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The Cross-border Insolvency Provision as *Ius Contituendum* of Bankruptcy Act of Indonesia

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Abstract. *The lack of cross-border insolvency regulation in Indonesia is an issue that hasn't been resolved until now. Borderless business patterns that developed continuously resulted in the promulgation of cross-border insolvency regulations becoming increasingly urgent. Even more, Indonesia as a member state of ASEAN must be fully aware that currently there is a process of economic integration in ASEAN as outlined in the ASEAN Economic Community Blueprint. In consequence, harmonious cross-border insolvency regulations are needed. Philippines, Singapore, and Myanmar already had cross-border insolvency regulation through the adoption of the UNCITRAL Model Law on Cross-border Insolvency while Indonesia still stuck to territorialism approach, not only in cross border insolvency proceeding, but also in civil proceedings in general. Indonesia has to synchronize civil code, civil procedural code, international civil code, and bankruptcy code to create legal certainty in bankruptcy law system. Therefore, in this article writing, there are several approaches that will be used, namely the comparative approach and statutory approach, with the research method of normative juridical. The objectives to be achieved in this article are to construct the lack of cross-border insolvency regulation in Indonesia and to describe cross-border insolvency regulation and practices in Philippines, Singapore, and Myanmar. At the end of this article, there is a recommendation to the Indonesian Government to immediately regulate cross-border insolvency in Indonesia, either by adoption of Model Law or by mutual agreement with certain countries.*

Keywords: *Cross-Border; Economic; Harmonious; Insolvency; Integration.*

1. Introduction

It is almost two decades since ASEAN declared the ASEAN Economic Community Blueprint (AEC Blueprint). The goal of ASEAN to integrate the economy in the South East region considered by some experts is difficult to achieve. The diversity of legal systems that are adopted by ASEAN members inflict economic integration in ASEAN is impossible to achieve easily. We can see the European

Union (EU) can achieve their economic integration since EU has the legitimate power to make regulations or any kind of policy that can support economic integration itself. That legitimate power is called supranational-legal personality. It is clear that without unified law, at least in economic law, there is no economic integration. Based on Balassa's theory about economic integration, there are 5 (five) stages of economic integration with their respective characteristic. In the highest stage, namely total economic integration, the characteristic of this stage is supranational organization legislates unified monetary, fiscal, social, and economic policy that can be bound and applied to member-states.[1]

However, different condition happens in ASEAN and its members. While EU has supranational power to manage its members, ASEAN sticks to sovereign and non-intervention principles. As a regional organization, ASEAN has coordinative characteristics. Based on Fischer's theory about regional organization, there are two phases of international organization. First, is the phase of traditional organization, which every international organization starts with this phase. There are four elements of international organization forming, namely: (1) a treaty, (2) states, (3) common interests, and (4) autonomous organs. However, this traditional type can be a supranational international organization as long as it fulfill the additional requirements. According to Fischer's theory, as exemplified in the European Union, there are five additional requirements to be a supranational international organization, specifically: (1) power to bind member states by legal acts; (2) such a power can be exercised by independent institutions of international organization itself; (3) power to enact law; (4) the binding of such law also upon individuals; and (5) has a compulsory jurisdiction.[2]

Based on Fischer's theory above, at the moment, ASEAN is still in the traditional phase of international organization. The simple reasoning is because ASEAN doesn't fulfill additional requirements to be a supranational organization. However, the existence of AEC Blueprint has described the political will of ASEAN to unify the economy in the region, and also unify economic-related law. One of the economic laws that is urgently needed to be harmonized in ASEAN is cross-border insolvency law. The borderless and stateless trading pattern demands company have establishments in several countries. The condition of business operations in several countries also results in the potential of company bankruptcy in member states of ASEAN, which will involve the jurisdictions of several states. This dispute can certainly be resolved through cross-border

[1] Bela Balassa, (1961), *The Theory of Economic Integration,* Connecticut: Greenwood Press, p. 174-175.
[2] Peter Fischer, (2012), "*International Organizations*", https://www.scribd.com/document/311609166/ International-Organizations-by-Peter-Fischer, accessed on [18/04/2024], p. 28-29.

insolvency mechanism. However, the current problem in ASEAN is there is no harmonized regulation regarding cross-border insolvency.

In fact, Among the 10 member states of ASEAN, there are only 3 members that have cross-border insolvency regulations, namely Singapore, the Philippines, and Myanmar. These three states have adopted the UNCITRAL Model Law on Cross-border Insolvency (*Model Law*) to their bankruptcy act. UNCITRAL Model Law on Cross-border Insolvency is a law guidance from UNCITRAL regarding cross-border insolvency proceedings that can be implemented by each country. Philippines adopted Model Law to its bankruptcy act (Financial Rehabilitation and Insolvency Act) in 2010. Then, Singapore adopted Model Law to its bankruptcy act (Insolvency, Restructuring, and Dissolution Act) in 2018 and commenced in 2020. Lately, Myanmar also adopted Model Law to its bankruptcy act (Law No. 01/2020) in 2020.

Unlike Singapore, Philippines, and Myanmar, in Indonesia, there is no cross-border insolvency regulation. Based on Jerry Hoff's opinion, the original approach of insolvency proceedings in Indonesia is the territorial approach.[3] The essence of the territorial approach in insolvency proceedings is there is a loophole for foreign insolvency judgments to be recognized and enforced in Indonesia. This is different from Model Law which adopted a modified universalism approach. In the modified universalism approach, there is a balance between the territorial approach and universalism approach, so the domestic bankruptcy act still has a role to protect the interests of domestic creditors from potential abuses that might occur when pure universalism is implemented. To explain further, in the analysis part, I will use LoPucki's conception regarding cross-border insolvency approach.

Based on the construction of thinking above, in this research, there are two main issues which I will research, specifically: (1) why the Indonesian Bankruptcy Act can't be applied to cross-border insolvency cases?; and (2) how cross-border insolvency regulated and executed in several member states of ASEAN? Of course, with the two issues above there are also two objectives to be achieved. The objectives of the first issue are how can I describe the legal vacuum condition of cross-border insolvency in Indonesia and construct the relation of Bankruptcy Act with other related acts, so it will appear inhibiting factors to regulate cross-border insolvency in Indonesia. After we get the picture of the legal vacuum of cross-border insolvency in Indonesia, as the objective of the second issue, author will analyze cross-border insolvency regulation in Singapore, Philippines, and Myanmar, and how that regulation can be applied to real cases.

[3] Jerry Hoff, (2000), *Undang-Undang Kepailitan di Indonesia*, Jakarta: Tatanusa, p. 200.

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2. Research Methods

Basically, the writing of this article uses normative legal research methods (normative juridical). As a consequence of using normative legal research methods, the research objects in writing this article consist of statutes/regulations, legal philosophy, legal theory, legal principles, and the opinions of legal experts.[4] The resources/material of research that I'll use consist of legal and non-legal materials.

Legal materials consist of primary, secondary, and tertiary legal materials.[5] The primary legal material that I used is Act No. 37/2004 (Indonesian Bankruptcy Act). The secondary legal material that researchers use is the *ius constituendum* regarding bankruptcy law, which currently still takes the form of an academic text issued in 2018 by the National Legal Development Agency. The tertiary legal material that the researcher used in writing this article consists of the opinions of legal experts regarding bankruptcy, cross-border insolvency, international law, and ASEAN. Meanwhile, the non-legal materials that researchers use include books, scientific journals, and other forms of publications about bankruptcy.

In collecting the materials above, the researcher used the library research method. Meanwhile, in analyzing the data that researchers obtained, they used qualitative methods. Qualitative analysis methods emphasize deductive and inductive inference processes as well as analysis of the dynamics of relationships between observed phenomena using scientific logic. The approaches that researchers use in conducting analysis include:[6]

2.1. Statutory Approach

The approach through law, also known as the statute approach, is an approach carried out by reviewing and analyzing all laws and regulations that are correlated with the legal issue being handled. When using the statute approach, researchers must pay attention to the structure of norms in the hierarchy of statutory regulations. Apart from that, researchers must also examine the existence of a norm, whether the norm is contained in a specific or general law, or whether the norm in question is contained in a new or old statutory regulation. Therefore, the center or focus of this legislative approach lies in the researcher's understanding of the principles of statutory regulations and also the theory of legal norms.

[4] Tommy Hendra Purwaka, (2011), *Metodologi Penelitian Hukum,* Penerbit Universitas Atma Jaya, Jakarta, p. 32-33.
[5] Soetandyo Wignjosoebroto, (2013), *Hukum, Konsep, dan Metode,* Malang: Setara Press, p. 27
[6] Peter Mahmud Marzuki, (2022), *Penelitian Hukum: Edisi Revisi*, Jakarta: Kencana, p. 133-136.

In this article writing, the statutory approach will be used to describe the territorial and universalism approach of insolvency proceedings adopted in Act No. 37/2004. I will also explain the hierarchy and coherency of Act 37/2004, procedural civil law, international civil law, international trade law, and other related laws.

2.2. Comparative Approach

The comparative approach or comparative approach is an approach that uses comparative legal studies. Comparative legal studies are an activity that compares the law of one country with the law of another country or compares a legal rule from one particular time to another. A comparative approach is used by researchers if legal issues question the existence of a vacuum in norms. The absence of norms in one country causes researchers to conduct more in-depth studies of positive laws in other countries. This legal comparison can be done by comparing the legal systems of the same or different countries so that it will enrich the research insights that will be outlined in this article. There are several objects of comparison that I will research, namely the Singapore Bankruptcy Act, the Philippine Bankruptcy Act, and the Myanmar Bankruptcy Act.

3. Result and Discussion

First of all, before I formulate the part of the analysis, it will be better if I start with the originality of this article writing in the beginning. To describe the originality of this article writing, there are several articles about cross-border insolvency which have been published previously. The first one is the article entitled "Transnational Insolvency Regarding Judicial Review in Indonesia". In general, this article discussed about how cross-border insolvency can be regulated in the Indonesian legal system. As the results, the territorial approach adopted in the insolvency regime of Indonesia should be abandoned immediately in accordance with fulfilling the legal needs of foreign investors regarding bankruptcy asset recovery. The article's writer recommends Indonesian Government to make the convention refer to the Model Law, with countries that invested in Indonesia, so whether local investors or foreign investors have legal certainty to doing business in Indonesia.[7]

The second one is the article entitled "The Authority of Curator in Executing Bankruptcy's Assets Abroad". In general, this article discussed about how a curator can execute bankruptcy assets placed outside of Indonesian jurisdiction. As the result, Indonesia's bankruptcy act adopted territorial and

[7] Putu Ayu Ossi Widiari & A.A. Sri Indrawati, "Pengaturan terhadap Kepailitan Transnasional di Indonesia", *Kertha Semaya,* 6(1): 1-12.

universal approach simultaneously. Article 21 regulates that insolvency includes all debtor's assets. However, the basis of insolvency procedural law refers to the territorial principle which is regulated in civil procedural law. Indonesia should follow Singapore's example in terms of regulating cross-border insolvency by adopting Model Law.[8]

The last is the article titled "The Execution of Bankrupt Assets in the Case of Cross-Border Insolvency: A Comparative Study between Indonesia, Malaysia, Singapore, and the Philippines". In general, this article discussed about the state of Indonesian bankruptcy act regarding the execution of bankrupt's assets which located outside Indonesian jurisdiction. As the result, the duality of insolvency approach in Indonesia inflicts a legal vacuum of cross-border insolvency. However the case is different in Singapore and Philippines, which have adopted Model Law to its bankruptcy act. Meanwhile, Malaysia also regulated cross-border insolvency, but limited to Singapore and designated countries. This article's writer recommends Indonesian Government to consider adoption of Model Law or make a convention/international agreement with other countries with reciprocal characteristics regarding the execution of insolvency assets which placed abroad.[9]

As a differentiator from the three previous articles, this article aims to explain about the construction of bankruptcy law with other related laws in Indonesia which results in the lack of cross-border insolvency regulation in Indonesia. After that, I will explain cross-border insolvency regulation and practices in Singapore, Philippines, and Myanmar, which are ASEAN member states that have adopted Model Law in comparison to Indonesia.

3.1. Territorial Approach to Insolvency Proceedings in Indonesia

Since 2004, insolvency proceedings in Indonesia have been regulated in Act No. 37/2004. Regarding bankrupt's assets, Article 21 regulates that assets of bankruptcy include all of the debtor's assets. There is no further explanation about this article. Therefore, if grammatical interpretation is applied to Article 21, we can conclude that all of the debtor's assets, whether placed inside or outside Indonesia, its included in the bankrupt's assets.

Regarding the international law section in Act 37/2004, specifically regulated in Article 212-214. Article 212 regulates that the creditor that took over the

[8] Ranitya Ganindha & Nadhira Putri Indira, (2020), "Kewenangan Kurator dalam Eksekusi Aset Debitor pada Kepailitan Lintas Batas Negara", *Arena Hukum,* 13(2): 329-347.
[9] Putu Eka Trisna Dewi, (2021), "The Execution of Bankrupt's assets in the Case of Cross-Border Insolvency: A Comparative Study between Indonesia, Malaysia, Singapore, and the Philippines", *IKAT,* 5(1): 47-59.

bankrupt's assets placed abroad, without preferential right, is obliged to return that asset to the receiver. Article 213 regulates the creditor prohibition to do cession of his receivables, whether fully or partially, to a third party with the intention of getting repayment foremost, including the bankrupt's assets placed abroad. Article 214 regulates the prohibition of debt set-off outside Indonesia. Based on the three articles above, although those articles didn't mention the authority to execute the bankrupt's assets placed abroad, yet we can conclude from Article 212 that the local creditor has the right to get repayment from the bankrupt's assets placed abroad.

There are 2 classical approaches to insolvency proceedings, namely territorialism and universalism. According to Jerry Hoff's opinion, the original approach of cross-border insolvency is the territorial approach. As the result of a bankruptcy declaration, the bankruptcy process and termination are limited to the territory of the country that decides the bankruptcy case. The implication of the territorial principle is the need for a plurality of bankruptcy claims in dealing with cross-border insolvency, it means that the claims submitted are as many as the number of countries where the debtor's bankruptcy is located.[10] Meanwhile, universalism approach exists on different sides of territorialism approach. If the territorialism approach inflicts duplicative proceedings that depend on the location of the bankrupt's assets, in the universalism approach that stipulation is not applicable. In the universalism approach, cross-border insolvency proceeds in a single forum under a single law, regardless of the actual location of the bankrupt's assets, claims, or parties.[11]

However, whether territorialism or universalism approach, has its own weaknesses. Despite the existence of the universalism approach gives a solution to bypass duplicative proceedings in the territorialism approach, but universalism approach also has a weakness. Executing universalism approach purely isn't feasible without international convention. It is because states were generally unwilling to allow or give effect to a foreign court's uninhibited extraterritorial actions.[12] So basically it returned us to the foundation of the state, namely the sovereignty principle. As a result, although the universalism approach existed, yet it will clash with sovereignty of the state itself. Based on this construction, Hoff's opinion about the territorialism approach as the default approach of cross-border insolvency has become logical. However, now there is an approach that can balanced between territorialism and

[10] Jerry Hoff, *loc.cit.*
[11] Jay Lawrence Westbrook, (1991), "Choice of Avoidance Law in Global Insolvencies", *Brooklyn Journal of International Law,* 17:499-515.
[12] Royston Miles Goode, (1997), *Principles of Corporate Insolvency Law,* London: Sweet & Maxwell, p. 495.

universalism, namely modified universalism[13], which became the basic principle of cross-border insolvency regulation in Singapore, Philippines, and Myanmar.

Back to bankruptcy regulation in Indonesia, the existence of Article 21 *juncto* Article 212 in Act 37/2004 proves implicitly that insolvency proceedings in Indonesia has universalism approach. However, the applicability of cross-border insolvency in Indonesia is essentially limited by Article 299 Act 37/2004. Based on Article 299, the procedural law that applies to insolvency proceedings is civil procedural law. The problem is that Indonesian civil procedural law rejects the applicability of foreign court's judgment in Indonesia. It is regulated in Article 436 *Reglement op de Rechtsvordering* (RV). Maybe for some readers who are unfamiliar with Indonesian law backgrounds will be questioning about RV, which is part of Dutch law. To put it simply, based on history, Indonesia is a former Dutch colony. So because of that the legal system and laws in Indonesia have been influenced by Dutch law, and some of Dutch inheritance laws still apply in Indonesia. RV is one of the Dutch inheritance laws that still applies in Indonesia.

Regardless of the historical discussion above, to prove the relation between bankruptcy act, civil procedural law, and international civil law within Indonesian legal framework, there is a basic principle that can define the relation of laws, namely *lex speciallis derogate legi generali*. From its inception, Dutch insolvency law was part of the Commercial Code of Indonesia (*Wetboek van Koophandel*). Later on, in its development, the insolvency law was separated from the *Wetboek van Koophandel* (W.v.K), thus becoming the *failissment verordering* (FV). Eventually, based on the concordation principle, the FV was enacted in Indonesia through its recording in Stb. 1905 No. 217 *jo.* Stb. 1906 No. 348.

The KUHD itself is also the *lex speciallis* of the *burgerlijk wetboek* (civil code).[14] Meanwhile, according to the legal history approach, FV is the *lex speciallis* of the commercial code. Therefore, it can be concluded that the FV is the *lex speciallis* of the Civil Code. Because FV is the *lex speciallis* of the Civil Code, then of course the procedural law applicable to the FV will be guided by the Civil Procedural Law, which has been regulated in RV and *Herziene Inlandsch Reglement*. And when insolvency involves the jurisdiction of several countries, then in this case the Bankruptcy Act has become *lex speciallis* of International Civil Law. In Indonesia, International Civil Law is not codified yet. However, there are 3 basic principles of international civil law in Indonesia, which are regulated in *Algemene*

[13] Kent Anderson, (2014), "The Cross-Border Insolvency Paradigm: A Defense of the Modified Universal Approach Considering the Japanese Experience", *Penn Carey Law: Legal Scholarship Repository,* p. 682.
[14] Article 1 Commercial Code of Indonesia

Bepalingen (AB), namely: *lex patriae* (Article 16), *lex rei sitae* (Article 17), and *lex loci actus* (Article 18). [15]

Discussing about Indonesian international private law, based on its history, Indonesian international private law is a legacy from the Netherlands. Until now in the Netherlands, territorialism provisions are still adhered in their international private law, especially in Article 431 *jo.* Article 985. However, the use of this provision will only apply to countries outside the non-European Union and countries that are not bound by cooperation in recognizing foreign judgments with the Netherlands.[16] The courts will recognize foreign judgments from European Union countries based on the Lugano Convention of 2007 on Jurisdiction, Recognition and Enforcement of Civil and Commercial Judgments. And for cross border insolvency judgments, there is EU Regulation No. 848/2015 on Insolvency Proceeding as legal ground for EU members to recognize proceeding/ judgment of cross border insolvency.

The emergence of international civil law in continental Europe, especially in Italy, France, and Netherlands are based on statute theory. With statute theory, the approaches of international civil law in resolving a dispute are based on domestic law (*lex fori*). In Huber opinion, the grounds of statute theory in Netherlands is exclusiveness of state sovereignty. There are 3 (three) principles of statute theory in Netherlands, among others:[17]

(1) Domestic law only applies in Netherlands territory;

(2) All legal subjects in Netherlands, either temporary or permanent, will be regarded as Netherlands's legal subjects and subject to domestic law; and

(3) The existence of *comitas gentium* principle recognize foreign law to be bounded with foreign legal subject as long as not contradict with domestic law.

Thus, it is equitable that Indonesia is currently still adopting territorialism, considering that the Netherlands is still adopting it until now. However, Netherlands was helped a little by becoming a member of the European Union, so that universalism could be applied in its jurisdiction, although limited to European Union countries only.

[15] National Legal Development Agency, [2014], "Academic Paper of the Draft Law on Civil International Law", *Ministry of Law and Human Rights of Indonesia*, p. 3.
[16] Brigitte Spiegeler & Samy Akeb, "Enforcement of a Foreign Judgment in the Netherlands", *Articles,* https://spiegeler.com/enforcement-of-a-foreign-judgment-in-the-netherlands/
[17] Bayu Seto Hardjowahono, *Dasar-Dasar Hukum Perdata Internasional,* Bandung: PT Citra Aditya Bakti, 2013, p. 43-44.

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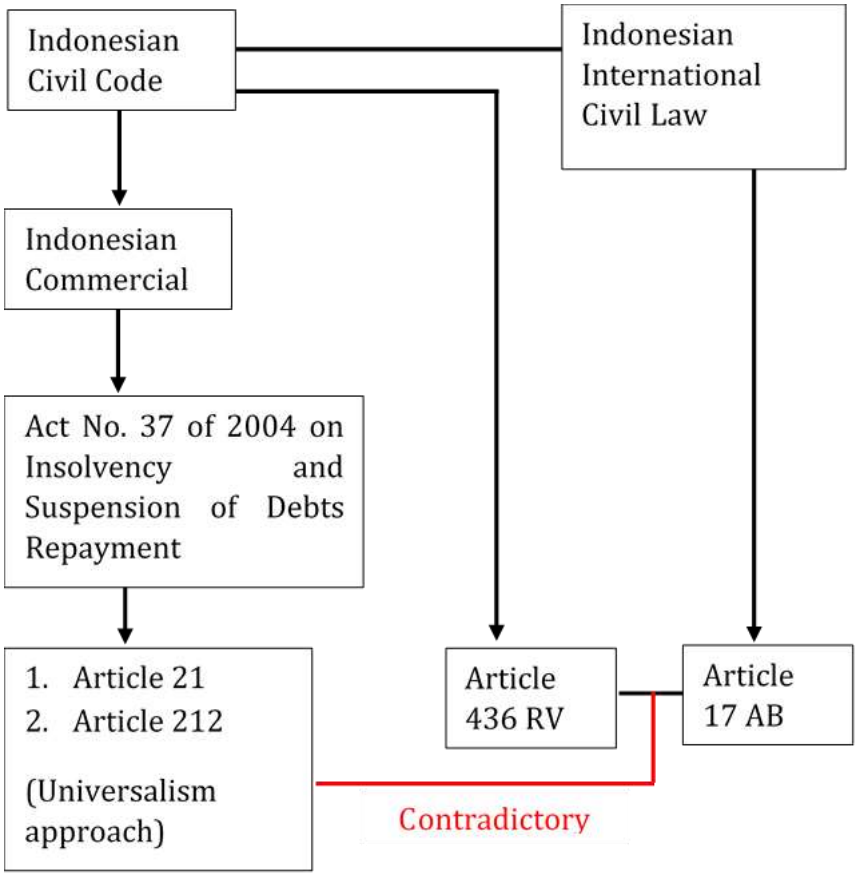
Back to main discussion, when we discuss about insolvency, it is all about repayment of creditor's claim from debtor's assets. According to claims and assets, Article 17 AB regulates that the applicable law for an object is the law of the country where the object is located. The implication of the existence of Article 17 AB is that if there is a dispute over an object, then the applicable law is the law of the country where the object is located. If we relate Article 17 AB with cross-border insolvency proceedings, then it will be identical to the territorialism approach in insolvency.



Picture 1. *Corelation between cross border insolvency, civil law, and civil international law*

In conclusion, based on the legal construction above, it is clear that Act No. 37/2004 adopts a dualistic approach to insolvency, namely universality (Article 21 jo. Article 212) and territoriality (Article 299). However, in its implementation, cross-border insolvency in Indonesia cannot be applied due to the existence of Article 436 RV and Article 17 AB, which explicitly prohibit the enforcement of foreign court judgments in Indonesia. Thus, in principle, cross-border insolvency in Indonesia has a legal vacuum.

However, there is modified universalism approach that can balance between territorialism and universalism approach in insolvency proceeding. With modified universalism approach, the interest to commence cross border insolvency proceeding can be implemented, while protection of domestic interest can be protected. Therefore, in modified universalism approach we recognize secondary proceeding, which mean any party in certain country can commence non-main proceeding in their jurisdiction, as long in that certain country placed an establishment that owned by debtor.

3.2. The Cross-border Insolvency Regulation in Singapore, Philippines, and Myanmar

Among the 10 countries in ASEAN, there are 3 member countries that have cross-border insolvency, namely: Singapore, Philippines, and Myanmar. These three countries have cross-border insolvency regulations by adopting the UNCITRAL Model Law on Cross-border Insolvency. Simply put, Model Law is a legal guideline created by UNCITRAL in 1997 in order to alleviate judicial and jurisprudential barriers between countries in resolving cross-border insolvency disputes.[18] Unlike the convention form, the existence of Model Law is not as strict as the convention, in the sense that, in making/establishing cross-border insolvency regulations, country can refer to the substance of the Model Law. And because the nature of the Model Law is like a guideline, country can adjust the substance of the Model Law to suit the legal ideals and interests of the country. However, in many studies it has been found that there is a real effect/impact arising from adjustments to the Model Law. However, due to the scope of research of this article writing, I will not conduct further research on the topic, so perhaps it can be further research for other researchers.

The first ASEAN member state that adopted the Model Law is Philippines. In 2010, Philippines legislated the Financial Rehabilitation and Insolvency Act (FRIA). The background of the FRIA was that the previous bankruptcy laws were considered incapable and unresponsive to insolvency proceedings, especially during the economic crisis in 1997 and 1998. Therefore, FRIA was introduced as a more systematic insolvency legal framework that provides fair treatment to all parties involved in the insolvency process. [19]

In deciding to approve a cross-border insolvency petition, the conditions considered by Philippine courts include:

[18] Arjya B. Majumdar, [2009], "The Uncitral Model Law on Cross-border Insolvency", https://www.researchgate.net/publication/256060632_The_UNCITRAL_Model_Law_on_Cross_Border_Insolvency, p. 11.

[19] Edgardo J. Angara, "S.B No. 1847: An Act Providing for The Recovery of Financially Distressed Enterprises and The Resolution of Their Indebtedness", *13 Th Congress of The Republic of The Philippines, First Regular Session*, p. 1.

a. Protection of Philippine creditors and the possibility of filing claims of Philippine creditors in foreign insolvency proceedings;
b. Fair treatment toward all creditors;
c. Authority of foreign jurisdictions to recognize cross-border insolvency proceedings;
d. Recognition of the rights of creditors and other interested parties by foreign courts; and
e. Recognition by the foreign court towards cross-border insolvency proceedings in the Philippines subject to the FRIA.[20]

In respect to Rule 5 of Financial Rehabilitation Rules of Procedure and reciprocal principle, foreign creditors have the same right with local creditors to commence insolvency proceedings in Philippines, as long as it does not alter the standing/class of the creditors regulated in the FRIA.[21]

Cross-border insolvency proceedings can be recognized as main insolvency proceedings or as non-main insolvency proceedings.[22] After cross-border insolvency petition is recognized by a local court, cross-border insolvency proceedings in Philippines can be commenced by a foreign representative if the debtor is doing business in Philippines. This proceedings is limited to the debtor's assets that are placed in Philippines.[23] If there are insolvency proceedings that are processed simultaneously, the court will strive for cooperation and coordination between courts. Any relief that will be provided to foreign courts should be made consistent as provided to local courts.[24]

After Philippines adopted Model Law in 2010, the next ASEAN member state that adopted Model Law was Singapore. In Singapore, before the Insolvency, Restructuring, and Dissolution Act (IRDA) was regulated, insolvency regulation was regulated in the Bankruptcy Act 1995. Since July 2020, the Bankruptcy Act was no longer valid and has been replaced by IRDA, even though it had been regulated since 2018. The regulation of cross-border insolvency in Singapore is an important issue that has been pursued for legislation by the Singapore Government since 2013.[25] Initially, the Model Law was implemented by Singapore in the amendment of the Companies Act 2017. Singapore became the

[20] Rule 5 of Financial Rehabilitation Rules of Procedure
[21] Section 3 of Rule 5 of Financial Rehabilitation Rules of Procedure
[22] Section 8 of Rule 5 of Financial Rehabilitation Rules of Procedure
[23] Section 21 of Rule 5 of Financial Rehabilitation Rules of Procedure
[24] Section 22 of Rule 5 of Financial Rehabilitation Rules of Procedure
[25] Mei Yen Tan, *et.al.,* [2020], "Singapore as a Forum of Choice for Insolvency Proceedings: the Story so Far", *Technical Paper Series,* No. 46, p. 1

42nd country to adopt the Model Law.[26] Then in 2018, the adoption of the Model Law was included as a substance of IRDA.

Based on Article 1 par. (1) of the Third Schedule of IRDA, The functions of the model law in Singapore's insolvency legal system include: (a) playing a role when Singapore is requested by a foreign court or foreign representative in respect of foreign proceedings, (b) playing a role when a foreign country conducts legal proceedings under the Singapore Bankruptcy Act, (c) playing a role when foreign legal proceedings and legal proceedings under the Singapore Bankruptcy Act in respect of the same debtor that are running concurrently, or (d) playing a role when a foreign creditor has an interest in commencing, or participating in legal proceedings under the Singapore Bankruptcy Act.[27] Based on Article 4 par. (2) regulates that the jurisdiction of the Singapore courts is authorized if: (a) the debtor carries on business in Singapore and has assets located in Singapore, or (b) the court considers that there are other reasons for the CBI to be enforceable.

Besides the Model Law that is regulated in IRDA, Singapore also has the Reciprocal Enforcement of Foreign Judgement Act (REFJA) 1959, which was amended recently. The REFJA is a binding regulation on commonwealth countries, which regulates the enforcement of court judgments between commonwealth countries.[28] The commonwealth states in question are Hong Kong, New Zealand, Australia, Sri Lanka, Malaysia, Pakistan, Brunei Darussalam, Papua New Guinea, India, Northern Ireland and the United Kingdom.[29] The REFJA was established with the aim of recognizing foreign court judgments (within the scope of commonwealth countries) based on the reciprocal principle.[30] Section 2A of the REFJA regulates that the REFJA does not apply to disputes recognized by the Choice of Court Agreements Act 2016. Under Section 9 (2) of the Choice of Court Agreements Act 2016, one of the disputes not facilitated by this Act is insolvency.[31] Therefore, using the *a contrario* interpretation, the recognition of foreign insolvency judgments in Singapore falls within the scope of the REFJA.

The last member state of ASEAN that adopted Model Law is Myanmar. In February 2020, Myanmar passed the new insolvency law. That new insolvency

[26] Putu Eka Trisna Dewi, *op.cit.,* p. 55-56.
[27] Article 1 ayat (1) *Third Schedule* IRDA.
[28] CMS Holborn Asia, [2023], "Reciprocal Enforcement of Foreign Judgements in Singapore: An Update", https://cms-lawnow.com/en/ealerts/2023/03/reciprocal-enforcement-of-foreign-judgments-in-singapore-an-update.
[29] Harish Kumar & Low Weng Hong, [2022], "Enforcement of Foreign Judgements", *Rajah & Tann Singapore LLP*, p. 10-11.
[30] Reciprocal Enforcement of Foreign Judgements Act 1959, p. 1.
[31] Article 9 par (2) Choice of Court Agreements Act 2016

law adopted Model Law, with the purpose of providing greater legal certainty on cross-border insolvency issues.[32] Before that new insolvency law came up, insolvency law in Myanmar was regulated in the Myanmar Bankruptcy Act 1920, in which cross-border insolvency provision was not regulated. Cross-border insolvency provision in Myanmar Insolvency Law 2020 regulated in Part X. The adoption of the Model Law hopefully can strengthen the cooperation between courts and other authorities that are involved in cross-border insolvency proceedings and protect the value of debtor's assets.[33] Overall, the substances of Model Law adopted in Myanmar won't be much different from Singapore and Philippines.

To illustrate how Model Law facilitates cross-border insolvency proceedings, there is an insolvency case that involved Indonesian debtors who had establishment in Singapore. This case happened in 2018 when receivers from Indonesia filed a recognition lawsuit to Singapore's Court. To put simply, the background of this case is the debtor, PT Megalestari Unggul, which is an Indonesian company, was declared insolvent by the Indonesian court by Judgment No. 138/Pdt.Su/PKPU/2016/PN.NIAGA/JKT/PST. The petitioners (Indonesian receivers) requested the recognition of the insolvency judgment in the Singapore court through Petition Number 71 of 2018. Ultimately, recognition was granted to the Indonesian bankruptcy judgment through Judgment No. SGHC 216, giving the Indonesian receivers the right to manage, value, and transfer the debtor's assets that were placed in Singapore.[34]

An important thing that we can highlight from the Singapore court judge's view on the recognition of the Indonesian insolvency judgment is that there are conditions that must be met for the recognition of foreign insolvency judgment, among others:[35]

a. Foreign insolvency judgment was made by a court that has competent jurisdiction;
b. The court must have jurisdiction in accordance with the debtor's domicile, or competency of the court to accept the petition;
c. Foreign insolvency judgment must be final and conclusive; and
d. There is no objection to the petition of recognition that is granted by the judge.

[32] Ayman Falak Medina, [2020], "A Guide on Myanmar's New Insolvency Law", *ASEAN Briefing,* https://www.aseanbriefing.com/news/guide-myanmars-new-insolvency-law/.
[33] Baker McKenzie, [2020], "Myanmar: Key Highlights of the New Insolvency Law 2020", https://www.lexology.com/library/detail.aspx?g=0f72befc-1d11-4a19-a720-94fe70adc0f4.
[34] [2019] SGHC 216, Background.
[35] Rajah & Tann Asia, [2019], "Recognition of Foreign Bankruptcy Order in the Singapore Court", *Client Update: Singapore,* p. 2

Based on that illustration, the consideration of judges to recognize foreign insolvency judgments can be referenced to the Parliament of Indonesia to regulate cross-border insolvency in *ius constituendum* of the Insolvency Act. Singapore is a successful example that can be emulated by Indonesia in order to strengthen its insolvency law system. In fact, not only by Indonesia but by other ASEAN member states in order to create a harmonized insolvency law.

One thing that we can learn from Singapore is how they created a grand design to bolster the legislation of IRDA. Since economic crisis happened in 2008, insolvency and restructuring action had been arising in Asia-Pacific. Globalisation in business sector inflicts multinational corporation has cross border assets, so at the same time when economic crisis at that time happened, many multinational corporations had sustained insolvency or restructuring. Looking at that situation, Singapore Government realize Singapore's capabilities to become an international restructuring hub just like New York and London.[36]

In 2010, Singapore Government formed Insolvency Law Review Committee (ILRC) with the tasks to conducting assessments, research and formulating ideas for legislation of IRDA.[37] This effort continues in 2015, which Singapore Government formed Committee to Strengthen Singapore as an International Centre for Debt Restructuring (Committee). This Committee has task to gives recommendation to government regarding law reform in Singapore that support Singapore to become a centre of international restructuring.[38] The recommendations from ILRC and Committee implemented by government in 3 (three) phases. *First,* amendment Bankruptcy Act (before IRDA) in 2015. *Second,* amendment Companies Act in 2017 regarding corporate rescue, restructurisation, and Singapore's standing as a choice of forum.[39] *Third,* legislation of IRDA in 2018.[40]

Despite the formation of ILRC and *Committee,* Singapore's Government also realize of the need to adjusted legal structure, namely the formation Singapore International Commercial Court (SICC). In 2013, Law Ministry of Singapore formed SICC Committee which had several tasks, among others: (a) the formation of SICC, (b) specify format, jurisdiction, competency, and other

[36] *Report of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring,* p. 7.
[37] Gibson, Dunn, & Crutcher LLP, "Proposed Enhancements to Strengthen Singapore As an International Centre for Debt Restructuring", https://www.gibsondunn.com/proposed-enhancements-to-strengthen-singapore-as-an-international-centre-for-debt-restructuring/
[38] Committee to Strengthen Singapore as an International Centre for Debt Restructuring, "Report of the Committee", 2016, p. 1.
[39] Mei Yen Tan, *et.al.,* "Restructuring and Insolvency Cases Following Recent Amendments to Companies Act", *International Law Office,* 2019, p. 1-2.
[40] Mei Yen Tan, *et.al.,* "Singapore as a Forum of Choice for Insolvency Proceedings: the Story so Far", *Technical Paper Series,* No. 46, 2020, p. 2-3.

specification that SICC must have, and (c) arrange the composition of SICC judges.[41] The formation of SICC intended for facilitating cross border commercial dispute by drawing on the expertise of judges from world's leading courts. Foreign lawyers also permitted to proceed in SICC.[42] There are several capabilities of Singapore that supported them to become an international hub for commercial dispute resolve, among others:

a. Business law system in Singapore is well established and refers to common law;
b. Experienced commercial law consultant;
c. Credible and trusted judges;
d. Sophisticated commercial dispute jurisprudence; and
e. Networking and geographic location that supported any party to resolve their dispute in Singapore.[43]

If we analyse based on legal system theory by Friedman, the effort of Singapore Government to created that grand design had fulfilled three indicators, namely legal structure, legal substance, and legal culture. Common law characteristic of Singapore is representation of fulfilment of legal culture. The legislation of IRDA dan adoption of Model Law are representation of fulfilment of legal substance. The formation of SICC is representation of legal structure. The fulfilment of three aspects of legal system by Singapore based on legal politic to become a centre of international restructuring. The determination of legal politic should be the basis for Indonesian Government to legislate cross border insolvency regulation.

In fact, in 2018 the Ministry of Law and Human Rights submitted an academic paper on the new bankruptcy act to the Parliament of Indonesia, in which one of the substances to be regulated was cross-border insolvency. However, until now the draft act has not been continued. The academic paper also mentions references to the Model Law. Therefore, the issue that must be addressed at this time is the determination of the political direction of insolvency law from the Indonesian Government. As long as Indonesian Government does not pay attention or consider the establishment of a new insolvency law as an urgency and priority, then the process of finalizing the draft of this new insolvency law will be even longer.

Despite adoption of Model Law in *ius constituendum* of Indonesian Insolvency Act, Indonesian Government should consider the adjustment of competency of

[41] *Report of The Singapore International Commercial Court Committee,* 2013, p. 3-4.
[42] Sundaresh Menon, "The Future of Cross-Border Insolvency: Some Thoughts on A Framework Fit for A Flattening World", *Keynote address at the 18th Annual Conference of the International Insolvency Institute 2018,* p. 25-27.
[43] *Report of The Singapore International Commercial Court Committee,* 2013, p. 7.

court that will facilitating proceed cross border insolvency in Indonesia. Same with Singapore, the formation of international commercial court in Indonesia need to be considered. Indonesia government also need to consider to develop man-power in the first place before legislate cross border insolvency regulation. In tradition of civil law system, the judges stuck to statutes, not to precedent. If we adopt Model Law, the judges definitely refer to precedent of foreign courts regarding similar conditions in cross border insolvency proceedings. Besides that, development of man-power also needs to be done in technical matters, such as the use of international language in proceeding and verdict. It will be useless if cross border regulation is legislated and is not supported by competent legal structure.

Finally, there are several alternatives that Indonesian Government can apply to regulate cross border insolvency. *First,* legislator can make new article in *ius constituendum* that regulates our commercial court can extent the jurisdiction to handle cross border insolvency as long as there is a mutual agreement between Indonesia and certain country. But, there is a weakness of this article, namely the lack of procedural law of cross border insolvency, so it must regulates in the mutual agreement. *Second,* legislator can adopt the Model Law to *ius constituendum,* so that Indonesia can apply material and procedural law in Model Law automatically. However, to achieve legal certainty, legislator should consider existences of Article 436 RV and Article 17 AB that become barrier to apply cross border insolvency proceeding. Because of that, before legislator legislate new bankruptcy act that adopted Model Law, Article 436 RV and Article 17 AB should declared not applicable to insolvency matters. Or, other alternative is in *ius constituendum* should regulates that insolvency matter is *sui generis* and not attached to civil procedural law. However, based on that alternative, legislator should regulate insolvency proceeding in new bankruptcy act, so that in the future it will no longer depend on civil procedural law.

4. Conclusion

Currently, Indonesia does not have a cross-border insolvency regulation. Although in article 21 jo. Article 212 of Act No. 37/2004 stated that the bankrupt's assets include all of the debtor's assets, whether placed inside or outside Indonesia. The existence of these articles is a representation of the universalism approach. However, the obstacle to the implementation of cross-border insolvency in Indonesia is the existence of Article 299 of Act No. 37/2004, which states that civil procedural law. In Indonesia, civil procedural law is regulated in RV and HIR. Based on Article 436 of RV, foreign court judgments cannot be enforced in Indonesia. In addition, Article 17 AB regulates the *lex rei sitae*, where the law applicable to an object is the law of the place where the object is located. The existence of Article 299 of Act No. 37/2004 is a

representation of the territorialism approach. Thus it can be concluded that Act No. 37/2004 is unable to facilitate the implementation of cross-border insolvency. Among the 10 ASEAN countries, only 3 member countries have cross-border insolvency regulations, namely the Philippines, Singapore, and Myanmar. These three ASEAN countries have adopted the Model Law into their insolvency laws. By adopting the Model Law, local courts have competent jurisdiction to handle cross-border insolvency cases and cooperate with foreign courts involved in cross-border insolvency cases. By adopting the Model Law, there is a fulfillment of the reciprocal principle among countries that have adopted the Model Law, which means there is equality of rights and obligations among these countries. This is not the case in Indonesia, where when an Indonesian receiver applies for recognition of a local insolvency judgment in Singapore, the Singapore court can grant the petition because the law allows it. Whereas, if a foreign receiver applies for recognition of its insolvency judgment in Indonesia, the Indonesian court cannot grant it because it is hindered by Article 299 of Act No. 37/2004 jo. Article 436 RV jo. Article 17 AB. Therefore, in this case, the Indonesian Government needs to consider adopting the Model Law in the *ius constituendum* of the insolvency law.

5. References

Journals:

Hartanto, R Sugiharto, Ong Argo Victoria, (2020), Analysis of Safety & Security on Crossings System in Indonesia-Singapore-Malaysia & Thailand's Border, *IWTJ: International Water Transport Journal,* Vol. 2 (1), p. 62-73

Jay Lawrence Westbrook, "Choice of Avoidance Law in Global Insolvencies", *Brooklyn Journal of International Law,* Vol.17, (1991), url: https://brooklynworks.brooklaw.edu/bjil/vol17/iss3/3.

Kent Anderson, "The Cross-Border Insolvency Paradigm: A Defense of the Modified Universal Approach Considering the Japanese Experience", *Penn Carey Law: Legal Scholarship Repository*, (2000), url: https://scholarship.law.upenn.edu/jil/vol21/iss4/1.

Mei Yen Tan, *et.al.,* "Singapore as a Forum of Choice for Insolvency Proceedings: the Story so Far", *Technical Paper Series,* No. 46, (2020), url: https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=http://oonpartners.com/wp-content/uploads/2023/03/Singapore-as-a-forum-of-choice-for-insolvency-proceedings-the-story-so-far.pdf&ved=2ahUKEwiAo puJi-SFAxVw3TgGHXsRD7kQFnoECBwQAQ&usg=AOvVaw1q9zdVDQipnDVXgkfonnDj.

National Legal Development Agency, "Academic Paper of the Draft Law on Civil International Law", *Ministry of Law and Human Rights of Indonesia*, (2014),

url: https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://bphn.go.id/data/documents/na_ruu_ttg_hukum_perdata_internasional_(lanjutan).pdf&ved=2ahUKEwi7s4GTi-SFAxV_4TgGHbijAKUQFnoECB0QAQ&usg=AOvVaw1H4eZj5rjr98_ZSVOB1D-k.

Putu Ayu Ossi Widiari and A.A. Sri Indrawati, "Pengaturan terhadap Kepailitan Transnasional di Indonesia", *Kertha Semaya,* Vol.6 No.1, url: https://ojs.unud.ac.id/index.php/kerthasemaya/article/view/40726.

Putu Eka Trisna Dewi, "The Execution of Bankrupt's assets in the Case of Cross-Border Insolvency: A Comparative Study between Indonesia, Malaysia, Singapore, and the Philippines", *IKAT,* Vol.5 No.1, (2021), url: https://jurnal.ugm.ac.id/ikat/article/view/64157.

Ranitya Ganindha and Nadhira Putri Indira, "Kewenangan Kurator dalam Eksekusi Aset Debitor pada Kepailitan Lintas Batas Negara", *Arena Hukum,* Vol.13 No.2, (2020), url: https://doi.org/10.21776/ub.arenahukum.2020.01302.8.

Books:

Bela Balassa, 1961, *The Theory of Economic Integration,* Connecticut: Greenwood Press.

Jerry Hoff, 2000, *Undang-Undang Kepailitan di Indonesia*, Jakarta: Tatanusa.

Peter Mahmud Marzuki, 2022, *Penelitian Hukum: Edisi Revisi*, Jakarta: Kencana.

Royston Miles Goode, 1997, *Principles of Corporate Insolvency Law,* London: Sweet & Maxwell.

Soetandyo Wignjosoebroto, 2013, *Hukum, Konsep, dan Metode,* Malang: Setara Press.

Tommy Hendra Purwaka, 2011, *Metodologi Penelitian Hukum,* Penerbit Universitas Atma Jaya, Jakarta.

Others:

Arjya B. Majumdar, 2009, "The Uncitral Model Law on Cross-border Insolvency", https://www.researchgate.net/publication/256060632_The_UNCITRAL_Model_Law_on_Cross_Border_Insolvency, accessed on 18 April 2024.

Ayman Falak Medina, 2020, "A Guide on Myanmar's New Insolvency Law", *ASEAN Briefing,* https://www.aseanbriefing.com/news/guide-myanmars-new-insolvency-law/, accessed on 18 April 2024.

Baker McKenzie, 2020, "Myanmar: Key Highlights of the New Insolvency Law 2020", https://www.lexology.com/library/detail.aspx?g=0f72befc-1d11-4a19-a720-94fe70adc0f4, accessed on 18 April 2024.

CMS Holborn Asia, 2023, "Reciprocal Enforcement of Foreign Judgements in Singapore: An Update", https://cms-lawnow.com/en/ealerts/2023/03/reciprocal-enforcement-of-foreign-judgments-in-singapore-an-update., accessed on 18 April 2024.

Government of Indonesia, "Commercial Code of Indonesia".

Government of Myanmar, "Myanmar Insolvency Law 2020".

Government of Philippines, "Financial Rehabilitation Rules of Procedure".
Government of Singapore, "Choice of Court Agreements Act".
Government of Singapore, "Insolvency, Resolution, and Dissolution Act".
Government of Singapore, "Reciprocal Enforcement of Foreign Judgements Act".
Harish Kumar & Low Weng Hong, 2023, "Enforcement of Foreign Judgements", *Rajah & Tann Singapore LLP,* https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://id.rajahtannasia.com/media/5067/2023-enforcement-of-foreign-judgm ents-indonesia-003.pdf&ved=2ahUKEwi84ee-jOSFAxXVamwGHTpYAmIQFno ECBIQAQ&usg=AOvVaw17NmTDJ5fhEP_0T6-XwLDm, accessed on 18 April 2024.
Peter Fischer, 2012, "*International Organizations*", https://www.scribd.com/document/311609166/ International-Organizations-by-Peter-Fischer, accessed on 18 April 2024.
Rajah & Tann Asia, [2019], "Recognition of Foreign Bankruptcy Order in the Singapore Court", *Client Update: Singapore*, https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://eoasis.rajahtann.com/eoasis/lu/pdf/2023-11_Recognising-Foreign-Pro ceedings.pdf&ved=2ahUKEwi19JL2jOSFAxUD-jgGHTWKCvIQFnoECBEQAQ& usg=AOvVaw1UheSgZ5JO6Hh0EWQRYqlw, accessed on 18 April 2024.
The High Court of The Republic of Singapore, 2019, "SGHC 216".