

THE FINANCIAL REHABILITATION AND INSOLVENCY ACT OF 2010: PROSPECTS AND RETROSPECT

Before mid-2010, insolvency and corporate rehabilitation proceedings are undertaken pursuant to the century-old Insolvency Law (Act No. 1956), the Interim Rules of Procedure on Corporate Rehabilitation (A.M. No. 00-8-10-SC), Presidential Decree No. 902-A, as amended, the Securities Regulation Code and some provisions of the Civil Code. On July 18, 2010, however, the Financial Rehabilitation and Insolvency Act (FRIA) of 2010 became effective.

Rationale. The FRIA is an attempt to institutionalize in statutory law useful doctrines and principles in rehabilitation proceedings, which until recently have only found sanction in judicial pronouncements and procedural rules.

The absence of effective and orderly procedures that may be applied consistently can aggravate economic and financial crises. Without them, credit availability may be compromised and inevitably severely affect commercial transactions.

Thus Section 2 of the FRIA declares it to be the policy of the State “to encourage debtors, both juridical and natural persons, and their creditors to collectively and realistically resolve and adjust competing claims and property rights” and to ensure “a timely, fair, transparent, effective and efficient rehabilitation or liquidation of debtors” with a view to achieving “certainty and predictability in commercial affairs,” preserving and maximizing “the value of the assets of debtors,” recognizing creditor rights, respecting priority of claims, and ensuring “equitable treatment of creditors who are similarly situated.” It has also been declared that whenever rehabilitation is no longer feasible, “it is in the interest of the State to facilitate a speedy and orderly liquidation of [the] debtors’ assets and the settlement of

their obligations.”

Rightly so, therefore, certain provisions have been made to hopefully bridge the gap between these objectives and what the old rules could only scarcely achieve, and more importantly, to implement business recovery in a manner, free from question.

Coverage. The FRIA extends its benefits, such as the Suspension or Stay Order, cram down, waiver of taxes, and permissible interference with contractual relationships not only to corporate entities but to sole proprietorships and partnerships. By widening the scope of the law and making it applicable even to small entities (which, needless to say, comprise a huge bulk of business interests in the country), economic recovery in the macro level becomes more promising and will no longer be too tedious to reach.

Proceedings under the FRIA. The law provides for three (3)



types of rehabilitation proceedings: (1) court-supervised, (2) pre-negotiated, and (3) out-of-court or informal. The practical approach to business recovery may already be seen from this attempt to allow flexibility in the manner by which debtors and creditors may finally want to settle their claims. The proceedings, being summary and non-adversarial, are more efficient and thus

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responsive to fast-paced business transactions.

A court-supervised rehabilitation is one that may be initiated by the filing of the petition with the proper court by the debtor or by any creditor or group of creditors having an aggregate claim of at least One Million Pesos (P1,000,000.00) or at least Twenty-Five Percent (25%) of the subscribed capital stock or partners' contributions, whichever is higher. Upon finding that the Petition is sufficient in form and substance, the court will then issue a Commencement Order which appoints a rehabilitation receiver, summarizes the requirements and deadline for creditors to raise and establish their claims against the debtor, prohibits suppliers of goods or services from withholding supply for as long as prompt payments are made by the debtor, and the debtor from making any payment of its outstanding liabilities, and issues a Stay or Suspension Order that puts on hold all actions **in and out** of court, for the enforcement of claims, judgments, attachments or other provisional remedies against the debtor.



Pre-negotiated rehabilitation is initiated by the debtor either on its own or together with his creditors. It is commenced by filing a petition with the court asking for the approval of the pre-negotiated rehabilitation endorsed or approved by creditors holding at least two-thirds (2/3) of the total liabilities of the debtor which include creditors holding more than Fifty Percent (50%) of the total secured claims and creditors holding more than Fifty Percent (50%) of the total unsecured claims. Again, if the petition is sufficient in form and substance, the court will issue an Order that directs the appointment of a rehabilitation receiver, if provided for in the rehabilitation plan, orders creditors and other interested parties to file their comments to the petition, and issues a Stay or Suspension Order.

Within a maximum period of One Hundred Twenty (120) days from the filing date, the court must act on the petition. Failure to do so will automatically consider the submitted rehabilitation plan as approved.

Out-of-court and informal agreements must also comply with minimum requirements. There must be approval by the debtor and Eighty-Five Percent (85%) of the total creditors, Sixty-Seven Percent (67%) of which must represent secured creditors and Seventy-Five Percent (75%), unsecured creditors.

Liquidation may either be voluntary (debtor-initiated) or involuntary (creditor-initiated) and is commenced by filing the appropriate petition with the court. It may also be resorted to by converting pending court-supervised or pre-negotiated rehabilitation to liquidation, upon motion of either debtor or creditor. When liquidation proceedings are finally completed, the court with which the petition has been filed will issue an order directing the Securities and Exchange Commission (SEC) to delist the debtor from the corresponding register.

Cram down provision. The cram down provision, which before the enactment of the FRIA has no statutory basis, was also incorporated in the law. Section 69 and 86 specifically deal with it. Pertinently, the FRIA allows, among others, the Rehabilitation Plan and its provisions to be binding upon the debtor and all persons who may be affected by it, including the creditors, whether or not such persons have participated in the proceedings or opposed the Rehabilitation Plan or whether or not their claims have been scheduled; payments to be made to the creditors in accordance with the provisions of the Rehabilitation Plan, and contracts and other arrangements between the debtor and its creditors to be interpreted as continuing to apply to the extent that they do not conflict with the provisions of the Rehabilitation Plan.

In 2007, the Supreme Court in Leca Realty Corporation v. Manuela Corporation, et al., G.R. No. 166800, 168924, September 25, 2007 voided a rehabilitation plan insofar as it altered the contractual relations between two parties. Nonetheless, in view of the recent enactment, the pronouncement may actually be considered inapplicable now. This is because the FRIA is arguably a product of the legislature's exercise of police power – an exception to non-impairment clause of the Constitution.

Stay or Suspension Order. As in the Interim Rules, the FRIA provides for the issuance of a Stay or Suspension Order. The upgrading of said remedy to a substantive provision of law affirms the purpose for which it has been institutionalized in the first place. The Order prevents a creditor from obtaining advantage or preference over another. It furthermore preserves the rights of party-litigants as well as the interest of the investing public or creditors, and is intended to give enough breathing space for the rehabilitation receiver to make the business viable again, without having to divert the attention and resources to litigations in various fora (Spouses Sobrejuanite, et al. v. ASB Development Corporation, G.R. No. 165675, September 30, 2005).

As between creditors, the key phrase is “equality is equity.” When a corporation threatened by bankruptcy is taken over by a receiver, all the creditors should stand on an equal footing. Not anyone of them should be given any preference by paying one or some of them ahead of the others. This is precisely the reason for the suspension of all pending claims against the corporation under receivership. Instead of creditors vexing the courts with suits against the distressed firm, they are directed to file their claims with the receiver who is a duly appointed officer of the SEC (New Frontier Sugar Corporation v. Regional Trial Court and Equitable PCI Bank, G.R. No. 165001, January 31, 2007).

Promises. The FRIA of 2010 received commendations from the business sector. It is without a doubt a promising legislation that everyone expects to make possible certain enhancements in the capital

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New Wage Order Enacted

A new wage order was enacted by the Regional Tripartite Wages and Productivity Board (RTWPB), bringing to Four Hundred Four Pesos (P 404.00), the new minimum wage rates of non-agriculture employees in the National Capital Region (NCR), or an increase in the amount of Twenty Two Pesos (P22.00), from the previous minimum wage rate of Three Hundred Eighty Two Pesos (P382.00). This new minimum wage was approved on 7 June 2010 and would take effect fifteen (15) days after its publication.

These minimum wage rates however do not apply to: (i) distressed establishments; (ii) retail/service establishments regularly employing not more than ten (10) workers; (iii) establishments whose total assets including those arising from loans but exclusive of the land on which the particular business entity's office, plant and equipment are situated, are not more than P3 Million; and (iv) establishments adversely affected by natural calamities. To be able to be exempted however, the establishment concerned must apply with the RTWPB and the same must be approved by the said Board. **LF**

Sector/Industry	Basic Wage	Wage Increase under Wage Order No. NCR-15	New Minimum Wage Rates
Non-Agriculture	P382.00	P22.00	P404.00
Agriculture (Plantation and Non Plantation)	P345.00	P22.00	P404.00
Private Hospitals with bed capacity of 100 or less	P345.00	P22.00	P404.00
Retail/Service Establishments employing 15 workers or less	P345.00	P22.00	P404.00
Manufacturing Establishments regularly employing less than 10 workers	P345.00	P22.00	P404.00

Migrant Workers Act strengthened

Republic Act No. 10022 amended Republic Act No. 8042, otherwise known as the Migrant Workers and Overseas Filipinos Act of 1995. This new law aims to strengthen and improve the standards of protection and promotion of the migrant workers, their families and other Filipino workers in distress. The Implementing Rules (New Rules) of the new law took effect on 15 August 2010.

Certain new developments were incorporated in the New Rules. The law defined an *Overseas Filipino in Distress* as referring to an Overseas Filipino who has a medical, psycho-social or legal assistance problem requiring treatment, hospitalization, counselling, legal representation or any other kind of intervention with the authorities in the country where he or she is found.

The law likewise expanded the definition of illegal recruitment as including the act of "reprocessing workers through a job order that pertains to non-existent work." Rule IV, Section 1 states that illegal recruitment shall now include the following acts:

"To give any false notice, testimony, information or document or commit any act of misrepresentation for the purpose of securing a license or authority under the Labor Code or for the purpose of documenting hired workers with the POEA, which include the act of reprocessing workers through a job order that pertains to non-existent work, work different from the actual overseas work or work with a different employer whether registered or not with the POEA."

To further amplify the protection accorded to migrant workers, the new law also punishes with removal from public office or dismissal from service with disqualification to hold any appointive public office members of the POEA Board who votes for the deployment of migrant workers without the required certification. This certification refers to the obligation imposed on the Department of Foreign Affairs (DFA), through the Philippine embassies to make a survey of the countries under their jurisdiction if the rights of migrant workers are protected in those countries. The



criteria for this survey include the following: (1) if the receiving country has existing labor and social laws protecting the rights of migrant workers; (2) if the receiving country is a signatory to and/or ratifier of multilateral conventions, declara-

tions or resolutions relating to the protection of migrant workers; (3) if the country has concluded a bilateral agreement or arrangement on the protection of the rights of overseas Filipino workers and; (4) the receiving country is taking positive and concrete measures to implement the first three criteria.

The certification will also indicate what types of workers, whether professional, semi-skilled, unskilled, or household service workers (HSWs) are protected in the receiving countries.

These certifications issued by the Philippine ambassadors outlining the receiving country's fulfilment of the four criteria will be submitted to the POEA. Taken in consideration with other information and other available data, the POEA Governing Board is then to decide if the receiving country can assure protection for OFWs. **LF**

New Tech Transfer Act Rules to spur more R&D

The Implementing Rules and Regulations (IRR) of Republic Act No. 10055 or the Technology Transfer Act of 2009 set the specific guidelines which cover the promotion and facilitation of the transfer, dissemination, use, management, commercialization and protection of intellectual property, intellectual property rights, and technology generated from government funded research and development.

Coverage. The IRR *only* extend to the protection, promotion, facilitation of the transfer of technology, intellectual property and rights which arise from government funded research and development, with the following objectives: to guarantee the protection of the interests of the government and the research and development institutes (RDIs) and to ensure that the beneficiaries of these government funded activities redound to the benefit of the taxpayers.

Protection of the Intellectual Properties, Intellectual Property Rights, and Technologies through the clear delineation of their ownership. A major component of the IRR is the design to protect the intangible properties and rights resulting from the research and development of technology. Technology as defined under the IRR are skills, products, manufacturing processes, practices, works, inventions and innovations within the scientific and artistic realm. In ascertaining the protection of the development of technology and the resulting rights and properties therefrom, the IRR provide that the property rights generated from the research and development activities shall be owned by the RDIs which will develop them. The ownership by these RDIs, however, is subject to certain exceptions: when the RDI has entered into a public, written agreement sharing, limiting, waiving or assigning its ownership of the property rights generated; in case of failure of the RDI to disclose potential intellectual property rights to the government funding agencies; or in case of failure of the RDI to initiate the protection of potential intellectual property rights within a reasonable time from confidential disclosure to the government funding agency. The IRR also give instances whereby the ownership of the property rights generated may be assumed by the government funding agency.

Fairness Opinion Board. The IRR set standards for the commercialization of the property rights by constituting the Fairness Opinion Board. This Board will issue a Fairness Opinion Report which will determine the fairness and propriety of the agreements made by the RDI and government funding agencies pertaining to the commercialization and utilization of the property rights. This ensures that the prop-

erty rights developed are properly used, sold and maximized for the interests of these research institutions, the government and the public.

The IRR also requires government RDIs to periodically submit intellectual property management reports to the national government agencies. These reports shall contain plans for securing protection on intellectual properties with commercial promise.

Revenue stream conflicts. Under the IRR, government funding agencies are given the power and right to assume the commercialization of the property rights generated from the research and development. The exercise of the power is neither bound by any standard nor is limited by requisites for its exercise. This may be a source of conflict between the government funding agencies and the RDIs and may be deemed as a provision in restraint of trade.

Government use of income and property. The government can also assume ownership of the intellectual property and rights in cases where national security, nutrition, health, or the development of other vital sectors of the national economy are involved, to be determined by the “parent agency” or the government entity with the largest financial contribution in the project. The assumption of ownership may be exercised whether or not the property rights are owned by the government or not.

While the power of eminent domain is clearly indicated, it appears that the exercise granted by the IRR falls short of the standards imposed by the Constitution and jurisprudence on two aspects. *First*, the IRR do not provide for just compensation; and *second*, the head of the government entity who will acquire the property rights is given the discretion to “determine” the grounds upon which the government will assume the property rights. It remains to be seen whether this part of the IRR will be challenged before the courts. **LF**

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market by assuring would-be investors who are reluctant to place their funds on distressed corporations (*See*, Maricel Burgonio, Congress passes new Insolvency Act, Manila Times.Net). This approach is quite noticeably unusual (at least from a conservative businessperson) but has nonetheless a business case to it.

While it may not be totally accurate to call it revolutionary (as the basic features of the law seem to be for the most part an affirmation of existing practices and business thrusts), to a certain extent it is radical in the sense that it promotes a paradigm shift. Not to mention, it is useful and pragmatic. With the mechanisms institutionalized under the FRIA, justification for investing in what others may consider a wobbly venture is reinforced. Through this, therefore, the drive to participate in the resuscitation of ailing businesses is further encouraged. As this result impacts positively on economic interests of the country, then the FRIA musters more relevance. **LF**

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