

54. *Cross-Border Insolvency: Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, *supra* note 1, ¶ 47.

55. *Id.* ¶ 1.

56. See G.A. Res. 52/158, *supra* note 11, art. 1.

administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding.⁵⁷

In specifying the characteristics of a "foreign proceeding" and a "foreign representative, the definitions mentioned in Article 2 of the UNCITRAL Model Law further limits the scope of its application.⁵⁸ For a proceeding to be "susceptible to recognition or cooperation under the Model Law and for a foreign representative to be accorded access to local courts under the Model Law, the foreign proceeding and the foreign representative must have the attributes of [the definitions mentioned above.]"⁵⁹

Similarly, the Model Law recognizes the limitation of its application on banks and insurance companies.⁶⁰ The FRIA, in Section 5 thereof, enumerates in detail those entities excluded from the scope of the said law

Section 5. Exclusions. — The term debtor does not include banks, insurance companies, pre-need companies, and national and local government agencies or units.

For purposes of this section:

- (a) Bank shall refer to any duly licensed bank or quasi-bank that is potentially or actually subject to conservatorship, receivership or liquidation proceedings under the New Central Bank Act (Republic Act No. 7653) or successor legislation;
- (b) Insurance company shall refer to those companies that are potentially or actually subject to insolvency proceedings under the Insurance Code (Presidential Decree No. 1460) or successor legislation; and
- (c) Pre-need company shall refer to any corporation authorized/licensed to sell or offer to sell pre-need plans.

Provided, That government financial institutions other than banks and government-owned or controlled corporations shall be covered by this Act, unless their specific charter provides otherwise.⁶¹

As in the Model Law,⁶² banks or insurance companies are excluded from the scope because the insolvency of such entities give rise to the

57. *Id.* art. 2 ¶¶ (a) & (d).

58. *Id.*

59. *Cross-Border Insolvency: Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, *supra* note 1, ¶ 68.

60. G.A. Res. 52/158, *supra* note 11, art. 1 ¶ 2.

61. Financial Rehabilitation and Insolvency Act (FRIA) of 2010, § 5 (emphasis supplied).

62. G.A. Res. 52/158, *supra* note 11, art. 1 ¶ 2. "This Law does not apply to a proceeding concerning [designate any types of entities, such as banks or insurance

exceptional need to protect vital interests of a large number of individuals,⁶³ or that the insolvency of those entities usually requires administration from "special regulatory regimes."⁶⁴ A situation may arise where the exclusions under Section 5 of the FRIA will be disregarded in order to recognize a foreign proceeding involving a bank or an insurance company because it is not subject to a special regulatory scheme in the foreign state. In such a case, the laws under the UNCITRAL Model Law as well as the FRIA are silent on how to resolve this scenario.

B. *The Right of Direct Access*

One important objective of the Model Law is to provide "expedited and direct access for foreign representatives to the courts of the enacting State."⁶⁵ Through the right of direct access, the foreign representative is able to directly file a petition for the recognition of a foreign proceeding without the need to produce forms of diplomatic or consular communications.⁶⁶ This, however, raises a concern regarding the threshold issue as to what extent a jurisdiction will be prepared to cooperate in adapting laws or judgment of other countries.⁶⁷ The customary mechanisms of the forum or enacting state may require difficult standards before entrance into its jurisdiction is allowed. In the Philippines, the recognition of judgments call for the strict offer of certain documents for a foreign judgment to be allowed access to the courts by the very fact that they, as a general rule, are without extra-territorial application.⁶⁸ Proof of the foreign judgment should be presented in accordance with the authorized rules of procedure.⁶⁹ The requisites for the recognition and enforcement of foreign judgments in the Philippines are as follows:

- (1) The foreign judgment must be supported by adequate proof;⁷⁰

companies, that are subject to a special insolvency regime in this State and that this State wishes to exclude from this Law]." *Id.* The italicized portion in brackets indicates that the enacting State may designate entities such as banks or insurance companies to be excluded from the application of the Model Law.

63. *Cross-Border Insolvency: Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, *supra* note 1, ¶ 61.

64. *Id.*

65. *Id.* ¶ 28.

66. *Id.*

67. See ASIAN DEVELOPMENT BANK, *supra* note 18, at 18.

68. EDGARDO L. PARAS, PHILIPPINE CONFLICT OF LAWS 74 (8th ed. 1996).

69. *Id.* (citing HERBERT F. GOODRICH, HANDBOOK OF THE CONFLICT OF LAWS 600-01 (1949)).

70. PARAS, *supra* note 68, at 76 (citing Perkins v. Benguet Consolidated Mining Co., et al. 93 Phil. 1035 (1935)).

- (2) It must be a judgment on civil and commercial matters;⁷¹
- (3) The judgment must be without “want of jurisdiction want of notice to the party, collusion, fraud, or clear mistake of law or fact”;⁷²
- (4) The judgment must not be against public policy;⁷³
- (5) The judgment must constitute *res judicata*;⁷⁴ and
- (6) The foreign judgment must not be barred by prescription under the law of the State in which it was promulgated or under the law of the State in which its recognition or enforcement is sought.⁷⁵

These requisites must be read *vis-à-vis* Article 15 of the UNCITRAL Model Law that provides —

- (1) A foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed.
- (2) An application for recognition shall be accompanied by:
 - (a) A certified true copy of the decision commencing the foreign proceeding and appointing the foreign representative; or
 - (b) A certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or
 - (c) *In the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.*
- (3) An application for recognition shall also be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.

71. PARAS, *supra* note 68, at 76 (citing GOODRICH, *supra* note 69, at 623–24).

72. PARAS, *supra* note 68, at 76 (citing 1964 RULES OF CIVIL PROCEDURE, rule 39, § 50 (b) (superseded 1997)). See 1997 RULES OF CIVIL PROCEDURE, rule 39 § 48.

73. PARAS, *supra* note 68, at 76 (citing Querubin v. Querubin, 87 Phil. 124, 133 (1950)).

74. PARAS, *supra* note 68, at 77 (citing 2 JOSEPH HENRY BEALE, TREATISE ON THE CONFLICT OF LAWS 1390 (1935)).

75. MICHAEL CHARLES PRYLES, DISPUTE RESOLUTIONS IN ASIA 324 (2006).

- (4) The court may require a translation of documents supplied in support of the application of recognition into an official language of this State.⁷⁶

At first glance, there is a glaring discrepancy as to how recognition shall be allowed in the jurisdiction of Philippine courts. Not only does it allow, for purposes of recognition, either a certified true copy of the decision commencing a foreign proceeding⁷⁷ or a certificate from the foreign country that affirms the existence of the foreign proceeding,⁷⁸ it goes further by stating that in the absence of these requirements, “any” other evidence acceptable⁷⁹ may be allowed. Yet, according to the Revised Rules of Evidence, it states that an official record, or in this case a judgment, may be

evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied, if the record is not kept in the Philippines, with a certificate that such officer has the custody. If the office in which the record is kept is in a foreign country, *the certificate may be made by a secretary of the embassy or legation, consul general, consul, vice consul, or consular agent or by any officer in the foreign service of the Philippines stationed in the foreign country in which the record is kept, and authenticated by the seal of his office.*⁸⁰

It thus becomes more apparent that due to Article 15 of the Model Law,⁸¹ documents submitted in support of the recognition proceedings need not be authenticated or “legalized”⁸² before the Courts may consider them.

Furthermore, Article 16 of the Model Law provides that

- (1) If the decision or certificate referred to in paragraph 2 of article 15 indicates that the foreign proceeding is a proceeding within the meaning of subparagraph (a) of article 2 and that the foreign representative is a person or body within the meaning of subparagraph (d) of article 2, the court is entitled so to presume.

76. G.A. Res. 52/158, *supra* note 11, art. 15 (emphasis supplied).

77. *Id.* art. 15 ¶ 2 (a).

78. *Id.* art. 15 ¶ 2 (b).

79. *Id.* art. 15 ¶ 2 (c).

80. REVISED RULES ON EVIDENCE, rule 132, § 24 (emphasis supplied).

81. G.A. Res. 52/158, *supra* note 11, art. 15.

82. *Legalization*

is a term used for the formality by which a diplomatic or consular agent of the State in which the document is to be produced certifies the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp on the document.

Cross-Border Insolvency: Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency, *supra* note 1, ¶ 113.

- (2) The court is entitled to presume that documents submitted in support of the application for recognition are authentic, whether or not they have been legalized.
- (3) In the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests.⁸³

Due to Article 16, paragraph 2 of the Model Law, courts are given a presumption in favor of the authenticity of documents without the need for any process of "legalization."⁸⁴ Again, this runs in contradiction with the abovementioned rule on proof of documents. The result is a liberalization of the courts in accepting documents without the need for proof of their authenticity or without the need of going through the rigors of the rules regarding the authentication and proof of public documents. This paints a picture in which any foreign body administering a reorganization or liquidation may petition⁸⁵ the local court for recognition and enforcement only on the basis of a certificate from a foreign court regarding such pending litigation, without necessarily presenting the proper proofs of its authenticity.⁸⁶ Again, the Model Law allows parties to rest on the discretion of the court in finding whether such documents may be admissible.⁸⁷ There

83. G.A. Res. 52/158, *supra* note 11, art. 16.

84. *Id.* art. 16 ¶ 2.

85. It was held by the Supreme Court in *Mejares v. Ranada* that —

[I]t is usually necessary for an action to be filed in order to enforce a foreign judgment, even if such judgment has conclusive effect as in the case of *in rem* actions, if only for the purpose of allowing the losing party an opportunity to challenge the foreign judgment, and in order for the court to properly determine its efficacy. Consequently, the party attacking a foreign judgment has the burden of overcoming the presumption of its validity.

The rules are silent as to what initiatory procedure must be undertaken in order to enforce a foreign judgment in the Philippines. But there is no question that the filing of a civil complaint is an appropriate measure for such purpose. A civil action is one by which a party sues another for the enforcement or protection of a right, and clearly an action to enforce a foreign judgment is in essence a vindication of a right prescinding either from a "conclusive judgment upon title" or the "presumptive evidence of a right." Absent perhaps a statutory grant of jurisdiction to a quasi-judicial body, the claim for enforcement of judgment must be brought before the regular courts.

Mejares v. Ranada, 455 SCRA 397, 410 (2005).

86. See G.A. Res. 52/158, *supra* note 11, art. 15.

87. *Id.* art. 16 ¶ 2. It states that "[t]he court is entitled to presume that the documents submitted in support of the application for recognition are authentic, whether or not they have been legalized." *Id.*

seems to be a conflict in applying the laws on enforcement and recognition of judgments upon examination of the Rules of Court and the provisions of the UNCITRAL Model Law. Perhaps this could be best addressed if there were supplementary rules, such as a set of Implementing Rules and Regulations of the FRIA promulgated by the Supreme Court.

IV. ANALYSIS AND RECOMMENDATIONS

From the two subjects of contention, the Author posits some points of consideration regarding the topic on Exclusions and the topic on Direct Access.

A. Exclusions

In the Discussion of the UNCITRAL Working Group,⁸⁸ it was suggested that "[an] enacting State might wish to treat, for recognition purposes, a foreign insolvency proceeding relating to a bank or an insurance company as an ordinary insolvency proceeding if the insolvency of the branch or of the assets of the foreign entity in the enacting State do not fall under the national regulatory scheme."⁸⁹ This means that the application of the exclusions under the FRIA should not be strictly imposed since the particular special laws would not come into play anyway. Perhaps the FRIA should be mindful of the fulfillment of the rationale of the Model Law on *cooperation* and *coördination* by not inadvertently and undesirably limiting the right of the foreign insolvency court to secure assistance or recognition merely because that insolvency is *subject to a special regulatory scheme*.

B. Direct Access

Perhaps the tone of Article 15 allowing direct access to the courts of the Philippines⁹⁰ could be remedied by supplementing more defenses against arbitrary standards of recognizing foreign judgments.

88. U.N. Commission on Int'l Trade Law, *Report of UNCITRAL on the work of its thirtieth session*, U.N. Doc. A/52/17 (May 12-30 1997). See also *Cross-Border Insolvency: Guide to the Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, *supra* note 1, ¶¶ 24-33; U.N. Commission on Int'l Trade Law, *Report of the Working Group on Insolvency Law on the work of the twentieth session*, ¶¶ 29-32, U.N. Doc. A/CN.9/433 (May 12-30 1997); and U.N. Commission on Int'l Trade Law, *Report of the Working Group on Insolvency Law on the work of the twenty-first session*, ¶¶ 102-106 & 179, U.N. Doc. A/CN.9/435 (May 12-30 1997).

89. *Cross-Border Insolvency: Guide to the Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, *supra* note 1, ¶ 63 (emphasis supplied).

90. G.A. Res. 52/158, *supra* note 11, art. 15.

The United States (U.S.) has adopted *in toto* Article 15 of the UNCITRAL Model Law into their laws on insolvency, found in Section 1515 of the Bankruptcy Code.⁹¹ It should be recalled that the FRIA adopted the Model Law through Section 139,⁹² without supplying the necessary support in order to implement it flawlessly. However, unlike the FRIA, the U.S. Bankruptcy Code, took portions of the Model Law and created additional guidelines on the effects of its implementation. Such guidelines are stated in Section 1509:

- (a) A foreign representative may commence a case under section 1504 by filing directly with the court a petition for recognition of a foreign proceeding under section 1515.
- (b) If the court grants recognition under section 1517, and subject to any limitations that the court may impose consistent with the policy of this chapter —
 - (1) the foreign representative has the capacity to sue and be sued in a court in the United States;
 - (2) the foreign representative may apply directly to a court in the United States for appropriate relief in that court; and

91. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), 11 U.S.C. § 1515 (2006). The Section is worded exactly as the UNCITRAL Model Law, stating that

- (a) A foreign representative applies to the court for recognition of a foreign proceeding in which the foreign representative has been appointed by filing a petition for recognition.
- (b) A petition for recognition shall be accompanied by —
 - (1) a certified copy of the decision commencing such foreign proceeding and appointing the foreign representative;
 - (2) a certificate from the foreign court affirming the existence of such foreign proceeding and of the appointment of the foreign representative; or
 - (3) in the absence of evidence referred to in paragraphs (1) and (2), any other evidence acceptable to the court of the existence of such foreign proceeding and of the appointment of the foreign representative.
- (c) A petition for recognition shall also be accompanied by a statement identifying all foreign proceedings with respect to the debtor that are known to the foreign representative.
- (d) The documents referred to in paragraphs (1) and (2) of subsection (b) shall be translated into English. The court may require a translation into English of additional documents.

Id.

92. Financial Rehabilitation and Insolvency Act (FRIA) of 2010, § 139.

- (3) a court in the United States shall grant comity or cooperation to the foreign representative.
- (c) A request for comity or cooperation by a foreign representative in a court in the United States other than the court which granted recognition shall be accompanied by a certified copy of an order granting recognition under section 1517.
- (d) If the court denies recognition under this chapter, the court may issue any appropriate order necessary to prevent the foreign representative from obtaining comity or cooperation from courts in the United States.
- (e) Whether or not the court grants recognition, and subject to sections 306 and 1510, a foreign representative is subject to applicable nonbankruptcy law.
- (f) Notwithstanding any other provision of this section, the failure of a foreign representative to commence a case or to obtain recognition under this chapter does not affect any right the foreign representative may have to sue in a court in the United States to collect or recover a claim which is the property of the debtor.⁹³

From Section 1509, the law limits the resulting actions that the foreign representative may avail of by enumerating the effects of the recognition.⁹⁴ The law allows the foreign representative, after recognition, to then commence either a voluntary or involuntary petition for bankruptcy, as the case may be.⁹⁵ Such foreign representative is then given the status of a party in interest, and shall participate accordingly in the case.⁹⁶ The Bankruptcy Code gives further protection by limiting the scope of the court in stating

93. 11 U.S.C. § 1509.

94. *Id.* § 1511 ¶ (b).

95. *Id.* § 1511. The Section provides that

- (a) Upon recognition, a foreign representative may commence—
 - (1) an involuntary case under section 303; or
 - (2) a voluntary case under section 301 or 302, if the foreign proceeding is a foreign main proceeding.
- (b) The petition commencing a case under subsection (a) must be accompanied by a certified copy of an order granting recognition. The court where the petition for recognition has been filed must be advised of the foreign representative's intent to commence a case under subsection (a) prior to such commencement.

Id.

96. *Id.* § 1512. The Section provides that “[u]pon recognition of a foreign proceeding, the foreign representative in the recognized proceeding is entitled to participate as a party in interest in a case regarding the debtor under this title.” *Id.*

that "the sole fact that a foreign representative files a petition under section 1515 does not subject the foreign representative to the jurisdiction of any court in the United States for any other purpose."⁹⁷ Conceivably, by providing further safeguards that come with the recognition of a foreign judgment, the right of direct access should not run contrary to spirit behind the strict procedure demanded by our Rules.

V. CONCLUSION

After looking into the different conflicts which may arise upon the incorporation of the UNCITRAL Model Law, it is important to see it now in its totality, and if it contributes to the treatment of cross-border insolvencies in the Philippines. First, it must be mentioned that the Model Law is not a treaty or convention⁹⁸ — the two consequences of this being that (1) it will only become effective if a jurisdiction legislates for it to be a part of domestic legislation (to which the Philippines has done),⁹⁹ and (2) it will not, by itself, result in reciprocity because it operates unilaterally.¹⁰⁰ This means that the concepts of coordination and cooperation can only apply insofar as another foreign jurisdiction has acceded to the principles of the Model Law. Thus, while the UNCITRAL allows a space for cross-border insolvency reliefs, this does not mean that a Filipino debtor, creditor, or interested person, is accorded the same privileges such as direct access and presumptions of authenticity.

The discussions above on Exclusions and Access only highlight the need for supplemental rules on how to go about in such circumstances, lest the *ratio* behind the UNCITRAL Model Law be undermined. Aside from this, it is the stand of this Author that the UNCITRAL Model Law creates an avenue that promotes and even protects the interest of the Philippines for two reasons. First, riding on the trend of globalization as a cornerstone for development would greatly improve trade and commerce due to the predictability and certainty of the law. Foreign investment will be encouraged. The International Monetary Fund recorded that "preliminary evidence also supports the view that in addition to sound macroeconomic policies, improved governance and institutions have an important impact upon a jurisdiction's ability to attract less volatile capital inflows."¹⁰¹ The predictability of outcome and consistency of decision-making are important

97. *Id.* § 1510.

98. ASIAN DEVELOPMENT BANK, *supra* note 18, at 29. See also *Cross-Border Insolvency: Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, *supra* note 1, ¶¶ 11 & 12.

99. ASIAN DEVELOPMENT BANK, *supra* note 18, at 29.

100. *Id.*

101. *Id.* at 20.

policy making objectives in commercial law. This means that the law has to be fair. An indicator of fairness of law is "that [it] is likely to result in different states treating like cases alike, notwithstanding the difference in each state's substantive law."¹⁰²

Thus, while the UNCITRAL Model is equipped with the ability to harmonize laws and to address more effectively instances of cross-border insolvency, the plain and unconditional adoption of it created some difficulties in harmonizing it with some of our procedural laws. At this point, it would be best that Supreme Court (as provided in FRIA) should promulgate rules to clarify the instances of Exclusions and Access for the greater applicability of the law.

102. *Id.*