



## THE POLITICS OF JUSTICE-BASED INTERNATIONAL BANKRUPTCY LAW

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### ABSTRACT

*The purpose of this study is to analyze international legal regulations regarding cross-border bankruptcy that are not yet fair, and to analyze international bankruptcy legal policies based on justice that can be applied effectively in a cross-border context. This study uses normative legal research. The results of this study are differences in the application of the territorial principle and the universality principle in various countries can cause injustice to debtors and creditors. The territorial principle can make it difficult for debtors who have separate assets in several countries, so they have to face bankruptcy processes separately in several countries, while the universality principle can cause injustice because creditors can be harmed by the application of the debtor's original law which is more beneficial to the debtor. Restorative justice emphasizes the restoration of losses for the injured party. The restorative justice approach can help reduce conflict in the international bankruptcy process and encourage solutions that prioritize mediation in its resolution. With the restorative justice approach, it is expected to provide justice for all parties.*

### A. INTRODUCTION

The law must be able to provide regulation for all aspects of humanity, especially in the current era of globalization. In its development, law has become a means for society to make various changes. This is because the development of society is based on planning, namely choosing various alternative ways to achieve life goals.<sup>1</sup> Law is very important in running the business world, especially when the business is managed abroad or outside the territory of Indonesia and other countries. Bearing in mind that in the era of globalization, each country must have an open attitude due to the borderless position of the country's territorial sovereignty becoming thinner so that world developments will have an impact on other countries' territories. Issues of global transparency, democratization, civil society, human rights, public accountability, non-discrimination have quickly influenced the application of legal norms.<sup>2</sup>

1 Andri Winjaya laksana (etc)., *Lembaga dan Pranata Hukum*, (Sukoharjo: Tahta Media Group, 2024): 1

2 Endang Sutrisno., *Bunga Rampai Hukum dan Globalisasi*, (Jakarta: Media, 2013): 83

The world of business is not only carried out within one's own country, but the business world has now developed to establish business relationships with other countries in the world. In this way, the assets owned by debtors or creditors are not in their own country but are in other countries.<sup>3</sup> Business relationships carried out between debtors and creditors do not always run smoothly, if these business relationships fail, both debtor and creditor assets will be located in several countries and this will also result in multiple jurisdictions.

Companies declared bankrupt that have assets in more than one country will certainly experience problems in bankruptcy law that conflict with other countries' jurisdictions. Until now, cross-border bankruptcy is still a problem because there is no uniformity or harmonization. The main problem arising from the lack of uniformity or harmonization of bankruptcy law relates to procedures for the recognition and implementation of foreign bankruptcy decisions.<sup>4</sup>

Bankruptcy that occurs between countries is called cross border insolvency, or, according to Anglo Saxon countries, transnational insolvency.<sup>5</sup> Cross-border bankruptcy is bankruptcy that arises from an international business transaction which contains foreign elements.<sup>6</sup> Every country that has bankruptcy law will of course apply this positive law in resolving a bankruptcy case. However, in cross-border bankruptcy cases, there is more than one bankruptcy law that is a variable. According to Dr. Marek Porzycki, bankruptcy that crosses national borders occurs in several situations, namely if the debtor has a number of assets abroad, the debtor has creditors abroad, the debtor carries out activities based across national borders, and the debtor has companies in several countries.<sup>7</sup>

Bankruptcy law can be said to be good and fair law when the law can provide legal protection for debtors, creditors and above both is in the interests of the wider community so that it can achieve the goal of bankruptcy law, namely justice for all parties.<sup>8</sup> However, differences in legal systems between countries and differences in bankruptcy regulations often become obstacles in achieving justice. Some countries place greater emphasis on protecting creditors with the aim of maintaining financial

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3 Hari Sutra Disemadi Fakultas Hukum dan Danial Gomes., Perlindungan Hukum Kreditur Konkuren Dalam Perspektif Hukum Kepailitan Di Indonesia, *Jurnal Pendidikan Kewarganegaraan Undiksha* 9, No. 1 (2021): 123-134

4 Rio Adhitya., Analisis Pembentukan Asean Cross Border Insolvency Regulation Sebagai Solusi Permasalahan Kepailitan Lintas Batas Di Asean, *Jurnal Kepastian Hukum Dan Keadilan* 3, No. 1 (2021): 32-42

5 Huala Adolf., Perlindungan Hukum Terhadap Investor Dalam Masalah Hukum Kepailitan: Tinjauan Hukum Internasional Dan Penerapannya, *Jurnal Hukum Bisnis* 28, (2009): 24-29

6 Daniel Suryana., *Kepailitan Terhadap Badan Usaha Asing Oleh Pengadilan Niaga Indonesia*, (Bandung: Pustaka Sastra, 2007): 7

7 Sutan Remy Sjahdeini., *Hukum Kepailitan Memahami Undang-Undang No.37 Tahun 2004 Tentang Kepailitan*, (Jakarta: Graffiti, 2010): 6

8 M. Fuady., *Hukum Pailit Dalam Teori dan Praktek*, (Bandung: Citra Aditya Bakti, 2017): 5

stability,<sup>9</sup> while others focus more on protecting debtors to enable them to restart their businesses. These differences often result in legal uncertainty and injustice in handling bankruptcy cases across national borders.

Previous research by Irham Rahman in a journal entitled "Juridical Analysis of Territorial Principles in Cross Border Insolvency Perspective of Bankruptcy Law in Indonesia" found that "Regulation regarding cross-border bankruptcy still does not have clear procedures. Existing regulations use conflicting universal and territorial principles so that curators experience difficulties in executing bankruptcy assets that cross national borders. International agreements are a solution for executing bankrupt assets that cross borders."<sup>10</sup>

Other research from Pramesthi Dinar Kirana Ratri and Emmy Latifah in the journal entitled "The Urgency of Implementing Cross-Border Bankruptcy Regulations Based on UNCITRAL Model Law on Cross-Border Insolvency in ASEAN," found that "the establishment of cross-border insolvency regulation is already needed within the ASEAN country members current state. However there are a few challenges including the difference of laws within the ASEAN members. The absence of proper regulation to satisfy the issue could lead into the possibility of legal uncertainty. The most suitable solution now is to converge the UNCITRAL model law into their national insolvency law and to recognize the international comity within the members regarding the foreign proceedings and the cross-border insolvency proceedings within the member states."<sup>11</sup>

The aim of this research is to analyze international legal regulations on cross-border bankruptcy that are not yet fair, and to analyze the politics of justice-based international bankruptcy law that can be applied effectively in a cross-border context.

## B. RESEARCHES METHODS

This research uses normative legal research. Normative legal research basically studies laws that are considered as rules or principles that apply in society and guide individual actions.<sup>12</sup> According to Soerjono Soekanto, normative legal research is defined as the study of literature or secondary data only.<sup>13</sup> The research specifications are that in this writing the research method used is analytical descriptive, namely based on existing conditions

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9 Feri Pramudya Suhartanto, Muhamad Fadly Darmawan, Noval Febriansyah, Zahra Febriani Nugraha, Hany Fauziyyah Irawan, & Farahdinny Siswajanthy., Penerapan Ketentuan Kepailitan Terhadap Bank yang Bermasalah, *Konsensus : Jurnal Ilmu Pertahanan, Hukum Dan Ilmu Komunikasi* 1, No. 4 (2024): 1-12.

10 Irham Rahman (et. al)., Analisis Yuridis Prinsip Teritorial Pada Cross Border Insolvency Perspektif Hukum Kepailitan Di Indonesia, *Morality: Jurnal Ilmu Hukum* 9, No. 1 (2023): 56-62

11 Pramesthi Dinar Kirana Ratri dan Emmy Latifah, Urgensi Penerapan Aturan Kepailitan Lintas Batas Negara Berdasarkan UNCITRAL Model Law On Cross-Border Insolvency di ASEAN, *Belli Ac Pacis* 2, No. 2 (2016): 8-15

12 Iman Jalaludin Rifa'i (et. al)., Metodologi Penelitian Hukum, (Serang: PT. Sada Kurnia Pustaka, 2023): 6

13 Soerjono Soekanto. *Pengantar Penelitian Hukum*, Edisi 11, (Jakarta: UI Press, 2010): 41

according to the data obtained in the research, connected and compared with existing theories in accordance with international bankruptcy law.

## C. Results and Discussion

### 1. The International Legal Regulations Against Cross-Border Bankruptcy Are Not Yet Fair

Many companies that have gone bankrupt have filed or submitted bankruptcy applications, due to the bad world economy resulting from the Covid-19 pandemic which has also had an impact on the economy in Indonesia.<sup>14</sup> During the pandemic, the Commercial Court was quite busy with the number of bankruptcy filings and postponement of debt payment obligations. According to M. Hadi Subhan, bankruptcy is a court decision that results in the general confiscation of all assets of the bankrupt debtor, both existing and future. And the curator is tasked with managing and clearing up the bankruptcy assets under the supervision of the supervising judge as payment of the debtor's debts from the sale of assets or bankruptcy assets in accordance with the proportional principle regulated by law.<sup>15</sup>

In cross-border bankruptcy cases, a situation often occurs where a debtor who will be sued for bankruptcy is domiciled in a country, but he also carries out business activities outside the country.<sup>16</sup> Or vice versa, a foreign debtor will be sued for bankruptcy, but he has business activities or assets in Indonesia. This results in the condition of the debtor's assets crossing national borders which often creates problems regarding the limits of the debtor's assets which are included in the bankruptcy court. In situations like this, both foreign creditors and local creditors can file a bankruptcy lawsuit at the debtor's place of residence or at the place where the debtor's company operates as long as it meets the requirements of local bankruptcy law.<sup>17</sup>

Cross border insolvency cannot be separated from problems that arise in various bankruptcy cases that cross state jurisdictions. The problems often faced in cross border insolvency are regarding recognition and implementation.<sup>18</sup> The implementation of a decision has wider consequences, such as it can give rise to active actions from

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14 Mikhael Andre Kurniawan (et. al.), *Pandemi COVID-19 dan Prediksi Kebangkrutan: Apakah Kondisi Keuangan Sebelum 2020 Berperan?* 13, No. 1 (2021).

15 M. Hadi Subhan., *Hukum Kepailitan Prinsip, Norma, dan Praktik di Peradilan*, (Jakarta: Kencana Prenada Media Group, 2009): 28

16 Edwar Kelvin., *Perlindungan Hukum Terhadap Kreditur Atas Debitur Asing yang di nyatakan Insolvensi oleh Putusan Pengadilan Indonesia*, *Journal of Law and Policy Transformation*, Vol. 4 No. 2, 2019, page 18-42

17 Lia Nopiharni Puspitasari S (et. al.), *Problematika Eksekusi Harta Pailit Dalam Cross Border Insolvency*, *Jurnal USM Law Review* 4, No. 2 (2021): 743-755

18 Arindra Maharany., *Tinjauan Hukum Terhadap Penerapan Instrumen Hukum Internasional Dalam Pengaturan Kepailitan Lintas Batas di Indonesia, Singapura, Malaysia, Thailand, Korea Selatan, dan Jepang*, (Depok: Fakultas Hukum Universitas Indonesia, 2011): .57.

certain agencies related to justice or administration, rather than a recognition which does not always result in active actions.<sup>19</sup>

Differences in bankruptcy regulations for creditors and debtors in bankruptcy from various countries in the world, cause injustice for creditors and debtors. There are countries that adhere to the principle of territoriality, such as Thailand, where regulations in Thailand foreign creditors can obtain their rights to the debtor's bankruptcy assets which are within the territory of the State of Thailand, foreign creditors can make claims based on Thai Bankruptcy Law, foreign creditors receive the same treatment. the same as local creditors in bankruptcy applications for local debtors who have assets in the territory of the State of Thailand, but on the other hand, foreign curators or liquidators to carry out all forms of management, distribution or other legal actions, against the assets of foreign debtors which are within the jurisdiction of the State of Thailand not acknowledged.<sup>20</sup> According to the provisions of International Private Law, bankruptcy decisions use the principle of territoriality where a bankruptcy decision pronounced abroad has no legal consequences within the country. Thus, by adhering to this principle, a person who has been declared bankrupt abroad can be declared bankrupt again in his country of origin. This also means that a bankruptcy decision that has been pronounced in the country of origin only has an impact on objects located within the territory of the country itself.<sup>21</sup>

On the other hand, there are countries that adhere to the principle of universality, namely Japan. Japan has regulations on Law Relating to Recognition and Assistance for Foreign Insolvency Proceedings No. 129 of 2000, where a bankruptcy decision from a foreign court can be implemented in Japan if there is recognition from the Japanese Court which has the authority to determine the recognition of the application of foreign bankruptcy law to the debtor's bankruptcy assets in Japanese territory. This recognition is given by first submitting a request from the debtor or foreign representative to the Japanese Court for recognition of foreign bankruptcy law as long as the debtor resides/is domiciled or has an office or carries out business activities in the jurisdiction of the country where the foreign bankruptcy decision is made. The application for recognition of the foreign bankruptcy decision must be accompanied by evidence showing that the debtor is actually domiciled or carrying out business activities in the jurisdiction where the foreign bankruptcy decision was issued.<sup>22</sup>

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19 Sudargo Gautama., *Hukum Perdata Internasional Indonesia*, (Bandung: PT Alumni, 2008): 182

20 Laura Hardjaloka., *Kepailitan Lintas Batas Perspektif Hukum Internasional Dan Perbandingannya Dengan Instrumen Nasional Di Beberapa Negara*, *Yuridika* 30, No. 3 (2015): 480-504

21 Sudargo Gautama., *Hukum Perdata Internasional Indonesia*, (Bandung: PT Alumni, 2008): 35

22 Laura Hardjaloka., *Kepailitan Lintas Batas*, *Op. Cit.* : 480-504

Differences in the application of the territorial principle and the universality principle in various countries can cause injustice for debtors and creditors.<sup>23</sup> The territorial principle can make it difficult for debtors who have separate assets in several countries, so that they have to face the bankruptcy process separately in several countries, besides that, injustice can occur. In the distribution of debtor assets to creditors, this is because the courts are carried out in several countries so that creditors in one country can benefit more than creditors in other countries, while the principle of universality can give rise to injustice because creditors can be harmed by the application of the debtor's origin law which is more profitable for the debtor. Debtor, where creditors outside the debtor's home country often do not have the same access to information and legal processes and if the debtor is still unfamiliar with the legal system that applies in other countries so that the debtor is unable to defend his rights.

## **2. The Politics of Justice-Based International Bankruptcy Law That Can Be Applied Effectively in a Cross-Border Context**

Defining legal politics is not an easy task. To dissect such, politics, as explicated by Bismarck, means staking chances in order to thrive for a bigger benefit.<sup>24</sup> Legal politics is part of the study of law which consists of political science and legal science, while the definition of legal politics is legal policy implemented by policy makers. Legal politics includes the creation and updating of legal materials to suit the needs of society, including the development of law enforcers. Legal products must have the value of justice, certainty and usefulness in accordance with legal objectives. Making national legal regulations in the context of economic development is one of the regulations for activities in the business world which cannot be separated from debt and receivable problems carried out by business actors.<sup>25</sup>

Economic cooperation between countries in a regional area is one effective way to build trust between countries. Ricardo Simanjuntak believes that building mutual trusts is related to the mutual understandings, assistances, even recognitions to their national laws and implementations.<sup>26</sup> Building trust between fellow member countries also means building understanding, mutual cooperation and also recognition of the national laws of each member country and their respective applications. This could be a reason that is more likely to be

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23 Herry Anto Simanjuntak., Prinsip Prinsip Dalam Hukum Kepailitan Dalam Penyelesaian Utang Debitur Kepada Kreditur, *Justiqa* 2, No. 2 (2020): 17-28

24 Fayreizha Destika Putri, Ani Purwanti., Legal Politics In The Amendment Of Regional Head Electoral Law, *Diponegoro Law Review* 03, No. 01 (2018): 112-131

25 Luqman Hakim dan Nanda Diyan Saputra., Politik Hukum Insolvency Test Dalam Pembaharuan Hukum Kepailitan di Indonesia, *Madani: Jurnal Ilmiah Multidisiplin* 1, No. 8 (2023): 305-311

26 Ricardo Simanjuntak., *Dispute Settlement Mechanism Under The ASEAN Legal Frameworks: A Collective Commitment Creating The Rules-Based ASEAN Economic Community*, (Jakarta: Kontan Publishing, 2015): 41

an economic reason or economic motive, namely for economic interests among fellow members, compared to purely political reasons.

A justice-based international bankruptcy legal framework must take into account the interests of debtors and creditors. In many international bankruptcy cases, creditors from different countries may have conflicting rights, so fair regulations are needed to resolve creditor claims.<sup>27</sup>

Coordination between countries is key in the politics of international bankruptcy law.<sup>28</sup> Without good coordination, efforts to address cross-border insolvency could be disrupted by unilateral actions from certain countries. The international rules that can be used as a reference in forming cross-border bankruptcy rules are a model law that has been issued by the United Nation related to the development of transnational transactions in the world. The UNCITRAL Cross-Border Insolvency Regulation as a model law, does not have binding force on member countries, but this model law is more intended to build a common perception and understanding of cross-border bankruptcy rules which will develop the possibility of legal harmonization in cross-border bankruptcy and in other international communities.<sup>29</sup>

This model law was passed in 1997.<sup>30</sup> This Model Law was created to assist countries in supplementing their bankruptcy laws with a modern legal framework to more effectively handle cross-border bankruptcy proceedings regarding debtors experiencing severe financial difficulties or bankruptcy. This Model Law also focuses on authorization and encouraging cooperation and coordination between jurisdictions, harmonization of substantive bankruptcy laws of world countries, and respecting differences between national laws.

The breakthrough used to overcome the deadlock in cross-border insolvency is in the form of a Model Law issued in the form of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency with Guide to Enactment which was adopted by several countries since 1997 to complete its bankruptcy law in a modern way in anticipating and dealing with cross-border bankruptcy cases.<sup>31</sup> If in this case a country adopts the Model Law, it means that the bankruptcy law of that country allows foreign court bankruptcy decisions to be executed. Starting from the inability to execute a court

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27 Nindyo Pramono and Sularito., *Hukum Kepailitan dan Keadilan Pancasila Kajian Filsafat Hukum atas Kepailitan Badan Hukum Perseroan Terbatas di Indonesia*, (Yogyakarta: CV. Andi Offset): 15

28 Frans Marzuki dan Suyatno., Implikasi Hukum Perlindungan Investor Dalam Lingkungan Investasi Global, *Jurnal Intelek Dan Cendikiawan Nusantara* 1, No. 2 (2024): 1976-1989

29 Respati Damardjati (et. al)., Analisis Pembentukan Asean Cross Border Insolvency Regulation Sebagai Solusi Permasalahan Kepailitan Lintas Batas Di Asean, *Privat Law*, V, No. 1 (2017): 106-112

30 Siti Nurjanah., Pelaksanaan Putusan Pailit Pengadilan Indonesia Terhadap Pailit Yang Melintas Batas Negara, *Journal of Judicial Review* 19, No. 1 (2017): 116-131

31 Arivan Halim., Prinsip Resiprositas dalam Sengketa Kepailitan Lintas Batas Negara (Cross-Border Insolvency), *Al Qalam*, Vol. 17, No 4, 2023, pages 2608-2621

decision in another country because it clashes with the jurisdiction and territoriality principles applied in most countries in the world, causing obstacles to the development of international business transactions and many international business transaction actors who feel that they are not guaranteed to obtain their rights (especially in cross-border bankruptcy cases). To answer this problem, in 1997 the United Nations provided a solution that allows every country to recognize and implement bankruptcy decisions by foreign courts through the Trade Law Commission (UNCITRAL).

This Model Law generally has five objectives stated in the preamble to the UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment,<sup>32</sup> namely: Cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency; Greater legal certainty for trade and investment; Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor; Protection and maximization of the value of the debtor's assets; Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.<sup>33</sup>

According to this Model Law, in a cross-border bankruptcy process there will be two courts involved in the bankruptcy process, namely the domestic court and the foreign court where the debtor's assets are located. The coordination relationship between the two courts is carried out either directly or through representatives (curators) who are authorized and supervised by the court itself. In matters referred to in article 1, "the court shall cooperate to the maximum extent possible with foreign courts or foreign representatives, either directly or through a insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State."<sup>34</sup>

Each country may have a different legal system and bankruptcy regulations, which can affect how that country handles bankruptcy.<sup>35</sup> So an international legal framework is needed that can accommodate local legal norms and can accommodate universal principles in international bankruptcy law. The concept of restorative justice can be a solution to injustice in the bankruptcy process. Restorative justice emphasizes restoring losses for the injured party. A restorative justice approach can help reduce conflict in the international bankruptcy process and

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32 Wang, Bingdao., *Cross-Border Insolvency Law in China and Hong Kong: A Critical Analysis based on the UNCITRAL Model Law on Cross-Border Insolvency*. PhD thesis, University of Leeds, 2018

33 Mariatul Fitriah., *Eksekusi Boedel Pailit Yang Berada Di Luar Wilayah Hukum Indonesia*, *Jurnal Kewarganegaraan* 8, No. 2 (2024): 1338-1347

34 Rifki Putra Dan Muhammad Rendy., *Eksekusi Putusan Pailit Atas Perusahaan Modal Asing Di Indonesia*. *Istinbath : Jurnal Hukum* 18, No. 2 (2021): 326-351

35 Tasuji Wirismalawati and Anak Agung Sri Utari., *Penerapan Uncitral Terhadap Penyelesaian Perkara Kepailitan Lintas Batas Negara Studi Kasus Kepailitan Fairfield Sentry Limited*, *Kertha Negara* 1, No. 1 (2017): 1-12



encourage solutions that prioritize mediation in its resolution. With a restorative justice approach, it is hoped that it can provide justice for all parties.

The novelty of this research is that differences in the application of the territorial principle and the universality principle in various countries can cause injustice for debtors and creditors in cross-border insolvency disputes. Cross border insolvency resolution can be done through the UNCITRAL Model Law and the application of the concept of restorative justice. UNCITRAL Model Law as an effort to build common perception and understanding in Cross border insolvency regulations. A restorative justice approach can help reduce conflict in international bankruptcy processes and encourage solutions that prioritize mediation in resolution.

#### **D. CONCLUSION**

Bankruptcy legal regulations must be able to provide justice for all parties, however, in cross border insolvency, the differences in legal systems that apply in various countries can become an obstacle to resolving cross border insolvency disputes. Differences in the application of the territorial principle and the universality principle in various countries can cause injustice for debtors and creditors. The territorial principle can make it difficult for debtors who have separate assets in several countries, so that they have to face bankruptcy proceedings separately in several countries, while the universality principle can cause injustice because Creditors can be harmed by the application of the debtor's origin law which is more profitable for the debtor. The UNCITRAL Cross-Border Insolvency Regulation as a model law can build a common perception and understanding regarding cross-border bankruptcy rules which will develop the possibility of legal harmonization in cross-border bankruptcy and in other international communities. Restorative justice emphasizes restoring losses for the injured party. A restorative justice approach can help reduce conflict in the international bankruptcy process and encourage solutions that prioritize mediation in its resolution. With a restorative justice approach, it is hoped that it can provide justice for all parties.

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