

**THE IMPACT OF JURISDICTION PRINCIPLES AND LEGAL
TRADITION TO ADOPT OF UNCITRAL CROSS BORDER
INSOLVENCY**

IN

**JAPAN, SOUTH KOREA, INDONESIA, THAILAND, MALAYSIA,
SINGAPORE, PHILLIPINE, USA and EROPEAN UNION**



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Backgrounds

- ✦ Enacted GATT and Establishing WTO 1994
- ✦ Article I and Article III GATT.
 - ✦ National Treatment / NT
 - ✦ Most Favored Nation / MFN
- ✦ Failures of The Dispute Panel Body Unit of WTO
- ✦ Global Economic market, trade have reduction of trade barriers and established multilateral/ economic regional forum i.e. AFTA, NAFTA, TPP , ASEAN plus 3.
- ✦ Enterprise /individual have assets more than one state, cross border Insolvency.
- ✦ UNCITRAL introducing Model Law : Cross Border Insolvency 1997.

Variable Research

✦ *Dependent Variable*

1. The Adoption Policy of Japan, South Korea, Indonesia, Malaysia, Thailand, Philippine, EU and USA to The UNCITRAL Model Law on Cross Border Insolvency

✦ *Independent Variable*

1. Legal tradition in each countries have affect in adoption of UNCITRAL on CBI.
2. The model of Jurisdiction (universality/territoriality/modified) have result in adoption UNCITRAL on CBI
3. Each country policy in order to proceeding of the foreign insolvency judgments ?

Cross Border Insolvency



Definition :

Cross Border Insolvency may occur, for instance where an insolvent debtor has asset in more than one state , or where creditors are not from the state where the insolvency proceedings are taking place , yet the cross border insolvency can apply to individual or corporate (Roman Tomasic: 2005)

*“..includes cases where some of the creditor of the debtor are not from state insolvency proceedings is taking place.
” (UNCITRAL Model Law on CBI 1997*

CBI

- ✦ Insolvent condition (person or company)
- ✦ Debt (money value) between debtor and creditor
- ✦ Minimum debt or more than 2 creditor
- ✦ Different territory jurisdiction among parties/ cross border.

Increasing Cross Border investment and Trade potentially

Increasing Cross Border insolvency matter.

Countries Adoption

No	Countries	Year Enacted
1	Australia	2008
2	Canada	2009
3	Colombia	2006
4	Eritrea	1998
5	Greece	2010
6	Japan	2000
7	Mauritius	2009
8	Mexico	2000
9	Montenegro	2002
10	New Zealand	2006
11	Poland	2003
12	South Korea	2006
13	Romania	2003
14	Serbia	2004
15	Slovenia	2007
16	South Africa	2000
17	Great Britain	2006
18	British Virgin Islan	2003
19	USA	2005

Legal Traditions the Countries



- ✦ Civil Law
- ✦ Common Law
- ✦ Islamic , indigenous legal tradition
- ✦ Mix legal tradition
- ✦ Legal system :
 - ✦ legal substance, legal structure, legal culture
 - ✦ Existing law ???

Legal System



is an operating set of legal institution , procedure and rules (JH Marryman 1985)

Legal system refers to the nature and content law generally and the structure and method whereby it is legislated upon , adjudicated upon, and administered, within given jurisdiction (Robert C Wilkins 1999)

Civil law



- ✦ May be defined as that legal tradition which has its origin in Roman law, codified in the corpus Juris Civilis of Justinian, as subsequently develop in Continental Europe and around the world.
- ✦ Codified roman law (French Civil Code of 1804 and it progeny and imitator continental Europe) and Uncodified Roman law (Scotland and South Africa).
- ✦ Civil law is highly systemized and structured and relies on declaration of broad, general principles, often ignoring details.

Common Law



- ✦ Legal tradition which evolved in England from eleventh century . Its principles appear for the most part in reported judgments , usually of the higher court ,in relation to specific fact situation arising in dispute which court have adjudicative. The common law is usually much more details its prescription than civil law. Colonies British empire, British Commonwealth.

Differences

Civil Law and Common law



1. Jurisprudence and Doctrine
2. Doctrine function
3. Doctrine Style
4. Jurisprudence Function
5. Style of Law Drafting
6. Appointment of Judges
7. Forum Non Conveniens

Jurisdiction Principles



- ✦ Prof Lynn Lo Pucky:
- ✦ (1) universalism;
- ✦ (2) modified universalism;
- ✦ (3) territorialism.

Universalism

- ✦ Universalism, unity is a system in which all aspects of a debtor's insolvency are conducted in one central proceeding under one insolvency law, one bankruptcy judgment could entry into force in all territory (countries)
- ✦ Foreign judgment should automatically binding in home country and enforcement in executorial asset debtor.

Universalism Modified: not automatically /by request, no reexamination, limitation with public order/national interest

Territorialism



The Territorialism approach: a separate and independent plenary case is pursued in each forum in which the debtor's assets are located.

Territorialism is the default system for all cross-border insolvency systems, because it relies on actual territory control over assets

The benefits of territorialism are varied. At the most basic level, territorialism, unlike any of the alternatives, does not require any special legislation, nor does it deviate from the universally adopted rules of jurisdiction and sovereignty

UNCITRAL Model Law on CBI 1997

- ✦ Enacted 1997 to harmonizing CBI
- ✦ Universalism principle and Automatically Recognition under Article 20 UNCITRAL Model Law on CBI
- ✦ Similarity with chapter 15 US Bankruptcy act. Influence common law tradition.

JAPAN



- ✦ Before bankruptcy Reform (2000) : principle of territoriality system Chapter III Bankruptcy Law (Tosan Ho) Law No 71 , 1992
- ✦ Reforming system : Universality by Law on Recognition and Assistance for Foreign Insolvency Proceedings Law No 129, 2000 and amended Chapter III Bankruptcy Act, Act No 75 June 2, 2004.

Adoption of UNCITRAL Model law CBI (2000)

Reform Policy



- ✦ Civil Rehabilitation Law , Law No 225 , 1999 amended
Law No 128, 2000
- ✦ New Corporate Reorganization Law No 154 , 2002
- ✦ Bankruptcy Act (Tosan Ho) Act No 71 , 1992 amended
Bankruptcy (Tosan Ho) Act No 75 June 2, 2004
- ✦ Law on Recognition and Assistance for Foreign
Insolvency Proceedings Law No 129, 2000

Foreign Recognition



Law on Recognition and Assistance for Foreign Insolvency Proceedings
Law No 129, 2000:

(Jurisdiction over recognition and assistance)

Article 4 : recognition and assistance cases shall be subject to the exclusive jurisdiction of the Tokyo District Court

Article 5 : the court prescribe in the proceeding article may, when it finds its necessary in order to avoid substantial harm or delay, by its own authority , transfer of recognition and assistance case to the district court that has jurisdiction over the debtor domicile, residence, business, office, or other office or or the location of the debtors property , upon making an order of recognition of foreign insolvency proceeding or after making such an order.

Japan reasons

- ✦ In order to see the Japanese changing policy on bankruptcy law such as adoption of the Model Law, Raj Bhala has point of view reasons that there is a larger context to consider, namely, the reaction of the international business and legal community. Foreign creditors would applaud the move.
- ✦ They might interpret it as signaling a more favorable business climate, and react by extending more credit, or credit on easier terms, to Japanese debtors.
- ✦ No doubt Japanese debtors would welcome the increased liquidity.
- ✦ The international legal community, might it not see Japan as taking out leadership on international insolvency reform , especially the first Asian Country
- ✦ Japan's experience, both good and bad, with international insolvencies demonstrates why the modified universal framework should be the paradigm of cross-border insolvency. Modern Japanese practice shows first that a modified universal approach is possible in today's world

The Japanese cases highlight the benefits of allowing a regime to be supple enough to accommodate systemic modifications designed for the actual circumstances.

In Japanese experience illustrates the inequities and inefficiencies that occur under a territorial regime. In short, Japan shows that the modified universal approach has all the elements of an attractive paradigm efficiency

(Kent Anderson 1999)

EU Convention on Insolvency Proceeding

- ✦ Majority Civil law system (except UK)
- ✦ Universalism , automatically recognition without any further restriction , EU Conv. on Insolvency Proceeding , Nov 1995 under article 3 jo 16 jo 17

Any judgment opening insolvency proceedings handed down by a court of member state which has jurisdiction pursuant to article 3 shall be recognized in all other member states from the time that it becomes effective in the State of the opening of proceeding

Indonesia Bankruptcy Law

- ✦ Before 1998 in Indonesia enacted bankruptcy law from Dutch Colony 1906 (name: Faillissements-Verordening, Staatsblad 1905:217 juncto Staatsblad 1906:348). In 1998 enacted Bankruptcy Law No 1 Year 1998 and Amendment with Bankruptcy Law No 37 Year 2004.
- ✦ Bankruptcy law in Indonesia, adopt two principle
 - ✦ territoriality for foreign judgment insolvency proceedings
 - ✦ the principle of universality of the existence of the bankruptcy properties the debtor in overseas art 21 Law No 37 , 2004.

Indonesia Bankruptcy Policy on Recognition of Foreign Insolvency Proceedings

- ✦ Under the article 18 AB (*Algemene Bepalingen van Wetgeving*), plenty said : “ the form of every action is determined by the law of the country where the act or do” (*locus regit actum*)”.
- ✦ Under article 436 RV regarding recognition and the enforcement of foreign Judgement (bankruptcy) : *Except in cases specified by Article 724 Commercial Code and other legislation, can not be implemented the decisions spoken by foreign judges or the courts a foreign court in the Republic of Indonesia.*
- ✦ (Arindra Maharani :2010) The presence of the prohibition to carry out a foreign judgment in the Indonesia serve targeted because of perceived as a violation of the principle of sovereignty Republic of Indonesia. It is due to the enactment or principle of the sovereignty principle of territorial (if territorial sovereignty principle) that is held in Indonesia, which requires that decision set in foreign countries, can not directly implemented in other regions on its own strength.



Kingdom of Thailand

- ✦ Civil Law System (Roman Tomasic)
- ✦ Forum on Bankruptcy Court
- ✦ Thailand Bankruptcy Act 1999
- ✦ Territoriality Principle
- ✦ (Black Dowson Waldron :2004) The only limitations placed on the jurisdiction of the court of Justice Thailand is with regard to the execution of a judgment. Thai Judgment are not recognized in other countries, nor will foreign judgments be recognized in Thailand. Although foreign Judgment maybe used in evidence , cases must be re investigated in a court of justice in Thailand.
- ✦ Section 177 Thailand Bankruptcy Act 1999, the controlled of property and the bankruptcy law of other countries has no effect on property in the Kingdom

South Korea




- ✦ Civil Law System, 1998 started to reform regulation regarding Bankruptcy
- ✦ Changing territoriality to universality following model law system.
- ✦ Debtor Rehabilitation and Bankruptcy Act (DRBA) March 21st 2005, which including 4 Act reformed
 - ✦ Corporate Reorganization Act
 - ✦ The Composition Act
 - ✦ The Bankruptcy Act
 - ✦ The Act on Rehabilitation of Individual debtor.

Philippine

- ✦ Civil Law system
- ✦ Territoriality, Non recognition automatically
- ✦ FINANCIAL REHABILITATION AND INSOLVENCY ACT(FRIA) RA 10142 2000

Singapore, Malaysia



- ✦ Territoriality with an exception (bilateral mutual recognition)
- ✦ Similarity benchmark and system , Common Law System and adaptation from United kingdom Bankruptcy Act 1883
- ✦ Agreement regarding mutual recognition and enforcement of cross border bankruptcy between Singapore and Malaysia ...which applied on Malaysia Bankruptcy Act article 104(3) and Singapore Bankruptcy Act article 105.

Legal Tradition

	CIVIL/ COMMON LAW	JURISDICT
JAPAN	CIVIL LAW	Territorialism to Universalism
SOUTH KOREA	CIVIL LAW	Territorialism to Universalism
MALAYSIA	COMMON LAW	Territorialism Bilateral recognition SG
SINGAPORE	COMMON LAW	Territorialism Bilateral recognition MAL
INDONESIA	CIVIL LAW	Territorialism but universalism for debtor asset liquidity
PHILIPINE	CIVIL LAW	Territorialism
THAILAND	CIVIL LAW	Territorialism
UNCITRAL CBI	Influenced by Common Law	UNIVERSALISM

COUNTRIES	BANKRUPTCY LAW
JAPAN	Bankruptcy (Tosan Ho) Act No 75 June 2, 2004 Law on Recognition and Assistance for Foreign Insolvency Proceedings Law No 129, 2000
SOUTH KOREA	Debtor Rehabilitation and Bankruptcy Act (DRBA) March 21 st 2005
INDONESIA	Law 37 of 2004 on Bankruptcy and Suspension of Debt Payments
MALAYSIA	Malaysia Bankruptcy Act 360 1967 amendment Jan. 2001
SINGAPORE	Singapore bankruptcy Act 1995
THAILAND	Thailand Bankruptcy Act No1 1940 BE 2483 amendment No 2 1968, No 3 1983, NO 4 1998, No 5 1999
PHILIPPINE	FINANCIAL REHABILITATION AND INSOLVENCY ACT(FRIA) RA 10142 2000

Countries&UNCITRAL	Foreign Bankruptcy Judgment Recognition
UNCITRAL	Automatically binding and enforce
JAPAN	Recognition by requested to Tokyo district court, non re examination, possible deliver to another district court
SOUTH KOREA	Indirect and Direct recognition
MALAYSIA	Non Recognition, except Singapore (apply in law), Commonwealth
SINGAPORE	Non Recognition, except Malaysia (apply in law) Commonwealth
THAILAND	Non Recognition, except bilateral agreement, re examination
INDONESIA	Non Recognition, except reciprocity, re examination .
PHILLIPINE	Non Recognition , and legal standing of property

Jurisdiction with Degree Recognitions

<i>Jurisdiction Principle</i>	Degree / level of recognitions			
	One Automatic Recognition	Two Recognition by Request	Three Recognition Bilateral Act	Four Recognition Reciprocity agreement , re adjudicated
<i>Universalism</i>	UNCITRAL Model Law CBI European Union United States			
<i>Universalism Modified</i>		Japan South Korea		
<i>Territoriality</i>			Singapore Malaysia	Indonesia Thailand Philippine

Legal Tradition & Level Recognition

<i>Legal Tradition</i>	Degree / level of recognitions			
	One Automatic Recognition	Two Recognition by Request	Three Recognition Bilateral Act	Four Recognition Reciprocity agreement , re adjudicated
Common Law	UNCITRAL Model Law CBI European Union United States		Singapore Malaysia	
Civil Law		Japan South Korea		Indonesia Thailand Philippine

Conclusions

1. Globalization of economy has thrown new challenges since the world shrinking in economic, as one world/market, the Political economic activities also need to be harmonize, to achieve by having similarly principle universality and possible to have recognition of foreign proceeding automatically in efficiency, next UNCITRAL Model Law on Cross Border Insolvency should be adopt by countries such Indonesia, Thailand, Philippine, Malaysia and Singapore.
2. Legal traditions each countries might not established barrier indirectly, to adopt the UNCITRAL Model Law on CBI but with similarity legal tradition (common law) more suitable and easier considering jurisprudence, doctrine, style law drafting, Judges appointed and mindset.
3. Jurisdiction in some condition easier matching (common law) but most of them related to sovereignty of the state

recomendation



Indonesia should have adopt system like Japan in case foreign Arbitral award , and possible apply such Japan Model in Indonesia CBI considering have similarity of Civil Law legal tradition.

Thank you for your
listening

