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Indonesia's Bankruptcy Law Reform for Stronger Cross Border Creditors' Protection

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Abstract Along with the increase in foreign investment in Indonesia, there is a growing awareness that the current Insolvency Law, i.e., Law No. 37 of 2004 regarding Bankruptcy and Suspension of Obligation for Payment of Debts dated October 18, 2004 may not be adequate to deal with bankruptcy risk associated with multinational corporations and transnational transaction, also known as cross border insolvency. This paper seeks to analyse legal framework for issues arising in cross border insolvency, such as, access to debtor's offshore assets, creditor rights and jurisdiction of the court for the better Indonesia's Bankruptcy Law. The author will use normative approach to find the answer. The analysis will begin with the legal framework for cross border insolvency under the UNCITRAL Model Law on Cross-Border Insolvency which deals with procedural issues in Cross-Border Insolvency. The UNCITRAL Model Law was designed to be promote legal certainty for trade and investment and will be suitable to attract investor to invest in a country adopting the UNCITRAL Model Law. It will be followed by a brief overview of Indonesia's bankruptcy law, particularly on how Law No. 37/2004 deals with transnational issues. The analysis on some Indonesia's insolvency proceedings involving foreign creditors, multinational corporations or offshore estate will then be considered in the following section. The author's research demonstrates that Indonesia might not be ready yet to adopt UNCITRAL Model Law on Cross-Border Insolvency and shall focus to several fundamental issues including creditors' rights and jurisdiction of the court over multinational corporations.

Keywords: Creditor's Protection, Cross border insolvency, Insolvency Law

Abstrak *Seiring dengan meningkatnya investasi asing di Indonesia, terdapat kesadaran yang semakin besar*

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bahwa Undang-Undang Kepailitan yang berlaku saat ini, yaitu Undang-undang No. 37 Tahun 2004 tentang Kepailitan dan Penundaan Kewajiban Pembayaran Utang tanggal 18 Oktober 2004 mungkin tidak cukup untuk menangani permasalahan tersebut. dengan risiko kebangkrutan yang terkait dengan perusahaan multinasional dan transaksi transnasional, yang juga dikenal sebagai kebangkrutan lintas batas. Makalah ini berupaya menganalisis kerangka hukum atas permasalahan yang timbul dalam insolvensi lintas negara, seperti akses terhadap aset debitur di luar negeri, hak kreditur, dan yurisdiksi pengadilan demi perbaikan Undang-Undang Kepailitan di Indonesia. Penulis akan menggunakan pendekatan normatif untuk menemukan jawabannya. Analisis akan dimulai dengan kerangka hukum untuk insolvensi lintas negara berdasarkan Model Law on Cross-Border Insolvency UNCITRAL yang mengatur permasalahan prosedural dalam Cross-Border Insolvency. Model Hukum UNCITRAL dirancang untuk meningkatkan kepastian hukum perdagangan dan investasi dan cocok untuk menarik investor agar berinvestasi di negara yang mengadopsi Model Hukum UNCITRAL. Bagian ini akan dilanjutkan dengan tinjauan singkat mengenai undang-undang kepailitan di Indonesia, khususnya mengenai bagaimana UU No. 37/2004 menangani isu-isu transnasional. Analisis terhadap beberapa proses kepailitan di Indonesia yang melibatkan kreditor asing, perusahaan multinasional atau perusahaan luar negeri akan dibahas pada bagian berikut. Penelitian penulis menunjukkan bahwa Indonesia mungkin belum siap untuk mengadopsi Model Hukum UNCITRAL tentang Kepailitan Lintas Batas dan harus fokus pada beberapa isu mendasar termasuk hak-hak kreditor dan yurisdiksi pengadilan atas perusahaan multinasional.

Kata kunci: *Perlindungan Kreditor, Kepailitan lintas batas, Hukum Kepailitan*

Introduction

In line with the Government's main goals which are to develop infrastructure across Indonesian territory and to increase employment, foreign investors are invited to do business in Indonesia by establishing enterprises or providing loan for infrastructure project or for Indonesian companies. Furthermore, a lot of foreign companies establish branches, representative offices and/or conduct commercial business activities in Indonesian territory.

The expansion of corporate business across national borders and globalisation has resulted in transnational legal relationship. When transnational financing become one of many important factors in economic growth, creditors, both local and foreign, will be in trouble when the debtors have become unable to pay its debts and the debts are due and payable. In an insolvency where there are insufficient bankruptcy estates, those creditors who enforced their claim with most vigour and expertise would be paid but naïve latecomers would not (Finch and Milman 2017). Insolvency law was developed at first to establish a process for the orderly collection and realisation of debtors' assets and the fair distribution of these according to creditors' claims (Hannan and Hannan 2017). However, in the globalisation era, cross border insolvency regimes which dealing with situation where an insolvent debtor trades, or has assets or creditors, in more than one jurisdiction, have also acquired a high profile and greater important (Hannan and Hannan 2017).

Indonesian bankruptcy law, Law No. 37 of 2004 regarding Bankruptcy and Suspension of Obligation for Payment of Debts dated October 18, 2004 ("**Law No. 37/2004**"), contains several provisions addressing transnational issues. However, these provisions may be inadequate in the situation where the world's economies have become more intertwined and mutually dependent. *First*, Law No. 37/2004 seems to adopt a universal theory of insolvency for proceeding commenced within Indonesian territory, requiring receivers also to investigate the existence of assets located offshore. However, in practice it will be difficult to transfer bankruptcy estates from other jurisdictions to Indonesia. On the other hand, Article 436 Rv provides that foreign court judgment is not recognized and enforceable in Indonesia. Therefore, there is no reason for Indonesia to transfer assets of an insolvent debtor to other jurisdiction for insolvency proceeding commencing in such other jurisdiction. *Second*, Article 3 paragraph 4 of the Law No. 37/2004 stipulates that if the debtor conducts the administration of its interest or its business on a regular basis

in Indonesia yet it is not Indonesian entities, the Indonesian court may exercise its jurisdiction over such foreign entities in an insolvency proceeding. However, the issue of transferring assets from the jurisdiction in which the company is incorporated has not been addressed in Law No. 37/2004. *Third*, there was also an instance where the Indonesian court, through a suspension of obligation for payment of debts proceedings (*penundaan kewajiban pembayaran utang* or "**PKPU**"), failed to acknowledge bondholders as creditors of the Indonesian guarantor under a guarantee arrangement where an Indonesian guarantor was providing a guarantee for notes issued by an affiliated offshore company. *Finally*, Law No. 37/2004 fails to deal with procedural issue of how the official receiver shall retrieve debtor's assets from other jurisdictions to maximize the value of bankruptcy estate.

Method

In finding solution to the above legal issues, author will perform a doctrinal legal research (normative) and study Indonesian national legislation, especially Law 37/2004, and an international legal instrument, namely UNCITRAL Model Law on Cross Border Insolvency in its normative concept. Analysis and discussion in this paper will be divided into three sections. The analysis will begin from the legal framework for cross border insolvency under the UNCITRAL Model Law on Cross-Border Insolvency which deals with procedural issues in Cross-Border Insolvency. It will be followed by a brief overview on how Law No. 37/2004 deals with transnational issues. The analysis on some Indonesia's insolvency proceedings involving foreign creditors, multinational corporations or offshore bankruptcy estates will then be considered in the following section.

Discussion and Results

Legal framework for Cross Border Insolvency under The UNCITRAL Model Law on Cross-Border Insolvency

Universalism suggests that home country of a multinational corporation should have worldwide jurisdiction over its bankruptcy.[1] The insolvency proceeding, creditors' rights and priority of the creditors shall then be governed by the law of the place most closely connected with the

[1] LoPucki, Lynn M., The Case for Cooperative Territoriality in International Bankruptcy. Available at SSRN: https://ssrn.com/abstract=224103 or http://dx.doi.org/10.2139/ssrn.224103.

multinational debtor (Hannan and Hannan 2017). This theory will be very difficult to be implemented as it is generally accepted that the principle of *lex situs* or *lex rei sitae* shall be applied for the status of immovable property. If a multinational debtor owns immovable property in other jurisdiction, the creditors' rights in relation with such immovable property shall be governed by the law of the country in which such property is situated. On the other hand, the place most closely connected with such multinational debtor may be the place of incorporation or place of operations.

Since universalism has generally not been the preferred mode of cross border insolvency proceeding due to imperatives of sovereignty and local politics (Bernardo 2011), Professor Westbrook suggested new concept of modified universalism. The modified universalism requires a central proceeding that serves a coordinating role, as well as a sophisticated, policy sensitive approach for choice of law (Westbrook 2017). In the modified universalism, there will be a centralized administration of creditors' claims and debtor's estate but local jurisdiction is allowed to have separate proceedings to assess the fairness of main proceeding in relation with priority rights regime and whether the main proceeding is consistent with public policy of the local jurisdiction. Therefore, it is important to identify the jurisdiction that should host the central proceeding (Westbrook 2017).

Professor Westbrook mentioned that modified universalism lies at the heart of UNCITRAL Model Law on Cross-Border Insolvency ("**The Model Law**") which was prepared over twenty years ago to deal with cross border insolvency issues (Bhatt and Gupta 2021). The Model Law, consistent with modified universalism, requires main insolvency proceeding to be commenced in the States where the debtor has the centre of main interest. A main proceeding is expected to be responsible to manage the insolvency of the debtor regardless of the number of States in which the debtor has assets and creditors.[2] While The Model Law promotes a uniform approach to cross border insolvency, it stressed out that the objective of The Model Law is not to unify substantive insolvency law.[3] Subsequently, The Model Law regulates only procedural issues instead of creditors rights and priority of creditor which remains to be governed under domestic jurisdiction.

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[2] United Nations Commission on International Trade Law, Guide to Enactment of The UNCITRAL Model Law on Cross-Border Insolvency, UN Doc A/CN.9/442 (19 December 1997) as approved by GA Res A/RES/52/158 (1997) (30 January 1998) and amended by GA Res A/RES/68/107 (2013) (16 December 2013) ("**Guide to Enactment of The Model Law**"), at para 31.

[3] Ibid, at para 3.

Regarding the procedural issues governed under The Model Law, Article 1 paragraph (1) of the Model Law sets forth the issues that may arise in cross border insolvency cases and for which the model law provides solution: (a) inward-bound requests for recognition of a foreign proceeding; (b) outward-bound requests for recognition of an insolvency proceeding commenced under the laws of the enacting State; (c) coordination of proceedings taking place concurrently in two or more States; and (d) participation of foreign creditors in insolvency proceedings taking place in the State adopting the Model Law.[4] The Model Law in general contains 3 (three) key elements:[5]

- providing a more efficient control of debtors' bankruptcy estate and stronger protection from unilateral actions by creditors;
- granting the local court discretion to allow all sort of relief to a receiver from a foreign main proceeding; and
- providing a statutory mandate to cooperate to ensure adequate protection for the debtor and its creditors.

Further, as briefly mentioned before, The Model Law distinguishes main proceeding and non-main proceeding which may result in the different nature of the relief rendered to the foreign receiver and affect the coordination of the proceedings taking place concurrently in two or more States.[6] Pursuant to Article 2 of the Model Law, an insolvency proceeding is deemed to be the main proceeding if it has been commenced in the States where the debtor has the centre of main interest (COMI). The Model Law adopts the concept of COMI like those contained in EC Regulation. This adoption shall include the interpretation of COMI since there is no definition of COMI in The Model Law.[7] The EU Insolvency Regulation 2015/848 of 20 May 2015 uses the notice of COMI to establish international jurisdiction. Article 3 paragraph (1) of EU Insolvency Regulation defines COMI as the place where the debtor conducts the administration of its interest on a regular basis and which is ascertainable by third parties.

This description conveys a law and economic aspects whereas arguably insolvency is foreseeable, and it is important that international jurisdiction be based on a place known to the debtor's potential creditors (Wessels and Madaus 2020). Even with this definition, national courts in

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4 Ibid, at para 53.
5 Neil Hannan, supra n. 4, at 10-11.
6 Guide to Enactment of the Model Law, supra n. 12, at para 81.
7 Ibid, at paras 11, 81, 82, 83, 87, 88, 141.

EU interprets COMI in various way (Wan and McCormack 2020).[8] Article 3 paragraph (1) further explains that in the case of legal person, the place of the registered office shall be presumed to the COMI in the absence of proof to the contrary. Again, this article does not go further as to explain what registered office is. Virgos-Schmit in their report specifying that where companies and legal persons are concerned, the registered office shall normally correspond to the debtor's head office .[9] In similar fashion, the European Court of Justice in Eurofood case (known as Parmalat case) determined that where a company, or legal person, carries on its business in the territory of EU Member State where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption that COMI is situated in the place of registered office (company's head office).[10] Aside from concept of COMI which is important to determine which State shall hold main insolvency proceeding, The Model Law also uses concept of establishment to determine where a non-main proceeding can be commenced. Establishment was defined, in Virgos-Schmit report, as a place from which economic activities are exercised whether the said activities are commercial, industrial or professional.[11] The important of human resource in carrying out an economic activity shows the necessity for a minimum level of organization to be considered as establishment.[12] With regards to a non-main proceeding, an insolvency proceeding commenced based on the presence of debtor's assets shall be restricted to the assets located in that particular State.[13]

Another key feature in The Model Law is direct access of foreign receivers and foreign creditors to the local court (of the enacting States) including:

- a mere fact of a petition for recognition filed by a foreign receiver does not subject the foreign receiver or the debtor's worldwide assets to the jurisdiction of the courts of the State adopting the Model Law (Article 10);

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[8] Library of the European Parliament, Cross Border Insolvency Law in the EU, available at https://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130476/LDM_BRI(2013)130476_REV1_EN.pdf, last visited on 1 October 2023.

[9] Virgos, Miguel and Schmit, Etienne. (1996) Report on the Convention on Insolvency Proceedings. [EU Council of the EU Document], at para 75, available at http://aei.pitt.edu/952/, last visited on 1 October 2023.

[10] See Case C-341/04, Eurofood IFSC Ltd.,2006 I-03813, (E.C.J. May 2, 2006).

[11] Guide to Enactment of the Model Law, at para 89.

[12] Ibid.

[13] Ibid, at para 85.

- a foreign receiver may commence a proceeding in the enacting State pursuant to the requirements applicable in the State adopting the Model Law (Article 11);
- a foreign receiver may participate in an insolvency proceeding in the State adopting the Model Law under the conditions applicable in that State (Article 12); and
- a foreign creditor may commence and participate in an insolvency proceeding in the State adopting the Model Law, and it shall not affect creditors' rank in a proceeding, except that the claims of foreign creditors shall not be ranked lower than the general non-preference claims in such State. In other words, foreign creditors shall not be treated worse than local creditors (Article 13).

In terms of recognition and enforcement, The Model Law indicates that approaches based purely on the comity or on exequatur do not provide the same degree of predictability and reliability as solutions contained in the Model Law, on judicial cooperation, recognition of foreign insolvency proceedings and access for foreign representatives to courts.[14] The Model Law provides streamlined proof requirements for seeking recognition and relief for foreign proceedings, avoiding the complexity in service such as letters rogatory for transmitting requests for judicial assistance and legalization requirements (Article 15 and 16).

As cross border insolvency involves bankruptcy estates in more than one jurisdictions, The Model Law contains the relief provisions as stipulated in Article 19 to 21. These articles aim to create a staying execution against or holding of the debtor's assets to protect and preserve the value of assets that are perishable, susceptible to devaluation or otherwise in jeopardy. This is to protect the business interests of the debtor, without unnecessarily interfering with the interests of creditors and traders. The appropriate relief that may be granted upon recognition of a foreign proceeding includes staying the commencement of individual actions concerning debtor's estate, staying execution against the debtor's assets, and suspending the right to transfer or dispose debtor's assets.

More importantly, The Model Law seeks to facilitate various national insolvency law by extending cooperation between courts and receivers (Article 25–27 of the Model Law). Under Article 27, Cooperation may take form in the following actions:

- appointment of a person or body to act at the direction of the court;

[14] Ibid, at paras. 8-9.

- communication of information by any means considered appropriate by the court;
- coordination of administration and supervision of debtor's estate;
- approval or implementation by courts of agreement concerning the coordination of proceedings; and
- coordination of concurrent proceedings regarding the same debtor.

Aside from promoting cooperation between States to facilitate a more efficient administration of cross-border insolvency, the Model Law was designed to provide legislative framework for cross-border insolvency that is well suited to the needs of international trade and investment.[15] The Model Law also promotes facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.[16] With the economic growth and rapid development in international trade and investment, the rate of adoption of the Model Law is increasing. The Model Law has been adopted by United States, United Kingdom and several States in Asia including Japan, Korea, Philippines, and Singapore.[17]

It should be noted that the adoption of The Model Law may not be the solution for all the issues arising out from cross border insolvency. In Philippines, where The Model Law has been part of its domestic legislation, the coordination and cooperation in cross border insolvency can apply insofar as another foreign jurisdiction has acceded to the principles of The Model Law .[18] The adoption of the Model Law by Singapore was stipulated in the amendment of the Companies Act on 10 March 2017 (Kim 2019). The amendments reflect the adoption of modified universalism theory that recognise foreign insolvency proceedings and eradicate the 'ring-fencing' rule, to provide a solitary forum applying the Model Law to manage the debtor's estate and creditors' claims on a worldwide basis.[19] However, Professor Hans suggested in his paper that even after adoption of The Model law, Singapore should not adopt a dogmatic approach on whether to ring-fence local assets or to order their transfer to the main insolvency proceeding, but should adopt a flexible approach that requires close cooperation between Singapore and foreign receivers in the quest to

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15 Ibid, at para 8.

16 Model Law on Cross-Border Insolvency of the United Nations Commissions on International Trade Law, G.A. Res. 52/158, U.N. Doc A/RES/52/158 (Jan. 30, 1998), preamble.

17 Background Paper for Bankruptcy Law Reform, 2018 ("**Background Paper**"), available at https://bphn.go.id/data/documents/naskah_akademik_ruu_kepailitan_dan_pkpu_final_2018.pdf, last visited 1 October 2023.

18 Torrijos, Ma. Mercedes Leanne B., Conflicts in Implementing the UNCITRAL Model Law on Insolvency as Adopted by the FRIA. 56 Ateneo L.J. 996 (2012).

19 Ibid.

achieve practical justice, i.e. balancing the interest of creditors, both domestic and foreign (Tjio 2008).

I. Overview of Indonesia's Bankruptcy Law

Long before the issuance of Law No. 37/2004, insolvency cases in Indonesia were subjected to Bankruptcy Ordinance, *Faillissements Verordening, Staatsblad* 1905: 217 *juncto Staatsblad* 1906: 348 (Sjahdeini 2010). Prior to independence, the *faillissements verordening* was the law instrument applicable to the European class, in accordance with the classification (or discrimination) imposed by the Dutch Government (Sjahdeini 2010). The Indonesian people may voluntarily comply with the *faillissements verordening* by utilizing a voluntary submission institution.[20] Following the independent from Dutch colonization, the constitutional law of Republic of Indonesia stipulates that the laws of the colonial Dutch East Indies government, to the extent that they are not in contrary to the spirit of Indonesian constitutional law, are applicable unless they are revoked and substituted by the respective laws and regulations.[21]

In mid-1997, during the Asian financial crisis which caused great difficulties among the business world, at the instigation of the International Monetary Fund (IMF) (Tomasic 2017), Indonesian Government worked on the amendment of insolvency law which resulted in the issuance of Government Regulation in Lieu of Law (or emergency regulation) No. 1 of 1998 concerning Amendments to the Law on Bankruptcy ("**Perpu No. 1/1998**").[22] Perpu No. 1/1998 was later affirmed by the Indonesian parliament as Law No. 4 of 1998 ("**Law No. 4/1998**"). However, the provisions stipulated in Law No. 4/1998 have not fulfilled the development and legal needs of the community.[23] Law No. 4/1998 had several weaknesses which may result in legal uncertainty in its application, including, lack of definition of indebtedness, debtor and creditor (Sjahdeini 2010). The new Indonesian Bankruptcy Law, i.e. Law No. 37/2004, which was promulgated on 18 October 2004, contains several important provisions to address the weaknesses of Law No. 4/1998.[24] First, with

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20 Ibid.
21 Transitional provision of Indonesian Constitutional Law.
22 Recital of Government Regulation In lieu of Law Number 1 of 1998 on the Amendment of Bankruptcy Act, enacted on 22 April 1998, State Gazette No. 87 of 1998.
23 Recital of Law No. 37 of 2004 regarding Bankruptcy and Suspension of Obligation for Payment of Debts, enacted on 18 October 2004, State Gazette No. 131 of 2004.
24 Subianta Mandala, Indonesian Bankruptcy Law: An Update, available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=2ahUKEwi1x4mJwsvnAh

regards to the definitions, Law No. 37/2004 provides definition of indebtedness, debtor, and creditor.[25] Second, more detailed provisions concerning who may file bankruptcy or PKPU petitions.[26] Third, more detailed provisions on procedures and time frames involved in the bankruptcy and PKPU proceeding.[27]

Law No. 37/2004 defines indebtedness as monetary obligation which value can be determined in Indonesian or foreign currency that currently exist or will exist in the future or is contingent that is incurred from an agreement or pursuant to the prevailing law and must be satisfied by the debtor, failing which the creditor will become entitled to recover its receivable from the debtor's assets.[28] Creditors are defined as person who has receivables from an agreement or pursuant to prevailing law that may be collected before the court.[29] Despite the existence of a more comprehensive definitions, the court, in implementing Law No. 37/2004, still have the authority to determine whether an entity may be considered as creditor. As can be seen in the case study in section III below, the court has previously refused to acknowledge an entity as creditor of another entity.

Law No. 4/1998 did not explicitly allow a creditor to file a petition for PKPU against the debtor. On the other hand, Law No. 37/2004 stipulates that petition for PKPU may be submitted by a debtor who has more than one creditor or by the creditor itself. With respect to petitions for bankruptcy, Law No. 37/2004 added one provision stating that in the event the debtor is insurance company, reinsurance company, pension funds, or state-owned enterprise engaged in the sectors of public interest, the bankruptcy petition may only be filed by the Minister of Finance. Other than this, the list of parties who may file bankruptcy or PKPU petition are identical with Law No. 4/1998, which are (1) voluntarily by debtor; (2) one or more of creditors; (3) public prosecutor (for public interest); (4) Central Bank of Indonesia if the debtor is a bank; and (5) capital market supervisory board if the debtor is a securities company, stock exchange, clearing and custodian institution, or settlement and depository institution. With respect to the bankruptcy requirements, Article 2 paragraph (1) of the Law No. 37/2004 provides that bankruptcy petition

WcxTgGHQEJCyEQFjABegQIAxAB&url=https%3A%2F%2Fwww.oecd.org%2Findonesia%2F38184160.pdf&usg=AOvVaw2QM8SXpJ8j8VBd-ZkMalOG, last visited 14 January 2021.

25 Ibid
26 Ibid.
27 Ibid.
28 Article 1 (6) of Law No. 37/2004.
29 Article 1 (2) of Law No. 37/2004.

may be filed when a debtor has two or more creditors and fails to pay at least one debt which has due and payable.

Below is a brief explanation on bankruptcy process pursuant to Law No. 37/2004:[30]

- bankruptcy petition may be filed by or against a debtor having two or more creditors and failing to pay at least one debt which has matured and became payable. A decision on bankruptcy petition shall be rendered by the court having jurisdiction over the region in which the domicile of the debtor is located.
- bankruptcy decision must be rendered by the court at the latest within 60 (sixty) days as of the registration date of bankruptcy petition. Pending a decision concerning the declaration of bankruptcy, creditors may file a petition to impose a conservatory attachment on part or the entire assets of the debtor; or to appoint an interim curator to supervise.
- legal remedy that may be pursued in respect of the bankruptcy decision shall be a cassation to the Supreme Court that must be submitted within 8 days as of the date of bankruptcy decision. The cassation may be filed by another creditor who was not the party to the hearing at the court of first instance and not satisfied by the bankruptcy decision. The decision regarding the petition for cassation must be given within 60 days as of the petition is registered.
- when a bankruptcy declaration has become final and binding, a party is allowed to file a civil review or reconsideration (*peninjauan kembali*) to the Supreme Court.

Meanwhile, a high-level summary overview of the PKPU process is as follows:[31]

- as abovementioned, debtor or one of the creditors may file a petition for PKPU. PKPU consists of the temporary PKPU and permanent PKPU. The temporary PKPU process must be concluded in no more than 45 days, within which the relevant debtor may submit its settlement plan that is subject for creditors approval or at the end of the 45 days period, the debtor may file a petition for permanent PKPU – also subject for creditors approval – if not then by the end of the 45 days period such debtor will be declared bankrupt.
- the approval of a settlement plan at the creditors meeting requires the affirmative vote of (i) more than fifty percent (50%) of the total number of unsecured creditors who hold at least two-thirds (2/3) of

[30] See Article 2 – 14 of Law No. 37/2004.
[31] See Article 222 – 230 of Law No. 37/2004.

the total amount of submitted claims of all creditors and (ii) more than fifty percent (50%) of the total number of secured creditors who hold at least two-thirds (2/3) of the total amount of submitted claims of all creditors (if any).

- creditors' claims must be submitted within the time period as specified by the supervisory judge decree (usually issued in 1 week period after the temporary PKPU decision) and shall be announced by the receiver in no more than 5 days upon the issuance of the decree; the claims will be vetted by the court-appointed receiver and are limited to the actual incurred and proven claim amounts.

Despite of several amendments to the old Bankruptcy law, Law No. 37/2004 and its implementation are still experiencing problems. The problems include lack of legal certainty and uniformity in interpreting and implementing article 2 paragraph (1) of Law No. 37/2004 regarding bankruptcy requirements; lack of discipline in the Commercial Court (especially at the Supreme Court level) in implementing a time frame for examining and deciding cases; the insolvency criteria of a debtor is unclear;[32] there is no legal certainty regarding the implementation of the duties and authorities of the curator or receiver, and there are insufficient provisions governing cross border insolvency cases.

Indonesian legislators describes cross border insolvency as a bankruptcy proceeding in which a debtor that has been declared bankrupt by a court in one jurisdiction has assets and / or creditors in one or more different jurisdictions.[33] It is understood that the most important theoretical question of bankruptcy across borders is the number of bankruptcy proceedings that must be initiated against debtors (questions regarding court jurisdiction), which country laws should be applied to regulate assets and claims against debtor[34] and issues regarding the recognition and implementation of bankruptcy decisions by a bankruptcy courts in different state jurisdictions .[35]

Law No. 37 of 2004 contains only 3 provisions to accommodate cross border insolvency case, which are:

- Article 212 stipulating that the creditors, who, after the bankruptcy declaration, have taken out their claim on debt in whole or in part, from

[32] Dan, Sejumlah Persoalan Hukum Mendesak Adanya Revisi UU Kepailitan, available at https://www.hukumonline.com/berita/baca/lt58e7479bed0be/sejumlah-persoalan-hukum-mendesak-adanya-revisi-uu-kepailitan/ last visited 18 February 2020.

[33] Background Paper, supra n. 28.

[34] Neil Hannan, supra n. 4, at 1.

[35] Elina Moustaira, International Insolvency Law: National Laws and International Texts, (Switzerland: Springer Nature Switzerland AG., 2019), at 10.

the goods owned by the bankrupt debtor located outside Indonesian territory which has not been encumbered by proper security interests, shall be required to pay into bankruptcy estate or pool of assets for what they took out;

- Article 213 which regulates the situation in which a creditor transfers its claims against the bankrupt debtor to a third party so that such third party may acquire repayment from the goods owned by the bankrupt debtor located outside Indonesian territory; and
- Article 214 stipulating that creditors shall compensate and make payment into pool of assets if such creditors assigns its claims against the bankrupt debtor, either in whole or in part, to third party such that the third party shall have the opportunity to set-off his debts or claims with a debtor claims beyond Indonesia

These articles requiring transfer of worldwide bankruptcy estate into bankruptcy estate administered under insolvency proceeding in Indonesia. These articles may also be interpreted as requiring a ring-fencing of the local estate of a registered foreign company for the benefit of paying debts and liabilities incurred in Indonesia. Consequently, they provide strong protection for the interest of domestic creditors. However, foreign creditors are then required to join insolvency proceeding commencing in Indonesia without certainty on whether judgment by Indonesian court will be recognised and enforceable in other jurisdictions where foreign insolvency estates are situated.

In relation with multiple insolvency proceeding, Law No. 37/2004 is silent on which court that has jurisdiction to commence a main proceeding. Article 3 paragraph (4) of the Law No. 37/2004 stipulates that if a debtor does not have legal domicile in Indonesia but conducts its business within Indonesian territory, the competent court is court having jurisdiction over the region where such debtor resides or where the headquarter (*kantor pusat*) is located. However, it does not explain on whether the insolvency proceeding commenced against such debtor will be the main proceeding or ancillary proceeding. By referring to Article 212 – 214 of Law No. 37/2004, the legislators are of the view that any insolvency proceeding commenced in Indonesia, both against a debtor incorporated in Indonesia or a debtor having establishment in Indonesia, should be considered as the main proceeding. Therefore, creditors' rights and priority of creditors shall be governed by Indonesian law.

The more important questions in relation with cross border insolvency issues in Law No. 37/2004 are (1) recognition and enforcement of Indonesian court decision in other countries and *vice versa* also (2)

recognition of the power and authority of receiver from one jurisdiction in another state jurisdiction.

On the enforcement of a decision by Indonesian court, Article 431 of the *Reglement op de Rechtvordering* ("**Rv**")[36] provides that the court's ruling by Indonesian court is enforceable within Indonesian territory. It has no binding power outside Indonesian territory. Consequently, foreign court judgment is not recognized and enforceable in Indonesia. This provision strengthens the position that Indonesian court, receiver shall have no power to require transfer of bankruptcy estate located in other jurisdictions. Furthermore, pursuant to Article 436 Rv, the only way to enforce a foreign court judgment is to file a new lawsuit before Indonesian court in which such foreign court judgment may be used as evidence on case by case basis.[37] These articles also apply for bankruptcy or PKPU cases. Hence, direct access as provided in the Model Law may not be easily integrated in Indonesia's bankruptcy law reform.

By the date of this paper, Indonesia has not signed any multilateral or bilateral treaties with other countries for the reciprocal enforcement of foreign court judgment. Distinction was made with respect to arbitral award whereas Article 65 of Law No. 30 of 1999 of Arbitration and Alternative Dispute Settlement which expressly states that the Central Jakarta District Court is authorized to handle matters with respect to the recognition and enforcement of an international arbitral award. Different treatment for arbitral award is understandable because fundamental issues associated with recognition and enforcement of foreign court judgment lies within state sovereignty. Thus, Government of Indonesia will need a lot of time and consideration before ratifying multilateral or bilateral treaties for the reciprocal enforcement of foreign court judgment let alone adopting The Model Law.

Case Study on Indonesia's insolvency proceedings involving Transnational Issues

1. Jurisdiction of Indonesian Commercial Court over a Foreign Entity Who Allegedly Owns Representative Office in Indonesia and Concept of COMI

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[36] This is one of many regulations that were in force and effective during the colonization period and has not been substituted by new regulation.

[37] M. Yahya Harahap, Hukum Acara Perdata, (Jakarta: PT Sinar Grafika, 2017), at 144.

In a case number 64/PKPU/2012/PN.Niaga.JKT.PST,[38] PT First Media Tbk's ("**First Media**") filed a petition for a PKPU against AcrossAsia Limited ("**AcrossAsia**") to the Commercial Court of the Central Jakarta District Court. On 4 March 2013, AcrossAsia was declared bankrupt by the Commercial Court of the Central Jakarta District Court. On 13 March 2013,[39] AcrossAsia filed a cassation and argued the following: *First*, the Commercial Court of the Central Jakarta District Court does not have jurisdiction over AcrossAsia. Pursuant to Article 3 paragraph (4) of the Law No. 37/2004, Indonesian's commercial courts may exercise its jurisdiction over a foreign company if such company conducts any businesses in Indonesian territory. AcrossAsia argued that it does not have permanent office in Indonesia nor does AcrossAsia conduct businesses in Indonesia.[40] *Second*, AcrossAsia argued that Commercial Court of the Central Jakarta District Court ignored the The Hong Kong's appeal chamber decision ruling that any payment made by AcrossAsia to the First Media must be made pursuant to writ of execution issued by Hong Kong's. The Supreme Court of Republic of Indonesia affirmed the bankruptcy declaration against AcrossAsia by Commercial Court of the Central Jakarta District Court on two reasons (1) they are not bound by the Hong Kong's high court decisions and (2) relying to Article 3 paragraph (4) of the Law No. 37/2004, Supreme Court of Republic of Indonesia, Indonesian commercial court has jurisdiction over AcrossAsia. In the civil review (*peninjauan kembali*) the Supreme Court of Republic of Indonesia ruled that AcrossAsia had established representative office in Indonesia and therefore fulfil the requirements under Article 3 paragraph (4) of the Law No. 37/2004.[41]

The author would like to stress on AcrossAsia's argument that it has no legal domicile nor headquarter in Indonesia and did not conduct any operations or business activities in Indonesia. However, the Supreme Court of Republic of Indonesia is of the view that Indonesian court has jurisdiction solely on the fact that AcrossAsia had established a representative office in Indonesia. With respect to this matter, Article 10 (2) of the Investment Coordinating Board Regulation

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38 Decision of the Commercial Court of the Central Jakarta District Court No. 64/PKPU/2012/PN.Niaga.JKT.PST dated 4 March 2013, PT First Media Tbk v. AcrossAsia Limited.

39 Decision of the Supreme Court No. 214K/Pdt.Sus-Pailit/2013 dated 13 March 2013, AcrossAsia Limited v. PT First Media Tbk.

40 Ibid, at 7 - 11.

41 Civil Review of the Supreme Court No. 44 PK/Pdt.Sus-Pailit/2016 dated 14 September 2016, AcrossAsia Limited v. PT First Media Tbk, at 5.

Number 6 of 2018 (including the former regulation) stipulates that representative office may only carry out the following activities:

- Acting as supervisor, liaison, coordinator and taking care the interests of the company or its affiliated companies;
- Preparing the establishment and the development of enterprises of foreign companies in Indonesia or outside Indonesia;

Moreover, representative office shall not:

- Seek any income from sources in Indonesia including is not allowed to carry out activities or engage in any conduct/sale transaction and purchase of commercial goods or services with any company or individual in the country; and
- Participate in managing any companies, subsidiaries companies, or branch companies in Indonesia.

On the assumption that AcrossAsia strictly comply with the provisions concerning representative office, AcrossAsia should not conduct business activities in Indonesia. Broad interpretation to Article 3 paragraph (4) of the Law No. 37/2004 may cause certain problem for AcrossAsia's creditors in its home country (where AcrossAsia is incorporated, has legal domicile, or commercial business activities). Creditors' interest may be harmed if they are not well-informed about PKPU and bankruptcy proceeding commenced in Indonesia. Thus, (i) Supreme Court of Republic of Indonesia shall provide further *ratio decidendi* with regards to its decision on jurisdiction issue and (ii) Indonesian legislators must consider the important of clarifying the scope of Indonesian court's jurisdiction, particularly over a foreign entity, for instance, there is prove that the actual centre of management of a debtor is in Indonesia.[42]

If AcrossAsia case above has been dealt with the Model Law, the court must first examine whether AcrossAsia representative office can be considered as centre of main interest or establishment as defined in Article 2 of Model Law. From the wording in Article 10 (2) of the Investment Coordinating Board Regulation Number 6 of 2018, it is quite clear that representative office does not constitute AcrossAsia's head office shall not be considered as AcrossAsia's COMI. With respect to the establishment, a minimum level of organization is required for the representative office to be deemed as establishment. From the case record, AcrossAsia argued that there's only one security office who is placed in its representative office. Therefore, it should also not be

[42] See Library of the European Parliament, supra n. 22.

considered as establishment. Therefore, local creditors shall not commence insolvency proceeding in Indonesia. Commencing proceeding in Indonesia will only result in difficulty of enforcing bankruptcy declaration and collecting bankruptcy estates from the country in which AcrossAsia is incorporated.

Question arises from the AcrossAsia case is whether Indonesia should adopt concept of COMI and establishment to determine jurisdiction of the court in insolvency proceeding. While Investment Law No. 25 of 2007 requires foreign investor to incorporate Indonesian entity to invest in Indonesia, certain sector such as oil and gas and construction sectors, allows foreign entity to conduct commercial activities and provide services to other third party without establishing Indonesian legal entity. Consequently, in some cases, while foreign entity may not have incorporation in Indonesia, it may have business administration in Indonesia or even substantial assets in Indonesia. On the other hand, the presence of representative office in Indonesia may not be sufficient to argue that a foreign entity has establishment in Indonesia because no economic activity is conducted by the representative office. Considering AcrossAsia case, Investment Law No. 25 of 2007 along with its implementing regulations, and regulations in oil and gas also construction sectors, the author is of the view that Indonesia may need to adopt concept of COMI and establishment as stipulated in the Model Law to determine whether Indonesian court has jurisdiction to commence insolvency proceeding against foreign entities which are not incorporated in Indonesia but presence in Indonesia. However, at this point, it will be very early to argue that Indonesia's bankruptcy law must also distinguish main proceeding and ancillary proceeding due to recognition and enforcement issues under Article 436 Rv.

2. Choice of Law/Forum as reasons to refuse to exercise jurisdiction and Access of Foreign Creditors to a proceeding as provided in The Model Law

In a case number 555 K/Pdt.Sus-Pailit/2013: The Bank of New York Mellon against PT Bakrieland Development ("**Bakrieland**"),[43] the Bank of New York Mellon, acting through its London branch, was a Trustee appointed by the bondholders for the bond or notes issued by

[43] Decision of the Commercial Court of the Central Jakarta District Court No. 555 K/Pdt.Sus-Pailit/2013 dated 5 March 2014, The Bank of New York Mellon vs. PT Bakrieland Development.

BLD Investment Pte. Ltd. Bakrieland was the guarantor for such bonds pursuant to the terms and conditions under Trust Deed. According to the Trust Deed, Bakrieland, unconditionally and irrevocably, guarantee that if BLD Investment Pte. Ltd. as the bond issuers fails to pay its debts when due and payable in accordance with Trust Deed, Bakrieland shall pay the debts which is due and payable on the instruction from the Trustee. Since Bakrieland's projects did not go as expected and they are unable to fulfil its obligations under the bonds, on 9 July 2013, the Bank of New York Mellon dispatched default notice to the bondholders specifying payment default by BLD Investment Pte. Ltd. and Bakrieland. The Bank of New York Mellon filed an insolvency proceeding before the Indonesian Commercial Court. On 23 September 2013, the Commercial Court of the Central Jakarta District Court rendered a decision that it has no jurisdiction to adjudicate the case due to the presence of choice of law and choice of forum in the Trust Deed. The Commercial Court of the Central Jakarta District Court is of the view that Law No. 37/2004 shall not override the choice of law agreed by the parties under the Trust Deed. This is in line with article 303 of the Law No. 37/2004 implying that the laws of the Republic of Indonesia shall be applied on territorial basis.[44] This decision was affirmed by Supreme Court of Republic of Indonesia on 5 March 2014.

In contrast with AcrossAsia case, in Bakrieland case, Indonesian court refuse to commence an insolvency proceeding against Bakrieland, an Indonesian entity having substantial assets in Indonesia, on the basis that the liabilities of Bakrieland were governed under foreign law. Syamsudin Sinaga, the former director general of general administration of law on the Ministry of Law and Human Rights, concludes that challenge of commercial court's jurisdiction raised by a debtor with the reason of the existence of choice of forum clause (i.e., that the parties have agreed to settle the dispute arises in the implementation of an agreement through arbitral tribunal) may be refused. At the same time, a choice of law clause is also not necessary to be considered or may be ruled out by a judge in commercial court.[45] The latter is consistent with the prevailing laws of Republic of Indonesia implying that choice of law is excluded in areas governing

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44 Article 303 of the Law No. 37/2004 stating that the commercial court shall remain be competent to examine and adjudicate bankruptcy and PKPU petitions from contracting parties containing arbitration clause provided that the debt being the ground of such petitions has fulfilled the requirements under the Law No. 37/2004. This means that commercial court shall have jurisdiction although the indebtedness agreement contains arbitration clause.

45 Syamsudin M. Sinaga, Hukum Kepailitan Indonesia, (Jakarta: Tatanusa, 2012), at 353-354.

companies and other legal entities[46] and insolvency.[47]Moreover, supervisory judge in the case number 10/Pailit/2003/PN.Niaga.Jkt.Pst. between Yashima & Co. Ltd. and PT Kideco Batulicin Plywood considered previous judgments indicating that bankruptcy petition against companies having domicile in Indonesia must be carried out in Indonesia. The author is of the view that, in Bakrieland case, commencing insolvency proceeding in Indonesia might be the only recourse owned by Bank of New York Mellon to take part in the distribution of Bakrieland's bankruptcy estate because Indonesia will not recognise foreign bankruptcy declaration. Therefore, considering opinion of Syamsudin Sinaga and supervisory judge in 2003, choice of law and choice of forum under the Trust Deed should not exclude the jurisdiction of the Commercial Court of the Central Jakarta District Court over PKPU petition filed by the Bank of New York Mellon against Bakrieland.

If the Model Law is to be applied in Bakrieland case, article 11 of the Model Law is designed to ensure that foreign receivers/representatives (of a foreign main or non-main proceeding) may request commencement of an insolvency proceeding in a State. In addition, Article 13 of the Model Law ensure that foreign creditor shall have the same right to local creditor regarding the commencement of insolvency proceeding. According to these articles, Indonesian court should refrain from excluding its jurisdiction, solely on the basis of the existence of choice of forum clause. Granting of access to foreign creditor will not harm the rights of the secured creditors since the principle of non-discrimination towards foreign creditors in The Model Law leaves intact the provision on the creditors' ranking. It only regulates that the claims of foreign creditor shall not be ranked lower than the general unsecured creditors. Similar with the possible adoption of concept of COMI and establishment for the reform of Indonesia's bankruptcy law, the legislators may want to consider elaborating the standing of foreign creditors or foreign representatives to commence insolvency proceeding in Indonesia.

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46 See Law No. 40 of 2007 concerning Limited Liability Company, State Gazette No. 106 of 2007, article. 14 (providing that companies are subject to this Law); Law No. 25 of 1992 regarding Cooperatives, State Gazette No. 116 of 1992, article 9 (providing that a cooperative acquires the status of a legal entity upon the approval of its deed of establishment by the government); Law No. 16 of 2001 regarding Foundations, State Gazette No. 112 of 2001, Art. 11(1) (providing that a foundation acquires the status of a legal entity upon the approval of its deed of establishment by the government).

47 Law No. 37/2004, Arts. 34, 36(3), 37, 38, 249(3), 250, and 251.

3. Determination of Eligible Creditor and Legal Certainty for Trade and Investment

On 9 December 2014, the Supervisory Judge in proceedings before the Commercial Court of the Central Jakarta District Court rendered a decision that noteholders were not creditors of Bakrie Tel for purposes of its court-supervised Bakrie Tel PKPU. Bakrie Tel, an Indonesian telecommunications company, guarantee the issuance of senior notes by a Singapore-incorporated special purpose vehicle that is a subsidiary of Bakrie Tel or the SPV. This is similar with the Bank of New York Mellon vs. Bakrieland case as mentioned before. The proceeds from the offering of such senior notes were channelled to Bakrie Tel through an intercompany loan agreement between the SPV and Bakrie Tel, which was assigned to the noteholders as collateral. In the decision affirming the composition plan, the Commercial Court of the Central Jakarta District Court accepted supervisory judge's position that noteholders are creditors of the SPV as the issuer of senior notes. As such, indebtedness that may be recognised for Bakrie Tel PKPU is the intercompany loan. As a result, only Bakrie Tel subsidiary issuing the senior notes that had standing as a Bakrie Tel creditor to vote in the Bakrie Tel PKPU proceedings.

As explained before, The Model Law was designed to promote legal certainty for trade and investment. If Bakrie Tel case is to be decided in accordance with the Model Law, Article 11 and Article 13 may be applied to grant access to noteholders to participate in Bakrie Tel's insolvency proceeding. However, it will not solve a more important question on whether noteholders can be considered as eligible creditors since the Model Law does not address the substantive insolvency law.

It shall not be disputed that economic growth in Indonesia will result in the increase of transnational financing transaction, including by means of issuing notes or bonds in foreign stock exchange. There is a need to provide legal certainty to noteholders as creditors of an Indonesian company issuing notes in other jurisdiction through its special purpose vehicle. It is understood that Article 8 paragraph (4) of the Law No. 37/2004 requiring the existence of facts or circumstances which summarily proving that bankruptcy requirement under Article 2 paragraph (1) of Law No. 37/2004 has been met. This requirement applies to both local creditors and foreign creditors. Although there is no infringement to principle of non-discrimination

as stipulated in the Model Law, difficulty to be recognised as eligible creditors shall be addressed to provide stronger protection for creditors. The UNCITRAL Legislative Guides on Insolvency Law defines creditor as natural or legal person that has a claim against the debtor that arose on or before the commencement of the insolvency proceedings. It also defines party in interest which includes any party whose rights, obligations or interests are affected by insolvency proceedings. This party in interest shall have the right to be heard and appeal including to request relief under the insolvency law.[48] By considering UNCITRAL Legislative Guides in the amendment of Law 37/2004, Indonesia may be able to provide a stronger protection for creditors.

4. Recognition and Enforcement of Foreign Judgment in relation with Cooperation with Foreign Courts and Foreign Representatives under The Model Law

Another question arising from AcrossAsia case as elaborated in previous section is recognition and enforcement of Hong Kong's appeal chamber decisions. The ruling from both Hong Kong's appeal chamber and Supreme Court of Republic of Indonesia will cause AcrossAsia to be baffled by conflicting decision. AcrossAsia must comply with Hong Kong Court decision pursuant to which it is not allowed to pay First Media without writ of execution. On the other hand, by virtue of Supreme Court of Republic of Indonesia decision, AcrossAsia is declared bankrupt and the receiver is authorised to determine the distribution of AcrossAsia's bankruptcy estate, which may be situated in Hong Kong.

In accordance with Article 431 Rv and 436 Rv, Hong Kong's court decision cannot be recognised and enforced in Indonesia. Presuming that these articles remain enforceable, adoption of provisions in The Model Law concerning recognition of a foreign proceeding and relief is out of the subject. If Indonesian government and legislators are willing to amend Article 431 Rv and 436 Rv, The Model Law may be too lenient. Several issues must be considered to determine the pre-

[48] United Nations Commission on International Trade Law, Legislative Guide on Insolvency Law, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf., last visited on 1 October 2023.

requisites for the recognition and enforcement of foreign judgment. These shall include, but not limited to, the following:

- Substance of judgment, for instance, it will only recognise and enforce foreign judgment on civil and commercial matters;
- Whether it requires that the judgment is supported by adequate proof;
- Whether it requires any supporting evidence that the judgment constitute *res judicata*; and
- Public policy, for instance, the foreign judgment must not against public policy.

Legislator may also consider provisions regarding cooperation and direct communication between courts as provided in article 25 to 27 of The Model Law to avoid the complexity in service such as letters rogatory. Concerning this issue, it must be understood that adoption of the Model law is a unilateral action. If Indonesia is to adopt direct communication provisions under the Model Law, Indonesian court is only entitled to communicate directly with, or request information or assistance directly from foreign courts in States having adopted the Model Law. The background paper for the reform of Law No. 37/2004 suggested mutual legal assistance treaty as solution to cross border insolvency issues.[49] It should be noted, however, that mutual legal assistance treaty may not eradicate the complexity in service.

CONCLUSION

Absence of specific regulations on cross border insolvency in Indonesia may results in numerous problems, including:[50]

- there is no legal certainty on which law shall be applied in a case of cross border insolvency and determine the creditors' rank as well as treat priority rights arise from secured transaction;
- the receivers will not have access to the debtor's estate located abroad. Consequently, when the bankruptcy assets located in Indonesia are insufficient, the creditors' interest will be put at risk for the receivers are unable to sell the foreign assets as a payment;
- the receiver does not have the discretion to determine the best way to handle the bankruptcy estate, either through "retail sale" or "going concern sale" for the worldwide assets are untouchable; and

[49] Background Paper, supra n. 28, p. 191-192.
[50] Background Paper, supra n. 28.

- the inability of the receiver to manage/liquidate the debtor's estates located outside Indonesia, would be the reason for a bad faith debtor to find "abroad" as the strategy to keep its assets out from the appointed receiver.

Apart from the above issues, the author would like to highlight two other important issues, i.e. jurisdiction of Indonesian court to commence insolvency proceeding against foreign entities and access to foreign creditors to commence and participate in insolvency proceeding in Indonesia. Although adoption of Model Law on Cross Border Insolvency has the potential to improve Indonesia's Bankruptcy and PKPU legal framework, this proposal may not be a one for all solution in relation with the above cross border insolvency issues. To provide a stronger protection for foreign creditors, legislators shall also consider the more fundamental issues such as eligibility to be recognised as creditors in insolvency proceedings under the laws of Republic of Indonesia.

In relation with jurisdiction of the Indonesian court to commence an insolvency proceeding against a foreign entity, the legislators can consider the concept of COMI and establishment in the Model Law. Other than incorporation, the fact that foreign entity conducting economic activities, whether commercial, industrial or professional, shall constitute sufficient ground to exercise jurisdiction over foreign entity. However, Indonesian court should also examine whether there are sufficient number of human resources engaged by such foreign entity in Indonesia to show the level of organization of such economic activity. In addition, an insolvency proceeding commenced based on the presence of debtor's assets in Indonesia shall be restricted to the assets located in that Indonesia.

As for recognition and enforcement of foreign judgment, the provisions under the Model Law may not be suitable for Indonesia because there are issues to be considered to determine the pre-requisites for the recognition and enforcement of foreign judgment including public policy. As for international cooperation for cross border insolvency, the Model Law may offer solution for a more direct legal assistance compared to mutual legal assistance treaty as suggested in the background paper for bankruptcy law reform, however the implementation of the provisions under Model Law will require reciprocity. They can only be applied insofar as another foreign jurisdiction has adopted The Model Law.

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