

INEFFECTIVENESS OF THE LAW ON CROSS INSOLVENSIS UNCITRAL MODEL

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ABSTRACT

Legal problems due to cross border insolvency are increasingly complex. The United Nations has issued the 1997 Model Law on Cross border Insolvency (CBI) to help countries solve their CBI problems. However, this model law is not effective because very few countries adopted it. The legal problem studied is why very few countries adopted the model law and how to overcome the ineffectiveness of the model law. The results of the study indicate that the lack of adoption of the model law caused by: the model law is only a non-binding legislative text; Too much flexibility encourages deviations from the provisions; do not want to reduce their sovereignty, status quo, international cooperation recommended by the model law is not always of primary interest, and many countries have been bound by international agreements on regional CBI which are considered more relevant than the model law. The solutions that can be suggested to overcome the ineffectiveness of the model law on CBI are national bankruptcy laws mechanism; the International Treaties and Conventions mechanism; Rules, Regulations, Principles and Guidelines mechanisms and protocol or adhocagreements.

Key words: Model Law; cross border insolvency; adoption

A. INTRODUCTION

Insolvency law firstly is implemented only in domestic area, whereas the respective parties or the location of the asset located only in one state, hence the issue and problems are not too complex (Rami EL Borai, 2006;8-9). The situation changed since late 1990's where the activity of conglomerate multinational across nations cannot be dammed again. (LiaMetreveli, 2017;316). Furthermore, as the transnational business transactions is increasing hence the potency of failure and loss can lead to bankruptcy. Bankruptcy is a condition where one who is a bankrupt; amenability to the bankrupt laws; the condition of one who has committed an act of bankruptcy, and is liable to be proceeded against by his creditors therefore, or of one whose circumstances are such that he is entitled, on his voluntary application, to take the benefit of the bankrupt laws. The term is used in a looser sense as synonymous with "insolvency". Once the bankruptcy is happen, in case there is alien element such as different parties' position, nationality difference, asset 'location in some nations,

therefore what is called cross border insolvency as well as transnational insolvency (Huala Adolf, 2009:24). Another common interpretation known as transnational bankruptcy, cross-border bankruptcy, transnational insolvency, and international insolvency. Transnational insolvency might be more complex when it involves subsidiaries, various business transaction from debtor, and creditor coming from many nations (Ignatius Andi, 2004:514)

Cross Border Insolvency (CBI) is more popular since the existence of Model Law from UNCITRAL in 1977. UNCITRAL stated that CBI: "... included cases where some of the creditors of the debtor are not from the state where the insolvency proceedings is taking place" (Sudargo Gautama, 2008:47)

Compared with domestic insolvency, CBI more complex and raise more legal issues. The first legal issue , for instance, related with the existence of *Par imparem non habet imperium* principle , under international law provided that one sovereign country is not bound of another sovereign country, including its jurisprudence on domestic courts. According to this principle, it will be difficult to rely on insolvency decision relied by foreign court to be acknowledged and implemented in place where the said assets located. For instance, rejected insolvency application to Manwani Santosh Tekchand(Indonesia) submitted by OCBC Securities Private Limited (Singapore) by Indonesian Court on the decision of High Court of Singapore no S870/2008/D dated 1 July 2009 stated that asked Manwani to pay an amount of money to OCBC. This order interpreted from applicant as Marwani's debt to OCBC and by reason that Manawi has ignored several times of billing hence lead OCBC filled an insolvency application against Manwani. One of the Indonesian Judge consideration by rejected the OCBC application that even the Singapore Court decision has satisfied all the requirement as the authentic deed, this cannot be implemented in Indonesia directly. Based on Article 436 of RV provided that foreign decision can not be implemented in Indonesia. Foreign court decision only seen as fact law that not binding and can be assessed as independent as Indonesian Judge.

The second legal issue on CBI is related with the difference of nation jurisdiction criteria. In case of Enron Directo Sociedad Limitada, a subsidiary of group that established and incorporated in Spain, has asset and lot of labor , but the main office is located in London, jurisdiction criteria that chosen by England Court is the location of main office. According to Yukos case, a big oil company in Russia 1993, Federal Court of Houston decided that even Yukos is foregin incorporated that not established in Housten, however the existence of account trust money and Yukos chief operating officer in US is enough as the basis jurisdiction for Houton on the transnational insolvency against Yukos.

This inconsistency regarding jurisdiction criteria is also happen in Indonesia. In case insolvency application The Ortrich Meat and Marketing Co.Ltd ('TOMM'),

a incorporated Australia company, Commercial Court Central Jakarta through its decision on No.30/PAILIT/2002/PN/NIAGA/JKT/PST decided to reject the insolvency application of TOMM because it is cannot be proven as located in Indonesia and does not have any representatives office which in accordance with the Company Law and Foreign Direct Investment (Riris Murdani,2016;7) . Although the applicant has already provided an evidence stated that TOMM has an single agent in Jakarta (Mahkamah Agung RI :179-182)

Moreover, in similar cases, Commercial Court Central Jakarta accepted insolvency application submitted by Choi Yon Hak and Kim Chang Bok with the evidence of South Korea Republic Pasport who run his business in Indonesia and obey all the law and regulations under Indonesian Law. The claim against Hong Young Soo(Korean citizen) with case registration number 06/PAILIT/2005/PN.Niaga/Jkt.Pst.

The third legal issue under CBI is regarding the location of asset outside the nation whose decided the insolvency case. Even though under Decision No. 021/ PKPU/2000/PN.Niagajo.Putusan No.78/Pailit/2001/PN.Niaga decided to accept the application against businessman FM (initial name) who domiciles in Indonesia but his asset and the depositor located in Saudi Arabia, the applicant is not automatically can execute the debtor asset of FM in Saudi Arabia (HikmahantoJuwana, 2005: 224-227).

Another legal issue is regarding the difference of criteria and debtor requirement to be bankrupt between nations. The insolvency decision by Commercial Court year 2002 (Putusan No 10.Pailit/PN. Niaga/Jkt.Pst) against Asuransi Jiwa Manulife Manusia(AJMI), has caused a strong reaction by Canada Government with regards to this problem.

As provided above, the absence of similar and coordinated terms in across-nations insolvency in few nations according to SandeepGopalan and Michael Guihot has arisen legal issues such as limited legal clarity with regards to the participation in foreign court : language : limited procedural fairness ; absence of fair treatment against creditor from few nations: obscurity regarding validity and security validity; limited of employee protection and another group ; enhancement of borrowing costs faced by creditor; late disbursement ; obsatcle in order to protect many target of national public policy. Additionally by the fact that it is difficult and the amount of transnational insolvency administration is quite expensive which leads to small creditor cannot participate in some insolvency process of some jurisdiction. (SandeepGopalan and Michael Guihot, 2015; 1227-1228).

All conditions provided above have cause awareness from many parties about the needs of CBI uniformity regulation. In 1997, UNCITRAL has successfully adopted Model Law On Cross- Border Insolvency With Guide To Enactment. Model Law designed to help countries to supplement their insolvency law with modern,

harmony, justice framework in order to resolve CBI cases effectively. (S. Chandra Mohan , 2012 ; 199-223)

Fact shows until 2015, only twenty two countries has adopted Model Law on CBI into their national law. Indeed this has rise question why many countries has not adopted yet Model Law on CBI into their national law. In fact, the more an international law instrument adopted, it would be easier to achieve its missions.

Related with Indonesia, lot of party has recommended Indonesia to adopt Model Law on CBI. Although according to USA, England, Australia, shows that Model Law (SandeepGopalan and Michael Guihot, 2015 : 1226)

*“has not Succeeded in delivering on the goal of certainty and predictability for creditors or debtors in relation to the enforcement of **insolvency** judgments. Creditors remain uncertain about how to protect their investments, and debtors are unsure about the consequences of participating in foreign proceedings or abstaining from them. circumstances, parties are effectively taking a lottery in making serious decision..”*

B. PROBLEM STATEMENTS

Based on the above explanation, the following section will review on issue why UNCITRAL Model Law on CBI has not been adopted yet by many countries which consequently leads to ineffectiveness due to its case settlement and what effort that should be done by international community including Indonesia to resolve this ineffectiveness of UNCITRAL Model Law on CBI?

C. METHODS

The research is a normative legal research (doctrinal research). It used a qualitative analysis and legislation, case, as well as conceptual approaches. Thus, the choice of relevant material and integrated interpretation during interviews with stakeholders related to the main research issues.

D. RESEARCH RESULT AND DISCUSSION

1. International Law Regulation on CBI

a. State Practices.

Before the establishment of Model Law 1977, International Customary Law have known 2 approaches practiced by States to resolve CBI cases. These approaches refer to Territorial Approach and Universal Approach. (Steven J. Arsenault, 2011;2-3)

Territorial Approach has being said as traditional approach (John J. Chung, 2006:93). According to this approach, insolvency statement decision only applies in countries where that decision is mentioned. Insolvency is only about assets and its part whose located in Countries where it is mentioned. For instance, X as debtor has been declared as bankrupt in Country A and X also possibly declared as bankrupt in Country B. Country A decision on insolvency only applies in Country A and cannot be implemented in Country B and *vice versa*. (DanielSuryana, 2006:23) . Based on this approach, debtor's assets which physically is present in few nations and subject to its supervision and local court jurisdiction where it is located. This approach also known as the grab rule, referring to process or procedure of debtor local assets sale and distributed of its result to the creditors based on local jurisdiction law system without considering another international insolvency procedure. (Steven J. Arsenault, 2011;4)

The second approach is universal approach. Insolvency decision by court in some nations beside bound to the debtor asset which located in that nation, also bound to debtor assets whose location in countries that adherent universal principle. Court in debtor home country has jurisdiction over debtor assets around the world, and assets will be given as long as it is in conformity under their law system. Curator also can exercise his duty in country where it can be found the debtor assets. This approach is based on economy analyze which can minimize the fee of insolvency regulation and will create the most efficient debtor assets distribution, modal allocation, decreasing the fee, avoid shopping forum, to facilitate of reorganization, and provide a clarity and legal enforcement for all parties, developing a fair justice and equality in distribution of assets to creditor by managing this cases in one center forum (Steven J. Arsenault, 2011: 6-7).

However, critic has shows that government reluctant to adopt universal by the reason of giving national sovereignty to foreign country. These countries tend not to apply foreign law in their region. Furthermore, because mostly multinational company base in developed countries, hence universal implementation will cause their laws will be applied rather that developing countries law. Additionally, it's not clear enough regarding which jurisdiction shall be seen as home country of multinational company. Another factor that shall be in consideration is regarding the asset location itself, creditor and where the business of debtor has been exercised (Steven J. Arsenault, 2011:7).

Beside of state practices regarding CBI has been explained above, currently there are few international law instrument which directly govern about CBI, will be in follow :

- a) “UNCITRAL Model Law” UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment (1997)
- b) “Guide to Enactment” ; Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency;
- c) “UNCITRAL Legislative Guide”: *UNCITRAL Legislative Guide on Insolvency Law* (2004);
- d) “UNCITRAL Practice Guide”: *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation* (2009);
- e) “EC Regulation”: European Council (EC) Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings;
- f) “European Convention”: Convention on Insolvency Proceedings of the European Union (1995);
- g) *Cross border insolvency agreement. Mutual Recognition and Mutual Enforcement of Republic of Singapore and Malaysia.*

Furthermore, there are also regulation that could help CBI process become easier such as *Convention Abolishing the Requirement of Legalization for Foreign Public Documents* 1961 (Apostille 1961); *The Hague Convention on the Taking Evidence Abroad in Civil or Commercial Matters* (1970); *Hague Convention 1971 on The Recognition And Enforcement of Foreign Judgments In Civil And Commercial Matters.*

Until now, Indonesia has not been involved in any one of international law instrument regarding CBI. Not only Model Law, the participation of these 3 regulations above still limited, even the party in Hague Convention 1971 in 2013 is only 5 countries , Albania, Cyprus, Kuwait, Portugal, and Netherlands. The reason is because this convention is reduce state sovereignty, and for businessman across nations there is no any legal protection for their respective rights (EmilioBettoni, 2013:469).

UNCITRAL Model Law on CBI drafted and prepared as a response to the difficulties of resolving bankruptcy companies operating in many countries.(Claudia Tobler, 1999:407). Model Law creates 4 principle, namely: (Steven J. Arsenault, 2011:5).

1. “access” by a foreign representative to the courts of the enacting State,
2. “recognition” by the state of the foreign proceedings,
3. “relief” which ensures the granting of interim reliefs pending recognition
4. “co-operation” and “co-ordination” which require courts and insolvency administrators in various states to communicate and co-operate for maximization of assets for the benefit of all creditors.

By implementing Model Law, therefore where CBI process is on going(ClaudiaTobler , 1999: 407)

- a. All creditor interests will be more protected, regardless what country they came from, because they will be treated equally and non discriminative
- b. Communication and cooperation between court and creditor representative or debtor will be more coordinated
- c. People or entity who authorized to manage and reorganization or liquidation will have faster access to foreign court and to obtain help from those who need.

Model Law in CBI is intended to provide a cooperation between court and another competent authority from enacting state and related foreign country, providing a clarity of legal protection to commercial and investment : creating CBI administration which more efficient and equal that protect creditor, debtor, and another party whose has authority : maximize debtor assets value: an facilitate business protection financially or in other words protecting investment and preventing work termination.

Model law applies modified universalism by distinguished the process between the main CBI and non-main CBI. The main foreign process happened in country whose has main interests (center of main interest/CMI), including main office location or where the debtor company is established or place where debtor conduct its administration regularly and can be known by the third parties (IrtitMevorac, 2018:1404. According to Article 20 of Model Law on CBI is :“...any foreign proceeding, other than a main proceeding, taking place in a state where the debtor has a place of operations and carries out a nontransitory economic activity within that place of operations”. Model Law has attempted to facilitate Countries regarding CBI cases by deleting procedural obstacle, trying the court cooperation, increasing court authority to provide an assistance to foreign representatives,, and also a moment to CBI Administrator to manage the debtor matters.

Foreign representative also provided a direct access to court of enacting country. They also have the opportunity to contributing in legal proceeding against one individual in enacting country that affect debtor asset. Model Law provides 2 foreign main process and foreign non-main process.

UNCITRAL Model Law provides for disputant party to cooperate in their maximal effort. Article 25(1)-(2), 26 (1)-(2) Model Law on CBI. Cooperation also can be implemented, including informal communication, administration coordination, asset security and debtor matters, agreement and implementation regarding coordination process, konkueren debtor coordination as well as another additional duty agree by enacting state. (Pasal 27(a)-€ Model Law on CBI)

2. Model Law on CBI as Soft Law and its effectiveness.

According to its binding power, international law source distinguished into hard law and soft law. Hard law is a law tool that non judicially binding. Furthermore, Soft Law only binding morally Soft law is understood as an instrument for normative but don't have legally binding force, implemented through voluntary income mechanism. (Michael Joachim Bonell, 2005; 229). Soft law generally apply legal rules that are not positive, therefore non judicially binding. Although soft law is not positive law, this can be positive law through court process, arbitral tribunals, or legislation, or on behalf mutual party agreement that leads into an agreement (Henry Deeb Gabriel, 2009:258).

In order to provide differences between hard law and soft law easier, the most effective way is coming from the title of the agreement; and treaty, while, soft law, tends to use declaration, model law, recommendation, guidance, norm of conduct, action of plan, codification of custom and usage promulgated by an international nongovernmental organization, the promulgation of international trade terms, model forms, and restatements by leading scholars and experts. Another way by using guidance provided by legalization theory (Concept of Legalization) from Kenneth W. Abbott, DuncalSnidal. This theory use 3 tools which are Obligation, Precision and Delegation. (Fuat Albayumi,2012;4)

Obligation is a bound by country to fulfill their responsibility or commitment stated in an agreement. Six indicator of obligation from highest level until lowest level is: (1) *Unconditional obligation, language and other indicia of intend to be legally bounded*, (2) *Political Treaty : implicit condition on obligation*, (3) *National reservation on specific obligation :contingent obligation and escape clauses*, (4) *Hortatory obligation*, (5) *Norms adopted without law making authority: recommendation and guidelines*, serta (6) *Explicit negation of intent to be legally bounded* (Fuat Albayumi,2012:4)

An authority delegation to the third party to interpret rules, settle a dispute, or even establish an advanced terms and condition on its instrument. Delegation measured from the existence of dispute resolution indicator and rule making and implementation. From dispute resolution aspect, there are seven indicator that shows level of delegation from the highest until the lowest : (1) *Courts: binding thirdparty decision, general jurisdiction, direct private access, can interpret and supplement rules, domestic courts have jurisdiction*; (2) *Courts : jurisdiction, access or normative authority limited or consensual*; (3) *Binding arbitration*; (4) *Nonbinding arbitration*; (5) *Conciliation, mediation*; (6) *Institutionalized bargaining* dan (7) *Pure political bargaining*. Furthermore, from rule making and implementation, there are 8 indicator that shows level from the highest until the lowest (1) *Binding regulation centralized enforcement*;

(2) *Binding regulation with consent or opt-out*, (3) *Binding internal policies legitimation of decentralized enforcement*; (4) *Coordination standards*; (5) *Drafts convention monitoring and publicity*; (6) *Recommendations confidential monitoring*; (7) *Normative statements*; dan (8) *Forum for negotiations*

Precision is a condition where the provision which consisted of the contract should govern the parties of the contract clearly. Precision is obtain to be measured within 5 indicators which showing the highest level to the lower, such as : (1) *Determinate rules: only narrow issues of interpretation*; (2) *Substantial but limited issues of interpretation*; (3) *Broad areas of discretion*; (4) *Standards: only meaningful with reference to specific situations*; and (5) *Impossible to determine whether conduct complies* (Fuat Albayumi, 2012:5).

If the legalization theory was applied for Model Law on CBI, therefore it would be obtained, *inter alia*: for the obligation on the sixth level of recommendation and guidelines, where model law only provides non-binding recommendation and instructions. In dispute resolution aspect of delegation on the second level, offer cooperation with courts related to CBI-countries. Aspects of production and application of the rule on seventh level normative standard, where model law is non-binding legislative texts, moreover for precision itself is at the third level which is broad areas of discretion due to model law provides broad flexibility to a country in adopting the provision of the model law.

According to Abbot and Snidal, advantages in applying hard law is to avoid the higher transactional cost, reinforce the credibility of State commitment also to expand political aims scope. Whereas its laxity is the sovereignty of the country would be eroded and it is not adaptable to change (Fuat Albayumi, 2015:5). Moreover, the advantages in producing the soft law, such as State sovereignty is still upholding, Agreement is easy to reach, more flexible in facing the diversity and change, also adaptable to norms changes. Soft law has excess in harmonizing the rule of law (Henry Deeb Gabriel:660). Its excess is has meant that soft law is not subjected to pressures for aligning all the provisions. A country could do selective harmonization. Soft law is unlike treaty or convention which generally has a long procedure to be ratified by the country, or even have delay enforcement if the qualification of ratification is not full filled. When the soft law was completed, this instrument is ready to adopt as an agreement between the parties' or ready to be applied as an interpretive document by courts and arbitrators. Until now, the success of soft law in the model law type is the UNIDROIT Principles of International Commercial Contracts. This model law obtained praises due to it is non-binding, not influenced by the government, and not threatening the national law system.

As is in the other model laws, Model Law on CBI is arranged to be law source which taking effect to unite the diversity of national law sources, but it still submitted fully to legislatures, courts and arbitral tribunals to decide how far the model law could be adapted to support finalise their problems (SandeepGopalan, 2004:159).

In order to the model law adopting successfully on CBI, UNCITRAL has had a lot of good things either before Model Law 1997 or after Model law 1997 was enacted. UNCITRAL model law has workshops, colloquia, discussion and consultation which involve the judge, governments officials, insolvency experts and practitioners (Jenny Clift, 2004:412). UNCITRAL was also published Guide to the Enactment of the Model Law on 1997; a Legislative Guide on Insolvency Law on 2004 dan Practice Guide on Cross-Border Insolvency Cooperation on 2009, and providing several technical supports to forwarding the adopting model law into National law. However, now Model Law on CBI has a low adopting level, it has 22 countries in 2015.

Based on research, there are several reasons why the country wont to adapt mode law, even if it only an apart of it. Firstly, model law is not a binding International agreement, then it only recommendation legislative text which is not bound the country to adopt or implementing it. Secondly, model law giving the country enormous freedom to decide how he wants to include the Model law into their domestic Acts. Article 1 (2), i.e. possibly, State could excluding the certain organization from model law in CBI application. For example, Bank or insurance company because their insolvency is related to the parties who have a high interest. America i.e. is excluding investment institutions, stock exchanges, insurance undertakings, clearing houses, brokers and traders, banks, railroads, stockbrokers and commodity brokers from Model Law on CBI application, however, it is impossible for foreign companies. And then Article 3 provides rights in a country to respect and holding on the International agreement which existed and binding also applies to him who is in contravention with the Model Law on CBI. Moreover, Article 6 is permitting the court to ignore the certain action if its action would be contradictive to the country's public policy. In practically, a lot of country modification several provisions due to many reasons including their relationship with the country's policy and social norms. The biggest flexibility in adopting model law into national law system already encourages irregularities from the provisions itself, regardless of UNCITRAL's request not to violate it.

Thirdly, the needs of maintaining the state sovereignty to enforce their law, specifically with regard to assets in their own territory, so that it can be handled as well as their own law (Steven J. Arsenault, 2011:19). For instance, almost there

is no country has difficulty in accepting that foreign creditor and local should be treated equally. On the other hand, there is a concern with its foreign aims, that it could be causing some kind of inverse inequality, which is the foreign court or foreign officials representatives who come, they have control and determines the seizures of assets. The country would be reluctant to enact the Acts which enforce them to recognize all decision of insolvency made by the foreign court, instruct to give access to official representatives of foreign insolvency to a foreign court, also hand over the assets which located in their territory to the global owning. The alternative application of the reciprocity principle perhaps more important than only protect it from “Opportunistic Behavior” (Francesco Parisi and Nita Ghei, 2003-2004:96).

Fourth, a lot of countries only continuing the best thing or their own national interests. There is no branch of law which formed more than the consideration of national economic policies and commercial philosophies (Sir Peter Millet, 1997:109).

Fifth, International cooperation which recommended by model law not always as the main interest, especially in case of CBI was subjected to the local media and public supervision. A lot of insolvency’s problems which relating to the seizure and distribution assets, also adjudication of creditor claims is determined by the regulation of the States which representing a fundamental value that is considered important by the states and the court feels bound to enforce it. Under a few countries that adopting Model Law, such condition is uneasy to reach the unification of procedural law without interest to aligning the substantives of insolvency law firstly.

Sixth, a lot of countries are bound into the International agreements about CBI in their regional and other regional instruments that considered more relevant than Model Law on CBI. Adopting model law 1997 could arise some problems for countries which already bounded into the convention or international agreement about CBI. For instance, a member of the European Union automatically bounded to EC Regulation on Insolvency Proceeding 2002 that consisted of the provisions related to the respect of jurisdiction, recognition of judgements and the insolvency law. Not all provisions of the model law are appropriate to EC Regulation on Insolvency Proceeding 2002. Conclusively, if member states of the European Union adopting model law, is mean that they would apply two different systems, so that is causing uncertainty and confusion. This matter was advised to Spain if he adopting model law. United Kingdom was noted that distinction of provision which related to the exemption for bank and others financial institutions, also related to jurisdiction provision, choice of law and determination of Center of Main Interest between Model law provision with EU

Regulation (Moss, Fletcher and Isaacs, 2011-2012:832). In the European Union, on several levels of the courts, they tend to apply EU Regulation even more including when handling the case with non-EU member (Mion C. Mion,2006:26). Similarly, a concern also explained by several practitioners of Canadian CBI when its country would adopting the Model Law on CBI. They stated that all this time Canadian courts and the United States are forming cooperation relation in CBI resolution. Therefore, Model law within its concept and terminology, it only would be compounding its cooperation relation, adopting the model law will producing “new uncertainty era”.

3. Settlement Recommendation

CBI’s problem actually is not a new problem, it has existed since model law CBI 1997 not enacted yet. However, in the globalization era the case was increased and more complex. Although it has UNCITRAL Model Law on CBI, it is not effective regarding its adopting is really minimum. Settlement of the CBI problem has a lot of obstacles due to differences in existing legal systems. Based on it, there is a solution that recommended for several countries, including Indonesia, inter alia:

a. Revise the Act of National Insolvency

The national Acts rather have a specific provision on CBI settlement that possibly through transnational cooperation which profitable for all parties involved. For instance, foreign insolvency order and the local court as a place of assets designate a competent specific administrator and recognized by other states. Moreover, another alternative is national Acts sets that foreign insolvency order it doesn’t have exclusive jurisdiction in order to CBI problems. Foreign insolvency order is recognized under reciprocity principles and its decision not violated with the public policy of the local court which the assets located. Hence, the local court has CBI’s case under foreign order that recognized by its local court. In Indonesia, the settlement provisions for CBI is insufficient and causing obstructed the CBI’s cases. Insolvency decision by Indonesia courts would not have legal consequences for debtor assets abroad. Also, curator’s authorities to solving the assets of a debtor are unrecognized by foreign courts which the debtor assets located.

b. Through the International Treaties and Convention mechanism

A set of the International or regional agreement already made or even before 1997 to resolve CBI’s problems that probably arise between them. For instance the Montevideo Treaty (1889) and the Bustamante Code (1928) which involving 15 States in Latin America; The Nordic Convention (1933)

signed by Denmark, Finland, Iceland, Norway and Sweden; OHADA (1995) that it is the acronym from the French “Organisation pour l’Harmonisation en Afrique du Droit des Affaires” its adopted by 16 states in West and Centre of Africa, which were colonized by France. Moreover, EC Regulation on Insolvency Proceeding 2002 was made by European Union citizen, also mutual recognition and mutual enforcement of Republic Singapore and Republic of Malaysia. These agreements facilitate states by states to make cooperation, coordination and resolve the differences on CBI provisions between them.

c. Through the Rules, Regulation, Principles and Guidelines

This solution was much-done post-1997, where the regional cross-border or transnational rules and regulations, directives, conventions, treaties, practice standards and guidelines on best practices were increased. Generally, forming was initiated by regional or political and trade grouping. This solution gave an advantage to decreasing law conflicts and able to focus on law and practices between states which have similarity perspectives. In the last years, a few financial and professional institution also has started several projects and study related to the CBI’s cases. The current results has appeared proliferation of insolvency “principles”, “guidelines”, “good practice standards” and “recommendations (Bob Wessels and Ian Fletcher, Global Principles for Cooperation in International Insolvency Cases <http://www.iiglobal.org/component/jdownloads/viewdownload/36/5303.html>). Availability of these several instruments creates an accidental consequence that Model Law become less relevant to be adopted in order for settlement CBI comparing with these instruments when the first time published. In facts, several guidelines were published is proven more relevant and less threatening the States sovereignty as is legislative texts model which provided by Model Law especially relate to the foreign process and intervention of its official representatives (Steven J. Arsenault, 2011:24).

d. Through making Protocol

Making Protocol is one of the solutions to resolve CBI. The meaning of Protocol in this matter is nothing less than a tailor-made law for the individual case (Evan D Flaschen and Ronald J Silverman, 2015:589). A protocol is Law that was specifically made for a specific case. Basically, it is a private agreement between the parties’ in CBI. A protocol which made by the United States and Canada in case of Matlack, it shows its excellence due to the court was dechiping the purposes, including the harmonization, coordination, efficiency promotion and justice, cooperation and transparency

(Keith D. Yamauchi,2003:26). Protocol becoming one of the instruments importantly after Maxwell case, its fully functioned to aligning the process through a framework of communication and coordination between the court and the parties' (Paul H Zumbro, 2010:11, Jamie Altman,2011:464).

After Maxwell, a protocol was much signed by in case of Lehman Brothers (2009), Bernard Madoff (2009) and Networks (2009). Lehman Case is involving the Bank operation in more than forty countries with seventy-five insolvency submissions in nine States, six of them are not adopting Model law yet. These protocols were made under Model Law on CBI; Concordat; ALI Court-to-Court Communication and European Communication and Cooperation (Paul H Zambro, 2010:26). Although International insolvency instrument was available to apply, for instances are Model Law and EC, it seems there is a higher preference to utilising the protocol or insolvency agreement when faced to the complexity of liquidity of the financial services company of Lehman Brothers or restructuring the business of the telecommunication Nortel. With the global solution that utilise the ad hoc agreement (protocol); informal workouts and restructuring business, the States increasingly have a reason to not adopting the text of legislative CBI in order Model Law on CBI 1997.

E. CLOSING

There are several causes that Model Law on CBI is not much adopted by States, such as: first, that Model Law is not binding International Agreement it only non-binding legislative texts; second, Flexibility is too broad in adopting the Model Law into the National Law System and it encourages the violation of its provisions; third, he needs to maintain the States sovereignty to enforce their own Law or regulation, especially related to the territory assets, so that it solved in accordance with their own regulation; fourth, a lot of States only continuing the best thing for their national interests; fifth, International cooperation which recommended by Model Law is not always as priority interest and sixth, a lot of States that already bound into International Agreement and the instruments about CBI in their regional that more relevant than Model Law on CBI. The measures when the Model Law are not effective to resolve the CBI's cases or problems, are first, revise the Act of National Insolvency; second, through the International Treaties and Convention mechanism; third, through the Rules, Regulation, Principles and Guidelines; and fourth, through making Protocol.

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