

**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**

Introduction

Now days 3 multilateral or international community agreement such as ASEAN plus 3, plus 6, AFTA, NAFTA, or TPP there has been steady increase cross border commerce among the countries. The development of global economy and International business transactions, cross border insolvency issues are often found and become a global problem. Applicability of the territoriality principle and the state sovereignty principle in most civil law and common law countries causes a bankruptcy judicial decision unable to be recognized and executed in another country, so that the asset of debtors located outside the region cannot be included into the set of the bankrupt's property. It will cause reduction of sum of bankrupt's property, which will be used to pay a sum of debt to the creditors, so that the fulfillment of the rights of the creditors payment won't be accomplished. Globalization means, in part that companies know no boundaries. Their assets and liabilities are spread across geopolitical borders, which are significant as far as conventional bankruptcy proceedings are concerned.

How does it result when the big precedent the Bank of Credit and Commerce International (BCCI) collapsed on July 5, 1991? ; How could the trustee responsible for marshaling BCCI's assets possibly make good on the \$10 billion owed creditors when those assets were located in 72 countries? After all, officials in at least some of those countries might and did refused to transfer control over BCCI's local assets,

preferring domestic creditors first. When BCCI's Tokyo branch suspended operations on July 5, 1991, a special liquidation proceeding was commenced in Tokyo District Court. The Court appointed a liquidator, who decided to participate in the worldwide pooling arrangements, based in Luxembourg, with the approval of BCCI's creditors. As of July 1998, in accordance with the pooling arrangement, a second dividend payment was made to the creditors. The point is that not every liquidator in every country will behave in as globally minded a way as the liquidator for BCCI-Tokyo. Even in Japan, the decision was easy given the peculiar circumstances. Creditor claims against BCCI-Tokyo far exceeded the branch's assets (if it is proper to speak of a branch having assets and liabilities separate from those of the parent).¹

The post Uruguay round dispute resolution mechanism has insight for the problem of jurisdiction. The famous "National Treatment" principle is a basis for critiquing the status foreign claimant have in home country Insolvency proceeding, and trade negotiations might be a model for expanding recognition and enforcement of foreign proceedings. On January 1, 1995 the World Trade Organization (WTO) was born, with the General Agreement on Tariff and Trade (GATT)² with its 9 annexes (TRIP's Trade Related Aspect of the Intellectual Property Rights, Trade Related Investment Measures TRIM's ect). To be sure in International trade negotiation, concessions are made on the basis of reciprocity. Under National Treatment Principles in GATT provision on article III were issued of reciprocity and Most Favored Nation provision (MFN) on article I, where all of the WTO member are expected not to discriminate

¹ Bhala , Raj International Dimension of Japanese Insolvency Law (Monetary and Economic Studies , 2001).at.132.

² World trade Organization officials website : <http://www.wto.org>

against other WTO members , obliged to treat other WTO members equally.³ Japan The first Asian Country who adopted UNCITRAL Model Law 1997 and next South Korea have been following. ASEAN countries such as Indonesia , Thailand, Philippine , Malaysia, and Singapore have not adopted of The UNCITRAL Model Law Cross Border Insolvency 1997 yet.

Global market has brought global investments in cross border circumstance. In Indonesia based on article 436 RV (*recht verordingen* / code civil law procedural) “ a foreign judicial decision cannot be recognized and executed in Indonesia appropriate with territoriality principle. It will cause a foreign bankruptcy judicial decision cannot be recognized and enforcement automatically in Indonesia and so does with Indonesia bankruptcy judicial decision in a foreign country.

The Asia global economic crisis in 1997 has spurred money countries in Asia to make bankruptcy law reform, especially in cross border insolvency regulation. In order to face the cross border insolvency issues Japan tried to fix the local bankruptcy law refer to the UNCITRAL Model Law on Cross Border Insolvency with Guide to enactment issued by the United Nations. Knowing that, there are not any local or international regulation about cross border insolvency in Indonesia yet, but sooner or later should be changed. It is very Important for Indonesia to take part in reforming the legal instruments policy to deal with cross border insolvency problems but conduct and ratify international treaties or arrange its local bankruptcy law refers to Model Law.

³ http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm

In fact, Indonesian Bankruptcy Policy adopted double standard which Territoriality Principle for foreign judicial decision recognition and Universality principle used for debtor's property located in foreign country.

Each countries have characteristic of their own legal traditions such as civil law or common law. And every country should be established with territoriality jurisdiction principles in commonly. How this legal system have influence (accelerator or barrier) to adopt UNCITRAL Model Law on Cross Border Insolvency (CBI)? And how that's effect to changing of the Territoriality to Universality system in Cross Border Insolvency cases. Probably by the end of this research it will have picture how Indonesia should apply kind of country typically experience to adopt UNCITRAL Model Law on CBI.

Research Design Variables

This research will use normative data, book and article literature in English version regarding of the research topic. The research questions create more focusing on analysis and details descriptions answers. The research of analysis have used descriptive analytically through the details of Research Variable.

The Dependent Variable

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

The Independent Variables

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 ?

Chapter 1: Cross Border Insolvency and Jurisdiction Policy

1.1. UNCITRAL Model Law on Cross Border Insolvency

Under Black Laws Dictionary Insolvency is define as⁴ :

“ the condition of the a person who is insolvent ; inability to pay one’s debt; lack of means to pay ones debt”

Roman Tomasic (2005) define ⁵ :

“ Cross Border Insolvency may occur, for instance , where an insolvent debtor ha assets in more than one state, or where creditor are not from the state where the insolvency proceedings are taking place, yet the across-border insolvency can apply to individuals or corporations ”

Phillip R Wood state that:

“ Cross Border Insolvency proceeding overrode the previous strict territorially of state insolvency proceedings which did not extend to assets located in foreign countries or vice visa ”⁶

The Resolutions 2205 (XXI) of 17 December 1966, by which created the United Nation Commission on International Trade Law (UNCITRAL) with mandate to further the progressive harmonization and unification of the law of international trade. On May 30th 1997 the United Nation Commission on International Trade Law

⁴ Black Laws Dictionary, Sixth edition . St Paul, Minnesota : West publishing Co, 1990. At 716.

⁵ Tomasic, Roman. Insolvency Law In The East Asia , (England: Ashgate Publishing Limited, 2005) at 542.

⁶ Wood, Phillip.R. Principle of International Insolvency , (London: Thomson Sweet & Maxwell , 2007) at 179.

(UNCITRAL) adopted the text of a model law on Cross Border Insolvency Law (CBI).

UNCITRAL Model Law on CBI January 1998 noted:

“..Increased cross border trade and investment lead to greater incidence of cases where enterprises and individuals have assets in more than one state. Also that when debtor with assets in more than one state becomes subject to an insolvency proceeding, there often exists an urgent need for cross border cooperation and coordination in the supervision and administration of the insolvent debtors assets and affairs...”

There are four principles on which the model law is built. They are⁷:

- a. The access principle
- b. The recognition Principle
- c. The Relief principle
- d. The cooperation and coordination principle

Those principles are designed to meet the following public policy objectives⁸:

- a. The need for greater legal certainty for trade and investment;
- b. The need for aid and efficient management of International Insolvency proceedings, in interest of all creditors and other interested persons, including the debtor;
- c. Protection and maximization of the value of the debtor's assets for distributions to creditors, whether by reorganization or liquidation;
- d. The desirability and need for courts and other competent authorities to communicate and cooperate when dealing with insolvency proceedings in multiple states

⁷ UNCITRAL Model Law on Cross Border Insolvency: The Judicial Perspective . United Nation New York , February 2012 .at 5

⁸ Preamble to the UNCITRAL Model Law 1997

- e. The facilitation of the rescue of financially troubled business with the aim of protecting investment and preserving employment.

The objectives of the UNCITRAL Model Law on Cross Border Insolvency⁹:

1. Cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;
2. Greater legal certainty for trade and investment;
3. Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
4. Protection and maximization of the value of the debtor's assets; and
5. Facilitation of the rescue of financial troubled business, thereby protecting investment and preserving employment.

The basic purpose of the UNCITRAL Model Law is to provide an effective mechanism for dealing with cases of Cross Border Insolvency.¹⁰ The law is based on nine principles, which are follows:

First: The court of the enacting State shall recognize only one foreign proceeding as a foreign main proceeding.

Second: The recognition of a foreign proceeding shall not restrict the right to commence a local proceeding.

⁹ United Nations (a), Model Law in Cross – Border Insolvency with Guide to Enactment, (New York: United Nations Publishing, 1997), at 3.

¹⁰ Bhahal, Raj, International Dimension of Japanese Insolvency Law (2012) at 151. See. Also . Andree J. Berends , UNCITRAL Model Law on Cross Border Insolvency , 6 Tulane.J.Int'l & Comp.L.(1998).at 323.

Third: A local proceeding shall prevail over the effects of a foreign proceeding and over relief granted to a foreign representative, regardless of whether the local proceeding was opened prior to or after the recognition of a foreign proceeding.

Fourth: When there are two or more proceedings, there shall be cooperation and coordination. *Fifth:* A foreign proceeding shall be recognized as a foreign main proceeding if the foreign proceeding is opened in the State where the debtor maintains the center of his main interests. A foreign proceeding shall be recognized as a foreign non-main proceeding if the foreign proceeding is opened in a State where the debtor has an establishment.

Sixth: Upon recognition of a foreign proceeding as a foreign main proceeding, some types of relief will come into effect automatically. They will be in effect until modified or terminated by the court. Upon recognition of a foreign proceeding as a foreign main proceeding, some other types of relief may be granted by the court, but they will not come into effect automatically. Upon recognition of a foreign proceeding as a foreign non-main proceeding, relief can only come into effect if it is granted by the court.

Seventh: Coordination may include granting relief to the foreign representative. In granting relief to a foreign representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets falling under the authority of the foreign representative.

Eighth: Creditors shall be allowed to file claims in any proceeding. Payments to creditors from multiple proceedings shall be equalize

Ninth: If there are surplus proceeds of a local non-main proceeding, they shall be transferred to the main proceeding.

UNCITRAL Model law on CBI foreign proceeding have drafted similar with Chapter 15 United States Bankruptcy Act, is automatically recognition such under article 20 Effect of recognition of foreign main proceeding :

- (1) Upon recognition of foreign proceeding that is a foreign main proceeding :
 - a. Commencement or continuation of individual actions or individual proceeding concerning the debtors assets, rights, obligations or liabilities is stayed;
 - b. Executions against the debtors assets is stayed;
 - c. The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.

With this the principle of recognitions between foreign and home countries adopted fully universalism than territoriality. There are 19 countries (2010) who have adopted UNCITRAL Model Law on Cross Border Insolvency such following tables¹¹:

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

¹¹http://www.uncitral.org/uncitral/en/uncitral.texts/insolvency/1997Model_status.html

15	Slovenia	2007
16	South Africa	2000
17	Great Britain	2006
18	British Virgin Islan	2003
19	USA	2005

1.2. Jurisdiction Principles: Territoriality Through Universality

The various approaches to a cross-border insolvency may be classified into five general categories by Professor Lynn LoPucki¹²: (1) universalism; (2) modified universalism; (3) secondary insolvency; (4) corporate-charter contractualism ; and (5) territorialism.

Universalism, also known as pure universalism, unity, and ubiquity, is a system in which all aspects of a debtor's insolvency are conducted in one central proceeding under one insolvency law. Because countries are generally unwilling to allow another state's courts to have unfettered control over local assets and persons, the universalist system relies predominately on some level of international treaty or convention.¹³

Modified Universalism incorporates the philosophy of universalism but accepts that a country may only unilaterally control its own territory and laws. Under a modified universal regime, a country does not try to coordinate its legislation with another country but rather creates a system that is open to cooperation while seeking the broadest impact possible for its own laws. There are two distinct aspects to this

¹² Anderson, Kent. *The cross border Insolvency paradigm: a defense on the modified universal approach considering the Japanese experience* . U.pa. J.Int'l con.L. See. E.g.. Lynn M.LoPocky. *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 CORNELL L. REV. 696 (1999).

¹³ See.id .at 687.

framework. The first aspect is that a state's insolvency laws must be drafted to reach out as widely as possible by providing for extraterritorial effect in all areas, including the creation of an estate, the issuance of protective stays, and the recognition of claims. Second, the local courts must occasionally be willing to give up control of domestic assets and interests for the benefit of a foreign insolvency. A local court modified universal regime- usually referred to as the ancillary court may relinquish control of those aspects of a case directly under its authority, but only after a review of the foreign insolvency proceeding. The net result of this approach is that not only must a modified universal system be prepared to address cooperative universal-like cases, but it must also be structured to accommodate territorial proceedings, whether brought about by foreign non-recognition or by domestic denial of cooperation¹⁴.

Territorialism is the default system for all cross-border insolvency systems, because it relies on actual in rem control over assets. Under the territorial approach, a separate and independent plenary case is pursued in each forum in which the debtor's assets are located.¹⁵ 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. The territorial approach also avoids conflicts among priority and other substantive insolvency rules, because each court deals exclusively with local interests pursuant to local laws.

1.3 . Legal Tradition System

¹⁴ See.id.at.690.

¹⁵ See.Id .at 697.

Legal Systems

There are various definitions of the term “Legal system”:

Legal systems, as that term is here used , in operating set of legal institutions, procedure, and rules.¹⁶ In other terms legal system have written as juridical system or system of law.¹⁷

Each law in fact constitute a system : it has vocabulary used to expressed concept, it has techniques for expressing rules and interpreting them, it is linked to a view of the social order itself which determined the way in which the law in which the law is applied and shapes the very function of the law in that society.¹⁸

The term of legal system refers to the nature and content of the law generally, and the structures and methods whereby it is legislated upon, adjudicated upon and administered, within a given jurisdiction. A legal system may even govern a specific group of persons. Thus a person belonging to various groups could be subject to as many legal systems.

Civil Law

Civil law may be defined as that legal tradition which has its origin in Roman law, as codified in the *Corpus Juris Civilis* of Justinian, and as subsequently developed in Continental Europe and around the world. Civil law eventually divided into two streams: the codified Roman law (as seen in the French Civil Code of 1804 and its progeny and imitators Continental Europe, Quebec and Louisiana being examples); and uncoded Roman law (as seen in Scotland and South Africa). Civil law is highly

¹⁶ JH Merryman, *the Civil Law Tradition: an introduction to the legal system of Western Europe and latin America* 1(2d ed. Stanford University Press 1985). From William Tetley , *Mixed Jurisdiction: Common Law v. Civil Law (Codified and Uncodified)* (McGill University , Unidroit Law Review , 1999)

¹⁷ Quebec research Center of private and Comparative Law Dictionary and bilingual lexicons 243 (2d ed. Les Edition Yvon Blais , 1991)

¹⁸ William Tetley , *Mixed Jurisdiction: Common Law v. Civil Law (Codified and Uncodified)* (McGill University , Unidroit Law Review , 1999)=

systematized and structured and relies on declarations of broad, general principles, often ignoring the details.¹⁹

Common Law²⁰

Common law is the legal tradition which evolved in England from the eleventh century onwards. Its principles appear for the most part in reported judgments, usually of the higher courts, in relation to specific fact situations arising in disputes which courts have adjudicated. The common law is usually much more detailed in its prescriptions than the civil law. Common law is the foundation of private law, not only for England, Wales and Ireland, but also in forty-nine U.S. states, nine Canadian provinces and in most countries which first received that law as colonies of the British Empire and which, in many cases, have preserved it as independent States of the British Commonwealth.

Differences in Source, Concept, and Style Civil Law and Common Law

Common Law and Civil Law have a lot of main characteristic differences aspect of law²¹. In recently days this legal system cannot replacing by each other but only mixed in certainty modified conditions. In main issues there are some of International Conventions cannot enforced because conflict of civil Law and Common Law regarding Jurisprudence. Where the civil law countries have refused enacting with previous Common law judges decisions or Jurisprudence.

- a. Jurisprudence and Doctrine. A major difference between the civil law and common law is that priority in civil law is given to doctrine (including the

¹⁹ See *Id.*p683.

²⁰ See *Id.*p684

²¹ See *Id.*p701

codifiers reports) over jurisprudence, while the opposite is true in the common law. This difference in priority can be explained by the role of the legislator in both traditions. French civil law adopts Montesquieu's theory of separation of powers, whereby the function of the legislator is to legislate, and the function of the courts is to apply the law. Common law, on the other hand, finds in judge-made precedent the core of its law.

- b. **Doctrine Function.** The civil law doctrine's function is to draw from this disorganized mass (cases, books and legal dictionaries) the rules and the principles which will clarify and purge the subject of impure elements, and thus provide both the practice and the courts with a guide for the solution of particular cases in the future. The common law doctrine's function is more modest: authors are encouraged to distinguish cases that would appear incompatible to a civilist, and to extract from these specific rules. There is a point where the common law author will refuse to draw specific rules that have no policy basis and will criticize openly absurd judgments.
- c. **Doctrine Style.** The common law author focuses on fact patterns. He or she analyzes cases presenting similar but not identical facts, extracting from the specific rules, and then, through deduction, determines the often very narrow scope of each rule, and sometimes proposes new rules to cover facts that have not yet presented them selves. The civilist focuses rather on legal principles. He or she traces their history, identifies their function, determines their domain of application, and explains their effects in terms of rights and obligations. At this stage, general and exceptional effects are deduced. Apart from requiring some statutory analysis, determining the area of application of a principle involves some induction from the existing case law, while

delimiting exceptions involves some deduction.

- d. Jurisprudence Function. In Common law jurisprudence sets out a new specific rule to a new specific set of facts and provides the principal source of law, while civil law jurisprudence applies general principles, and that is only a secondary source of law of explanation.
- e. Style of Law Drafting Civil law codes and statutes are concise (*le stylefrançais*), while common law statutes are precise (*le style anglais*). Indeed, civil law statutes provide no definitions, and state principles in broad, general phrases. Common law statutes, on the other hand, provide detailed definitions, and each specific rule sets out lengthy enumerations of specific applications or exceptions, preceded by a catch-all phrase and followed by a demurrer such as notwithstanding the generality of the foregoing.
- f. Appointment of Judges Common law judges, who are called to play an important role in deciding what the law is, are appointed from among experienced practicing lawyers. Civil law judges, whose main function is adjudicating, are appointed fresh from specialized schools.
- g. Forum Non Conveniens, *Forum non conveniens* is the common law principle whereby a court, which has jurisdiction to hear a claim, refuses to do so, because it believes another court of another state also has jurisdiction to hear the claim and can better render justice in the circumstances. This principle was unknown to civil law courts, which are often required by the constitutions of

their respective countries to hear an action, although they may suspend it²²

Chapter 2 : Bankruptcy Policy on Cross Border Insolvency by Japan, South Korea, Indonesia, Thailand, Philippine, Malaysia, Singapore, European Union and USA

2.1. Japan Bankruptcy Policy

In beginning of 1990 Japanese policy on Cross Border Insolvency had been critiqued by many lawyers, because it had refused to recognize the effect of foreign insolvency proceedings in Japan, and also refused the effect of local insolvency proceeding in foreign states²³. However the amendment of Insolvency laws was not so easily put on legislative agenda. But finally Japanese government decided at last to radically reform the insolvency legislation.²⁴ Then the work of reform was started in October 1996 , while the International standard of this problem had been just coming into existence , namely the Project UNCITRAL Model Law on Cross Border Insolvency²⁵.

In order to see the Japanese changing policy on bankruptcy law such as adoption of the Model Law, Raj Bhala²⁶ have 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

²² *See.Id .p710*

²³ See. Yamamoto, Kazuhiro . “ *New Japanese Legislation on Cross Border Insolvency compared with UNCITRAL Model Law* at.1. see also. Shinichiro Takagi (tosan ho no kaisei to unyo, Shoiji Houmo , 2000) at 74.

²⁴ *See .Id.*

²⁵ *See. Id.* See also Homu-sho minjikyoku sanjikansitsu , Tosan-hosei ni kansuru kaisei-kentojiko (Shoji Homu Kenkyukai , 1997)

²⁶ Bhala, Raj.*Supra .Note1.* at 162.

terms, to Japanese debtors. No doubt Japanese debtors would welcome the increased liquidity. As for 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 also highlight the benefits of allowing a regime to be supple enough to accommodate systemic modifications designed for the actual circumstances. Finally, 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.²⁷

Japan law structure in order to bankruptcy matters²⁸:

1. Traditionally Procedures

Individual and Corporate bankruptcy on Bankruptcy Law (Tosan ho Law No. 71, 1992) and Special Liquidation Commercial Code (Sho ho Law No.48 1899).

2. Reconstruction-Type Procedures

Civil Rehabilitation Law (Minji saisei ho Law No.225, 1999 amend to Law No.128, 2000).

Corporate Arrangement Commercial Code (Sho ho Law No. 48, amended

²⁷ Anderson. Kent. Supra Note.at 765.

²⁸ Maharani, Arindra . Arindra Maharani SH. *Tinjauan Hukum terhadap penerapan Instrumen Hukum Internasional dalam pengaturan kepailitan lintas batas di Indonesia, Singapura, Malaysia, Thailand, Korea Selatan dan Jepang*. Skripsi, Fakultas Hukum Universitas Indonesia Juli 2011. At 70

1938).

New Corporate Reorganization Law (Kaisha Kosei ho Law No. 154, 2002).

3. Special Procedures

Civil Conciliation Law (Minji chotei ho Law No. 222, 1951) .

Special Mediation Law (Tikutei saimu to no chosei no sokushin no tame no tokutei chotei ni kan suru horitsu Law No. 158, 1999).

Special Procedures for Reorganization on Financial Institutions Law (Kinyu kikan no kosei tetsuzuki no tokurei to ni kan suru horitsu Law No.95, 1996) .

4. Separate Statue of Cross-Border Insolvencies)

Law on Recognition and Assistance For Foreign Insolvency Proceedings (Gaikoku tosan shori tetsuzuki no shonin enjo ni kan suru horitsu Law No.129 , 2000).

Japan Policy on Recognition and Enforcement of Foreign Bankruptcy Proceeding

Under territoriality principle on Japan's Insolvency law regime, it ought not to come as a surprise to learn that Japanese Courts neither recognize nor give effect to foreign insolvency proceedings or judgments with respect to property situated in Japan .

Base on article 3(2) Bankruptcy Law ²⁹ put it :

“ a bankruptcy adjudged in foreign country shall no be effective with respect to properties existing in Japan”

But in 1981, there is a Jurisprudence, that Japanese courts have not turned a deaf ear to the rising chorus of criticism of the territoriality principle and its deployment in Japan. For example, in 1981, the Tokyo High Court held that the territorial provisions

²⁹ Bankruptcy law (Hasan Ho) Law no 71 of 25 April 1992 Translated in English .

of the Bankruptcy Law were simply intended to limit the general staying effect of foreign proceedings, and did not deny a foreign trustee's rights to manage the debtor's assets in Japan.³⁰ Article 3 paragraph 2 of the Bankruptcy Law provides only that foreign bankruptcy adjudication does not automatically have an effect, in particular effect of collective execution, to the debtor's property. It does not necessarily mean that the court must ignore the foreign bankruptcy itself or must deny the right of the foreign administrator to manage and dispose of the debtor's property which is granted by the law of the foreign country. Accordingly, under certain circumstances, Japanese courts may allow a foreign trustee to administer the debtor's assets located in Japan.³¹

*Japan is not likely to adopt the Model Law as a whole provision by provision. The wording of and concepts embedded in, the Model Law are appropriate for Anglo – American common law system, then they do not fit so easily into the Japanese Legal system*³². But in order to adopted, The Japanese official and legal scholars will have to import the Model Law only after carefully examining each and every provision at the border and making adjustments or additions, deletion, and the like to fit in the Japanese legal context.³³

³⁰ Bhala, Raj International Dimension of Japanese Insolvency Law (Monetary and Economic Studies , 2001).at.162 See.also. Soichi Tagashira Intraterritorial Effect of Foreign Insolvency Proceedings: An Analysis of Ancillary Proceeding in United Staes and Japan. At 9. In the case, a Swiss trustee was allowed to litigate the rights of a foreign debtor, a Swiss corporation, in Japan. A Japanese creditor had arrested a registered trademark of the Swiss corporation. In the ensuing Swiss bankruptcy proceeding, the trustee sought to cancel the action of the Japanese creditor (the arrest). The Tokyo High Court agreed the trustee had “a right to manage the debtor's assets in Japan.” Id. at 9; See also Judgment of 30 January 1981, Tokyo Kosai [Tokyo High Court], 32 Kaminshu 10, 12.

³¹ Bhala , Raj See.Id.at 163. See. Junichi Matsushita, Present and Future Status of Japanese International Insolvency Law, 33 TEX. INT'L L.J. 71, 72 (1998) at 76-77.

³² Bhala, Raj . International Dimension of Japanese Insolvency Law (Monetary and Economic Studies , 2001) at 152 ., See.from. Professor Junichi Matsushita , Faculty of Law , Gakushuin University.

Under the article 118 of the Japan Code of Civil Procedure provides that a foreign judgment will be recognized as valid in Japan if (1) the jurisdiction of the foreign court is recognized under Japanese law or an applicable treaty, (2) the defendant received personal service of process or appeared voluntarily, (3) the foreign judgment does not contravene public order or good morals in Japan, and (4) reciprocity is guaranteed as regards the recognition of Japanese judgments. Similarly, under Article 24 of the 1979 Law of Civil Execution.³⁴ Japanese courts will enforce a foreign judgment if these four conditions are met, and that judgment is final. Possibly, these conditions could be the “talking points” in the early stages of negotiations toward recognition and enforcement criteria for an international framework. The new Japanese law on recognition of foreign proceeding requires several conditions for recognizing foreign proceeding. the most important are that of jurisdiction and that of public order.

Process of recognitions under new Japanese law provides Tokyo district is only competent for the case of recognitions of foreign proceedings.³⁵

The system of recognitions of foreign proceeding by Japan Judicial decisions. In Point (2) standing to apply recognitions belongs only to foreign representatives and point (3) a foreign representatives appointed upon an interim basis may also apply recognition of an interim foreign proceeding.³⁶ New Japanese Bankruptcy law have adopt a judicial decision recognition system which is similar with that of Model Law.

³³ Bhala, Raj. See.id .at 153.

³⁴ See.Japan Law No 4 of 1979 .

³⁵ See.Article 4 on Act on recognition of foreign Proceeding.

³⁶ See. Yamamoto Kazuhiko, New Japanese Legislation on Cross Border Insolvency compare with the UNCITRAL model law. At.11.

Japanese law limits the standing of application of recognitions to a foreign representatives³⁷.

Related to recognition of an interim proceeding we can recognize some different with model law, where Japanese law permits an interim representatives to apply recognition, but nonetheless it does not permit the court to recognized an interim proceeding. At all the court is only authorized to order interim measure before the foreign court formally commences the insolvency proceeding and that the foreign proceeding become recognizable.

2.2. South Korea Bankruptcy Policy

The legal system of Republic of South Korea is civil Law system , that its basis in the Constitutions of the republic of Korea.³⁸ In 1998 started to regulation reform in matter of Bankruptcy. The Debtor Rehabilitation and Bankruptcy Act (DRBA) March 21st 2005 have created in which including 4 Act reformed

- a. Corporate Reorganization Act
- b. The Composition Act
- c. The Bankruptcy Act
- d. The Act on Rehabilitation of Individual debtor.

Before recognition on UNCITRAL Model Law on CBI have been in Territoriality but after changed in Universalism. The foreign proceeding recognition not automatically but should by request to the court. And the court would decide agree or not to enforce. And also limited to public policy of the state.

³⁷ See.id.

³⁸ Wikipedia . acces http://en.wikipedia.org/wiki/Law_of_South_Korea.

2.3. Thailand Bankruptcy Policy

Thailand have legal tradition in civil law system. In July of 1997 Thailand lacked legal procedures to govern restructuring. Over the next two years, lawmakers built upon Bankruptcy Act B.E. 2483, which provides a framework for liquidation, to detail such procedures. This section details some aspects of the legal changes and analyzes how the legal changes could impact the costs of financial distress. Bankruptcy Act B.E. 2483 was written in 1940 and amended in 1968, 1983, and 1999. The law covers liquidation of both personal and corporate entities. It allows creditors to file petitions enabling a court-designated agent to seize assets, dispose of them, and distribute the proceeds. Kingdom of Thailand have territoriality principle. Foreign Proceeding cannot automatically recognition but should have re-adjudicated in Thailand Court. The only limitations placed on the jurisdiction of the court of Justice Thailand are 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.

2.4. Philippine Bankruptcy Policy

Philippine have a civil law legal system. Territoriality principles have governed by the law. In bankruptcy law also applied territoriality principles. The Philippines may be regarded as using the appeal method ³⁹. In this system, the foreign judgment is in

³⁹ Paper presented at the A.L.A. 5th Conference, Denpaser - Bali, 7 October 1989. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS AND ARBITRAL AWARDS

principle enforceable. The grounds for refusing judgment seem to be modeled after the rules of the United States. However, by accepting that clear mistakes of fact or law could also form a ground for refusing to enforce a foreign judgment, it could be said that a winning party must in effect "appeal" from his foreign judgment in order to secure its enforcement in the Philippines. Therefore this method could be classified more as a non-enforcing rather than as an enforcing one. The Philippine law on FINANCIAL REHABILITATION AND INSOLVENCY ACT(FRIA) RA 10142 2000.

2.5. Malaysia Bankruptcy Policy

Malaysia have similarity legal system with Singapore, applied Common Law from united Kingdom. Malaysia adopted territorial principle for foreign bankruptcy proceeding or foreign Judgment should be re adjudicated in Malaysia Court. But Malaysia have bilateral recognition which enacted in Malaysian Bankruptcy Act . Agreement regarding mutual recognition and enforcement of cross border bankruptcy between Singapore and Malaysia have stated in Malaysia Bankruptcy Act Article 104(3).

2.6. Singapore bankruptcy Policy

The English origin of the Singapore legal system is due to the reception of English law during and even after the colonial era. Singapore adopted common law system from British Colony. A foreign judgment has no direct operation in Singapore. However, foreign judgments may be recognized and enforced either at common law or under statute. Court orders obtained in foreign insolvency proceedings can only be enforced in Singapore if the Singapore courts recognize these proceedings. Although

they retain a discretion in recognizing these proceedings, it is generally accepted that Singapore courts adopt a pragmatic approach in dealing with cross-border insolvency cases and appear to be increasingly willing to recognize and enforce foreign insolvency proceedings⁴⁰. The Principles International Comity generally has led common law countries to either pass statutes or enter into treaties that provide for the recognition of judgments rendered in other countries⁴¹.

Singapore's conflict of law provisions, rooted in English common law, provide an opportunity for equal creditor treatment; Singaporean courts temper jurisdictional control over assets located within Singapore by recognizing the interests of foreign creditors and bankruptcy representatives while concurrently seeking cooperation with foreign courts. Under article 151 jo 152 Singapore bankruptcy Act 1995, foreign proceeding and foreign judgment cannot entry into force automatically. Territoriality principles applied where should be re adjudicated in Singapore Court, limited to public policy, and there is reciprocity agreement. Both of Singapore's insolvency statutes (corporate and individual) vest all of the debtor's property with the equivalent of a trustee in bankruptcy. Singapore's Bankruptcy Act clearly states that it is to have effect over both movable and immovable property, whether situated in Singapore or elsewhere. The Act also provides for reciprocal assistance between the courts of Malaysia and Singapore under article 102 Singapore Bankruptcy Act.

2.7. Indonesia Bankruptcy Policy

⁴⁰ Lee Kiat Seng, "Cross-Border Insolvency Issues," <http://www.lawgazette.com.sg/2009-4/feature2.htm>,

⁴¹ Gross, "Foreign Creditor Rights: Recognition of Foreign Bankruptcy Adjudications in the United States and the Republic of Singapore

The Indonesian legal system is a Civil Law⁴² system rather than a Common Law system. The Common Law System is found chiefly in Australia, England, America and other former British colonies such as Singapore, Malaysia and Hongkong). The Indonesian legal system is derived from French and German models, and The Dutch Colonial have applied it to Indonesian as Dutch colony (320 years). For example, Civil Law systems do not use juries. Instead, a panel of three judges makes decisions as to guilt or innocence. One of these judges is the Chair (*ketua*) and is usually more senior than the other two judges. Typically, the judges produce a single, joint judgment (*Putusan*). It is virtually unknown for a judge (*hakim*) to dissent from the decision of the other two members of the panel and dissenting judgments are rarely produced and never released (except, recently, in the Commercial Court (*Pengadilan Niaga*)). Typically, Civil Law judgments are much shorter than Common Law judgments. In Indonesia, for example, the judgment may be only a few pages. In major cases, judgments tend to be long, of a length to be expected in a Common Law Appeal Court, but this is usually because the Courts often summaries all the evidence in the judgment (This is not usual in Common Law judgments). Legal reasoning to distinguish previous cases and so forth is relatively rare, because Civil Law systems do not have a system of precedent.

Precedent or Jurisprudence in Common Law systems, is the principle that previous cases with similar facts on an identical point of law will bind courts of equal or lower status. In Civil Law systems, courts are not bound by decisions of courts at the same level or higher. This means that there is little need for law reporting in Indonesia and certainly not for published authoritative sets of judgments. Some, limited collections

⁴² Lindsay, Tim. *Indonesia: Bankruptcy, Law Reform & the Commercial Court*, (ed.) (2000), Desert Pea Press, Sydney.

of judgments are published (for example, *Yurisprudensi*) but they are ad hoc in nature. In fact, statements as to preferred interpretation or policy issued by the Supreme Court in the form of *surat edaran* (circular letters), rather like practice notes in the Common Law System, tend to be more influential than previous decisions, even of the Supreme Court. Another key distinction between Common Law and Civil Law systems is that Civil Law systems are ‘inquisitorial’ in nature while Common Law systems are ‘adversarial’. This means that in Common Law systems the judge acts as an impartial referee while the parties present their witnesses in an attempt to convince a jury or, in most cases, the judge. The judge generally does not ask questions of witnesses (*saksi*) and is usually active only in enforcing the rules of evidence and procedure.

Indonesia Bankruptcy Law

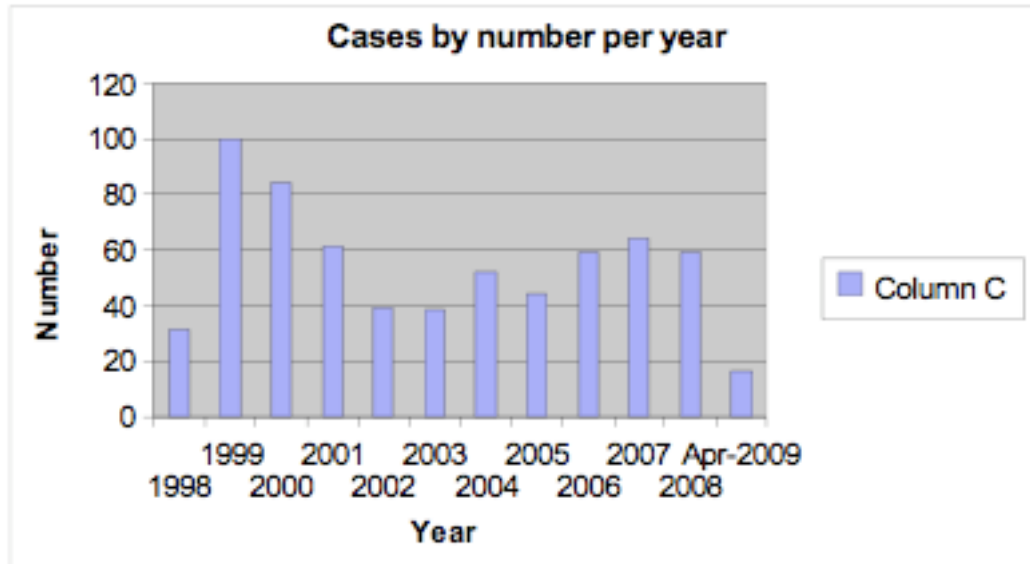
Before 1998 in Indonesia enacted bankruptcy law from Dutch Colony 1906 (name: Faillissements-Verordening, Staatsblad 1905:217 juncto Staatsblad 1906:348). In 1998 enacted Bankruptcy Law No 1 Year 1998 and Amendment with Bankruptcy Law No 37 Year 2004.

Statistic Bankruptcy Cases in Central Jakarta Commercial Court Year 1999 -2009

No	Decission	Cases	Precentage (%)
1	Bankruptcy	233	36.01
2	PKPU (reorganization)	54	8.35
3	Rejected	233	36.01
4	Withdrawal	112	17.31
5	Accord	2	0.31
6	Undecided	8	1.24
7	Unknown	5	0.77
	Total	647	100

Source: Central Jakarta Commercial Court⁴³

Number of Bankruptcy cases per Year 1999 – 2009⁴⁴



In year 1999 is the highest number of cases because accumulation of Indonesian economic crisis and a year after first establishing Bankruptcy Law 1998 No. 4 . Next New Amendment of Bankruptcy Law in year of 2004 No. 37.

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*)”.⁴⁵

Under article 436 RV regarding recognition and the enforcement of foreign Judgment (bankruptcy) :

⁴³ Official website central Jakarta Commercial Court Indonesia , Access by March 23rd , 2012 time 22:23 JST <http://pn-jakartapusat.go.id/>.

⁴⁴ See.Id.

⁴⁵ Maharani, Arindra , at 54.

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.

The presence of the prohibition to carry out a foreign judgment in the RI serve targeted because of perceived as a violation of the principle of sovereignty Republic of Indonesia as their country. It is due to the enactment or principle of the sovereignty principle of territorial that is held in Indonesia, which requires that decision set in foreign countries, can not directly implemented in other regions on its own strength.⁴⁶ In other articles of Bankruptcy law in Indonesia, adopt a different principle (territoriality), since Indonesia adheres to the principle of universality of the existence of the bankruptcy properties the debtor in overseas.

It was based on provisions in the Act No.37 of 2004, namely as the following⁴⁷:

- a. Bankruptcy Law under article 21, the bankruptcy estate the debtor covering the entire wherever debtors assets persistence (overseas). In this case means includes total assets of insolvent debtors inside and outside the country;
- b. Pursuant to section 212-214 UUK-PKPU which had to do imbursement by the creditor or any person, in a state as in articles.

2.8. European Union

Most of the European Union members states have civil law legal traditions. But especially for cross border insolvency EU have already adopted within automatically recognition of foreign proceeding in cross border insolvency among the members

⁴⁶ Longdong, Tineke Louise Tuegeh, *Asas Ketertiban Umum dan Konvensi New York 1958*, (Bandung: PT. Citra Aditya Bakti, 1998), at.187.

⁴⁷ Maharani Arindra supra.note.at 62.

states. EU established the Convention on Insolvency Proceedings by EU Councils and signed in November 23rd, 1995.

The system is written under article 3 and article 16 :

Article 3 International Jurisdiction:

- (1) the court of the country state within the territory of which of the center of the debtors main interest is situated shall have jurisdiction to open Insolvency proceedings.
- (2) The effect of these proceedings shall be restricted to the assets of the debtors situated in territory of the latter contracting state.

Article 16 Principle point (1):

any judgment opening insolvency proceedings issued by a court of a contracting state, which has jurisdiction pursuant to article 3 shall be recognized in all the other contracting states from the time that it becomes effective in the state of the opening proceedings.

Article 17 Effect of recognitions

- (1) the judgment opening the proceedings referred to in articles (3) shall with no further formality produce the same effect in any other contracting state as under the law of the state of the opening of proceedings.
- (2) The effect of the proceedings referred to in article 3(2) may not be challenged in other contracting states.

Under article 16 and 17 should be automatically recognition without any further complicated requested .

2.9. USA Bankruptcy Policy

United States of America have legal tradition in Common Law system such as United Kingdom. In regarding matter of recognition of foreign proceedings on cross border Insolvency have created chapter 15 on US Bankruptcy Act. Chapter 15 is a new chapter added to the Bankruptcy Code by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. It is the U.S. domestic adoption of the Model Law on Cross-Border Insolvency promulgated by the United Nations Commission on International Trade Law ("UNCITRAL") in 1997, and it replaces section 304 of the Bankruptcy Code. Because of the UNCITRAL source for chapter 15, the U.S. interpretation must be coordinated with the interpretation given by other countries that

have adopted it as internal law to promote a uniform and coordinated legal regime for cross-border insolvency cases.

Under chapter 11 U.S.C. § 1509. Once recognized, a foreign representative may seek additional relief from the bankruptcy court or from other state and federal courts and is authorized to bring a full (as opposed to ancillary) bankruptcy case. Under Chapter 11 U.S.C. § 1517 “ Immediately upon the recognition of a foreign main proceeding, the automatic stay and selected other provisions of the Bankruptcy Code take effect within the United States.”

Table : Jurisdiction and Recognition Countries

<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

Table : Legal Tradition and Recognitions Countries

<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 United States		Singapore Malaysia	
Civil Law	European Union	Japan		Indonesia

		South Korea		Thailand Philippine
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CHAPTER 3 : CONCLUSIONS

Conclusions

1. Globalization of economy has thrown new challenges insofar as economic law and economic politics are concerned. Since the world is shrinking in economic terms and is described as one world, laws governing the economic activities also need to be harmonized to achieve by having similar principles of universality and possible to have recognition of foreign proceedings automatically or with some condition (by request). Realizing this need UNCITRAL Model Law on Cross Border Insolvency should be adopted by countries such as Indonesia, Thailand, Philippines, Malaysia and Singapore.
2. Legal traditions of each country might not be established barriers to indirectly adopt the UNCITRAL Model Law on CBI but with similar legal traditions (common law) more suitable and easier considering the law maker, philosophy of law in written or common law, and mindset of the judges made law.

Recommendation for Indonesia

From the above provisions can be seen that Bankruptcy Indonesia against insolvent debtors' assets, adhere to the principle of universality. The rules of private International law in Indonesia do not recognize a bankruptcy procedure commenced

in a foreign jurisdiction against an Indonesian debtor, except where the country concerned and Indonesian have entered into a bilateral agreement or a regional or International convention that recognized such bankruptcy proceeding in foreign jurisdictions and their decisions.

This means that unless otherwise banned by country in which the assets are located, assets of the bankrupt debtor located abroad are part of the bankrupt debtor's assets.

The branches or subsidiaries of Foreign companies registered in Indonesia cannot be declared bankrupt through the Indonesian Commercial Court . However , under the Indonesian legal system , such companies , acting either through their foreign offices or their Indonesian subsidiaries or branches, may file a bankruptcy petition before the Commercial Court against any Indonesian nationals or entities. Such companies may also file for suspension of payment with regards to Indonesian creditors and seek ratification of a composition plan from the Commercial Court.

Standing of a foreign Insolvency Representative to Litigate in Indonesia.

Indonesia will not recognize or enforce orders and judgments resulting from foreign bankruptcy procedures. However, such orders and judgments may be recognized as supporting evidence in Indonesian bankruptcy proceeding. As a consequences of the non recognition and non enforceability of foreign bankruptcy orders and judgments. The Indonesian legal system does not recognize bankruptcy administrator (e.g trustee, liquidators, receivers) appointed under bankruptcy procedures of other countries.

Possibilities Adoption from Japan CBI Model as a Benchmark

The term *benchmarking* was first used by Cobbler (shoemaker) to measure people's feet for shoes. They would place someone's foot on a "bench" and mark it out to make the pattern for the shoes. Benchmarking is used to measure performance using a specific Indicator (cost per unit of measure, productivity per unit of measure, cycle time of x per unit of measure or defects per unit of measure) resulting in a metric of performance that is then compared to others.⁴⁸

Benchmark is define as a point of reference from which measurements may be made or something that serves as a standard by which others may be measured or judged.⁴⁹

Japan and Indonesia have been using a similar civil law system. By this legal system is more match and easier than common law system (UNCITRAL Model Law 1997).

Indonesia have possible to make Japan Cross Border Insolvency as a point of reference / standard by which Indonesian adoption of Cross Border Insolvency may be measure or made on Bankruptcy policy reform. The non automatically scheme model recognition and Universality Jurisdictions with limitation should be following by Indonesia Bankruptcy policies reform.

Indonesia should adopted Universalism Principle regarding Recognition and enforcement of foreign Bankruptcy proceeding and judgment. This is under recently practice circumstances in condition Indonesia part of Global Market, and had practice on Cross Border Investment. Indonesia actually have double standard jurisdiction principles where territoriality for recognition and enforcement of foreign bankruptcy proceedings and universalism use for the existence of the bankruptcy properties the

⁴⁸ Wikipedia . <http://en.wikipedia.org/wiki/Benchmarking> , Access on March 25th 2012, 10:23 am JST

⁴⁹ *Miriam-Webster Dictionary*, website www.merriam-webster.com/dictionary/benchmark access: On March 25th 2012 , 10:30 am JST.

debtor in overseas.

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