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Insolvency Proceedings: ASEAN and EU Comparison on the Rules of Foreign Court Jurisdiction

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Due to a lack of uniformity or harmonization of laws and regulations, cross-border insolvency has remained an issue in the ASEAN region. ASEAN economic openness with the implementation of the ASEAN Free Trade Area (AFTA) and ASEAN Economic Community (AEC) may create issues at some points as investors compete to dominate the ASEAN while assets are located not only on their own territory but also in other ASEAN member countries. On some occasions, they can fail to meet their debt payment obligations when performing international business transactions. As a result of the bankruptcy case, a legal arrangement may exist between the country in which the business actor is declared bankrupt and the country in which the bankrupt debtor's assets are located. This interaction between two or more countries involves a clash of jurisdictions. In order to counter such an issue, ASEAN may learn from what the EU has done over these decades. The study aims to compare the regulatory issue of foreign court jurisdiction in settling the insolvency cases both in ASEAN and EU. The paper is normative-qualitative legal research. It used a comparative, statute, and conceptual approach. It is found that in terms of cross-border

insolvency, the European Union is far ahead of ASEAN, given that at least two major regulations in place, namely EC Regulation 1346/2000 and EU Regulation 2015/848, while ASEAN has almost nothing to offer at this time. The experience of the EU to formulate and implement a settled regulation on foreign court jurisdiction in settling the insolvency cases among EU member countries is one of the valuable lessons that ASEAN may take from the EU.

Keywords: bankruptcy; center of main interest; international court; state sovereignty; transnational insolvency

1. Introduction

The globalization of the economy has resulted in an increase in trade activities between people of different nationalities. The Asian economic crisis of 1998¹ shattered many countries' economic pillars. One of the government's efforts to overcome the crisis is to boost investment. This investment is prioritized based on the type of equity-based investment, such as foreign investment in direct investment and capital market investment in the form of portfolio investment.² This international trade activity then obviates the need for national borders. Cross-border insolvency is an inevitable result of the growth of international market transactions and the proliferation of multinational corporations.

¹ Lin, B., & Liu, C. (2016). Why is Electricity Consumption Inconsistent with Economic Growth in China? *Energy Policy*, 88, 310-316.

² Paul, J., & Benito, G. R. (2018). A Review of Research on Outward Foreign Direct Investment from Emerging Countries, Including China: What Do We Know, How Do We Know and Where Should We be Heading? *Asia Pacific Business Review*, 24(1), 90-115.

For instance, the ASEAN Free Trade Area (AFTA) application, which is a form of cross-border economic integration related to free trade between the ASEAN member countries and other countries that have been mutually agreed upon.³ With AFTA, it will be easier for foreign companies to carry out their economic activities in the ASEAN region.

Cross-border insolvency has remained an issue in the ASEAN region due to a lack of uniformity or harmonization of laws and regulations. The procedures for recognizing and applying international bankruptcy decisions are the key issues that arise due to the lack of uniformity or harmonization of bankruptcy law. Based on this, it is hoped that the existence of a legal arrangement as a solution to cross-border insolvency problems in the ASEAN region would be a facilitator in problem-solving and can minimize ambiguity in cross-border insolvency cases, thus facilitating smooth foreign business transactions.

A cross-border insolvency law arrangement in the ASEAN region is indeed very relevant given the difficulty in executing judges' decisions whose enforcement cannot cross the country's jurisdiction. On the other hand, asset execution is very important because it involves the interests of creditors who are harmed. The refusal to enforce international court rulings is linked to the principle of state sovereignty. ASEAN comprises ten sovereign member countries that cannot jointly recognize international court rulings to be carried out on their territories. This is why cross-border insolvency remains an issue that needs a resolution.

In this case, ASEAN as an international community can take lessons from what the European Union has done, especially in formulating regulations on

cross-border insolvency. In terms of cross-border insolvency, the European Union is far ahead of ASEAN, with at least two major regulations in force, namely EC Regulation 1346/2000 and EU Regulation 2015/848, while ASEAN has almost nothing to offer up to this point. The European Union is a union of 27 European countries. The European Union is one of the largest international organizations in the world. The European Union is a successful example of how countries with various interests can achieve common goals. The European Union was officially established in 1992 with the Maastricht Treaty.⁴

The European Union is a unique international organization because it is not a federation like the United States but also not a cooperative organization between governments like the United Nations. The European Union consists of a set of supranational agencies set up by member states - each of which gives up a portion of its sovereignty to make policies on matters of common interest in Europe. This unification of sovereignty is often referred to as "European Integration". The purpose of its creation is none other than to create unity among European peoples.⁵

The paper aims to present an idea for resolving insolvency cases in the ASEAN region. It compares the regulatory issue of foreign court jurisdiction in settling the insolvency cases both in ASEAN and EU. It used a comparative, statute, and conceptual approach. The European Union is the benchmark and reference that is deemed appropriate in discussing cross-border insolvency. It will also greatly enhance the adoption of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency into

³ Ishikawa, K. (2021). The ASEAN Economic Community and ASEAN Economic Integration. *Journal of Contemporary East Asia Studies*, 1-18.

⁴ Wallace, H., Pollack, M. A., Roederer-Rynning, C., & Young, A. R. (Eds.). (2020). *Policy-Making in the European Union*. Oxford University Press.

⁵ Wiener, A. (2019). *European Integration Theory*. Oxford University Press.

the ASEAN regulatory framework. In addition, this study will analyze and explore the authority of foreign courts in handling insolvency cases involving foreign countries in terms of the rules in force in the European Union and the norms listed in the Model Law on Cross-Border Insolvency.

2. Analysis and Discussion

2.1. ASEAN Insolvency Proceedings: A Proposal to Reform

The establishment of the ASEAN Single Market, which opens the widest possible access to the ASEAN economic sector by removing national borders⁶ involving the ten ASEAN member countries, certainly affects various other fields, one of which is in the field of law. Particularly in bankruptcy law, ASEAN economic openness creates problems when business actors and investors are competing to dominate the ASEAN market in which their assets not only in the territory of their country but scattered in other ASEAN member countries. On some occasions, they may experience a failure to carry out debt payment obligations in conducting their international business transaction activities. As a result, the bankruptcy case causes a legal relationship between the countries where the business actor is declared bankrupt and the country where the bankrupt debtor's assets are located.

This relationship between two or more countries forces a clash of jurisdictions in each country in which a sovereign country has jurisdiction in the form of the authority of state courts to hear and issue legal decisions.⁷ The existence of jurisdiction owned by a

country makes it impossible between countries to enforce court decisions from foreign countries. Failures in cross-border business activities resulting from the increasing growth of cross-border business activities in the ASEAN region and the progress of the ASEAN Economic Community have further forced the immediate implementation of cross-border bankruptcy law regulations. The urgency for establishing cross-border bankruptcy arrangements in the ASEAN region is in line with the opinion of Ricardo Simanjuntak's that ASEAN economic integration through the concept of the ASEAN Economic Community will not be separated from the need for the presence of cross-border bankruptcy laws in ASEAN. The formulation of cross-border bankruptcy arrangements in the ASEAN region is expected to be realized to facilitate cooperation and coordination between countries in cross-border bankruptcy, considering that a country's national bankruptcy law is no longer able to accommodate.⁸

The breakthrough used to overcome deadlocks in cross-border insolvencies 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, which has been adopted by several countries since 1997 to complement the bankruptcy law in a modern way.⁹ This is critical in anticipating

⁶ Desierto, D. A., & Cohen, D. J. (Eds.). (2020). *ASEAN Law and Regional Integration: Governance and the Rule of Law in Southeast Asia's Single Market*. Routledge.

⁷ Yordan Gunawan. (2021), *Hukum Internasional: Sebuah Pendekatan Modern*, Yogyakarta, LP3M UMY, p. 223

⁸ Simanjuntak, R. (2018, April 23). *Cross-Border Insolvency Law, the Future Law of AEC in Regulating International Debt Dispute Settlements among the ASEAN Member States* [Paper Presentation]. International Seminar on Internationalizing Business Movement in the Globalization of Markets and Economics from the Perspective of the Indonesian Business Law, Medan, Indonesia. <https://www.peradi.or.id/files/Presentasi%20Dr.Ricardo%20Simanjuntak.pdf>. [Accessed April 10, 2021]

⁹ Moustaira, E. (2019). UNCITRAL Model Law 1997. In *International Insolvency Law* (pp. 73-106). Springer.

and dealing with cross-border insolvency cases. If a country adopts the Model Law, it means that the bankruptcy law of that country recognizes foreign court bankruptcy decisions to be executed.¹⁰ This idea originated from the reluctance of a court decision to be executed in another country because it conflicts with jurisdiction and the principle of territoriality that is applied in most countries in the world. As a result, international business transactions are delayed, and many players in international business transactions are concerned about securing their rights (particularly in cases of cross-border insolvency).

In this Model Law, representatives of foreign bankruptcy court proceedings (foreign curators/administrators) can submit applications to courts in other countries to recognize the processes and decisions of the bankruptcy court where he was appointed. For example, when a Singapore national company is declared bankrupt in Indonesia, a curator from Indonesia can apply to a Singapore court to acknowledge the bankruptcy decision of the Indonesian court. This is explained in Chapter III Article 15 paragraph (1) UNCITRAL¹¹ Model Law on Cross-Border Insolvency concerning Application for Recognition of a Foreign Proceeding, which states that "A foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed." Also, to protect creditors, the court must monitor the assistance provided

by foreign representatives. CHAPTER III Article 23 paragraph (1) and (2) states that to protect the interests of creditors from actions that are ineffective or may harm creditors in the process of reorganization or liquidation, the court, in this case, is obliged to supervise foreign representatives (curators) in carrying out their duties so that in accordance with the provisions of applicable national law.

An example of a bankruptcy case in the ASEAN region such as a case between five Indonesian Garment and Accessory Suppliers Association Members (APGAI) v. PT. Tozy Sentosa. APGAI has been granted for Postponement of Debt Payment Obligations (PDPO), which was submitted by its five members to PT. Tozy Sentosa. Tozy Sentosa is the owner of the Centro and Parkson Department Stores in Indonesia. This company is part of Parkson Retail Asia, a Malaysian retail giant that has been listed on the floor of the Singapore stock exchange. Reporting from its official statement, the Panel of Judges led by Chief Judge Made Sukerini, with member judge 1 Dulhusin and member judge 2 Makmur, at the verdict hearing on March 31, 2021, granted the PDPO request submitted by the five IGASA member companies. The five companies are PT. Primajaya Putra Sentosa, PT. Indah Subur Sejati, PT. Multi Megah Mandiri, PT. Harindotama Mandiri⁵, and PT. Crown of Petreido Indoperkasa. The PDPO application cases filed by the five companies as known originated from Tozy Sentosa's failure to pay (return) the proceeds from consignment sales that had been sold at Centro and Parkson outlets. However, APGAI is concerned about the losses that must be borne by local suppliers if the assets owned by Tozy Sentosa are much smaller than the liabilities left behind, considering that several Centro outlets have recently closed.¹²

¹⁰ Mears, P. E. (2016). The ASEAN Economic Community and Legal Convergence of Contract Enforcement and Insolvency Laws: An Opportunity to Stimulate the Growth of Global Supply Chains and World Trade in the ASEAN Region. *Pratt's Journal of Bankruptcy Law*, 12, 66.

¹¹ Yordan Gunawan. (2017). Arbitration Award of ICSID on the Investment Disputes of Churchill Mining PLC v. Republic of Indonesia. *Hasanuddin Law Review*, 3(1), 14-26. doi: <http://dx.doi.org/10.20956/halrev.v3i1.948>

¹² Sutrisno, B. (2021, April 10). *Industry Association Praises Court's PKPU Injunction for Protecting Local Suppliers.* The Jakarta Post.

Then the question arises, how if the debtors do not carry out their profession or business or do not have assets in the area where they are declared bankrupt? To answer this question, Chapter I Article 2 introduces the term "foreign main proceeding".¹³ This is a court forum that carries out the process of submitting a bankruptcy statement to the execution of bankruptcy assets. This court forum is determined by the main location or center of economic activity and the location of the majority of the debtor's assets. The inter-state courts concerned will coordinate and then appoint a court to supervise the process. After determining the main court forum, the "foreign proceedings" are determined. This is because cross-border bankruptcy will come into contact with the jurisdiction of other countries. The foreign proceeding is a judicial forum or collective administration in a foreign country, which deals with bankruptcy when processing debtor assets and affairs so that they can be controlled or supervised by a foreign court for the purpose of reorganization or liquidation. Determination of foreign main proceedings and foreign proceeding can answer questions that always arise in cross-border insolvency proceedings regarding courts that are authorized to carry out and supervise the process. Thus, it can make it easier for creditors and debtors to determine which state court will file a bankruptcy statement and which will supervise the process.

2.2. EU Rules on Jurisdiction in Insolvency Proceedings

With the issuance of the new EU Reg. 2015/848 on insolvency proceedings,

<https://www.thejakartapost.com/news/2021/04/10/industry-association-praises-courts-pkpu-injunction-for-protecting-local-suppliers.html>. [Accessed April 18, 2021]

¹³ McCormack, G., & Wai Yee, W. (2018). The UNCITRAL Model Law on Cross-Border Insolvency Comes of Age: New Times or New Paradigms. *Texas International Law Journal*, 54, 273.

published in the EU Official Journal No. L. 141 of June 5, 2015, which entered into force on June 25, 2015, adds an important new element to European judicial cooperation, particularly in the field of bankruptcy and insolvency proceedings in general. Besides, the need for international bankruptcy law was lessened after the entry into force, in the European Union, of EC Reg. 1346/2000 on cross-border insolvency procedures, which uniformly regulated the main issues of jurisdiction and applicable law in the bankruptcy of a debtor by referring to the Center of Main Interest (COMI) which located in a Member State.¹⁴

The new EU Reg. 2015/848 repealed and definitively replaced the EC Reg. 1346/2000 starting from June 26, 2017 (with the exception of some provisions that will only become applicable subsequently), introducing important innovations and clarifications regarding the determination of the competent court to manage the insolvency procedure and the determination of the national law applicable to the insolvency procedure, as well as expanding the field of application of the regulation to all bankruptcy procedures.

The notion of COMI, which is the main center of the debtor's interests, constitutes the primary criterion for identifying the competence of the court to which to attribute the power to open and manage a main cross-border insolvency proceeding.¹⁵ Meanwhile, up to now, the EC Reg. 1346/2000 on cross-border insolvencies did not provide an unambiguous definition. Article 3.1 of EC Reg. 1346/2000 provided that the courts of the Member State in whose territory the center of the main interests of the debtor is located are competent to open insolvency proceedings. For companies and

¹⁴ Bork, R., & Mangano, R. (2016). *European Cross-Border Insolvency Law*. Oxford University Press.

¹⁵ Van Calster, G. (2016). COMIng, and here to stay: The Review of the European Insolvency Regulation. *European Business Law Review*, 27(6).

legal persons, it is assumed that the center of main interests is, until proven otherwise, the place where the registered office is located. This provision was to be read in conjunction with Article 13, which states that "the center of main interests should correspond to the place where the debtor conducts the administration of his interests regularly and is therefore ascertainable by third parties."

The same criteria for international jurisdiction also apply to the national law applicable to the insolvency procedure; pursuant to Article 4 of the EC Reg. 1346/2000, the bankruptcy procedure is subject to the law of the Member State in whose territory this procedure is open (so-called *lex concursus*).¹⁶ The national and community jurisprudence in the interpretation of this rule has tried to clarify that, to identify the jurisdiction of the judge, COMI should be understood unambiguously as the place where the debtor habitually and recognizable by third parties exercises its interests. Nevertheless, it is easy to see how, in fact, the judges of more than one state might be deemed competent, each of them, to open cross-border insolvency proceedings, resulting in a conflict of jurisdiction and a conflict of applicable laws.

In addition, in cases where the request for opening the insolvency procedure was addressed to the judges of more than one State, all abstractly deemed competent. In practice, this regulatory framework has generated distortions in the system, given that the country where it was actually the "center of main interests" was not favored, but rather the one that was able to open the insolvency procedure more readily, generating the well-known phenomenon of so-called "forum shopping" (search for the

bankruptcy court deemed most favorable by the applicant).

The greatest perplexities arose when, alongside the main procedure, one or more secondary procedures were also opened; with rare exceptions, secondary procedures usually have only liquidated purposes. It is good to clarify it, and they can end up representing a weakening of the main one. In fact, given the possibility of opening an indefinite number (potentially, without limits), and considering that each procedure is intended to follow the bankruptcy rules of the respective individual country, it is not difficult to imagine the violation of the so-called *pars conductio creditorum*, given that each creditor it is destined to receive a different satisfaction of its credit based on the country in which the insolvency procedure to which the creditor refers is carried out. The verification necessary to identify the location of the COMI was therefore carried out in practice, up to now, by the judge on the basis of the factual data at his disposal, without there being a clear rule as a direction.¹⁷

The rulings of the Court of Justice of the European Union in the matter of cross-border insolvency stressed the need to compare the different interests managed by the debtor in the places where he carries out his activity in terms of their size and respective importance. In the context of this jurisprudence, the recognition by third parties assumed central importance in this regard.

Today, the EU Reg. 848/2015, acknowledging the notions of jurisprudential elaboration of the Court of Justice, clarifies that the COMI is the place where the debtor exercises the management of his interests habitually and recognizably by third parties; to the new Article 3.1 indeed states "The courts of the Member State in whose territory

¹⁶ Oprea, E. A. (2020). The Law Applicable to Transaction Avoidance in Cross-Border Insolvency Proceedings. In *Recasting the Insolvency Regulation* (pp. 75-107). TMC Asser Press, The Hague.

¹⁷ Eidenmüller, H. (2017). Contracting for a European insolvency regime. *European Business Organization Law Review*, 18(2), 273-304.

the center of the main interests of the debtor is located (main insolvency procedure) are competent to open insolvency proceedings. The center of main interests is the place where the debtor exercises the management of its interests habitually and recognizably by third parties". In confirming that the main title attributing the jurisdiction is the "main center of the debtor's interests", EU Reg. 848/2015 has therefore finally clarified the scope of this definition.

The Regulation then specifies its scope, introducing some *iuris tantum* presumptions, which reveal the pragmatic and factual approach adopted by the case-law of the Court of Justice of the European Union (CJEU) in the interpretation of the concept in question, subsequently codified at the regulatory level.¹⁸ And so, for companies and legal persons, it is assumed that the COMI is the place where the registered office is located, but the Regulation also specifies that "the competent judge of a Member State should carefully assess whether the center of main interests of the debtor is located in that Member State. In the case of a company, this presumption should be able to be rejected if the central administration of the company is located in a Member State other than that of its registered office and an overall assessment of all the relevant elements makes it possible to establish that, in a manner recognizable by third parties, the effective center of management and control of the company itself, as well as of the management of its interests, is located in that other Member State "(Recital 30).

It should also be noted that the interpretation of COMI, as an autonomous notion, must be carried out in the light of the principles indicated by European jurisprudence and the Regulation to ensure a

uniform application, free from meanings attributed at the domestic level. It has just been said that the COMI is a general criterion for applying the Regulation. This means that the only relevant parameter is that the debtor is located in the territory of a Member State (with the exception of Denmark). And this, moreover, even in the case of a subject constituted according to the law of a third State that has its statutory seat outside the European Union.

As a title of jurisdiction, then, the COMI divides the jurisdiction of the judges of the Member States to open insolvency proceedings so-called "Main". Indeed, the Regulation provides, in compliance with the limited universality model on which it is based, two types of procedures: the main procedure - with universal scope and effects on all the debtor's assets - and a secondary procedure - with effects limited to the assets located in the place where the debtor has an establishment. And in fact, according to the provisions of Article 3.1 of the Regulation, the courts of the Member State in whose territory the debtor's COMI are located are competent to open the main insolvency proceeding. With the clarification referred to in Article 3.2, according to which if the COMI is located in the territory of a Member State, the courts of another Member State are competent to open secondary insolvency proceedings against the same debtor.

For companies and legal persons, the presumption continues to apply that the COMI coincides with the place where the company's registered office is located, but it is specified that where said headquarters have been moved to another Member State in the three months prior to the application for opening insolvency proceedings, the original presumption does not operate and the verification will have to be carried out in practice, case by case (Article 3.1). Furthermore, in order to allow better coordination between the main and any secondary proceedings, the judge appointed

¹⁸ Elosegui, N.M. (2021). Centre of a Debtor Individual Person's Main Interests on Regulation (EU) 2015/848 on Insolvency Proceedings. *Cuadernos Derecho Transnacional*, 13, 974.

to open the secondary proceedings may, at the request of the person administering the main proceedings, refuse or postpone the opening of the secondary one.

One of the objectives to issue the EU Reg. 848/2015 is to identify which cases can be the subject of a law on the jurisdiction that is introduced by a reform of the law of business crises. To this end, a few brief remarks should be made on the scope of application of the Regulation. As is known, in fact, the latter provides for a discipline on cross-border "intra-European"¹⁹ insolvency, which - by virtue of the principle that establishes the primacy of EU law - is mandatory in all its elements and directly applicable in the Member States (excluding Denmark). Therefore, the Regulation affects national law, replacing it with a different and broader discipline, valid throughout the territory of the European Union. With the consequence that any internal legislation on cross-border insolvency will be applied only where the operation of European provisions is excluded (unless further international obligations on the matter prevail).

For the purposes of this paper, it is considered appropriate to point out, moreover, that compared to the previous Regulation (EC) 1346/2000, the current Regulation has considerably expanded its scope of material application. If the previous discipline applied only to insolvency procedures based on the requirements of insolvency, the dispossession of the debtor, and the appointment of a trustee, the Regulation also extended its discipline to pre-insolvency procedures, restructuring, and agreed solutions, thus also including open procedures against companies which, although not in a state of overt insolvency,

are in a state of economic difficulty, however likely to undermine business continuity.

Among the further innovations, a significant innovation for the purpose of creating a European judicial area is the establishment, envisaged by EU Reg. 848/2015 by June 2019, of an electronic system of interconnected bankruptcy registers accessible free of charge by the operators of the Member States, in order to promote transparency and publicity of insolvency proceedings and improve the information of creditors and judges.²⁰

3. Conclusion

With the implementation of AFTA and AEC, it is quite clear now that ASEAN is in urgent need of a specific rule regulating insolvency cases. As the inter-state connection in terms of an international business transaction, somehow, will not always go smoothly. In the event that one party is not able to meet its duty to pay the debt, it will cause a major issue in finding a way of debt recovery or insolvency proceedings as it involves two or more jurisdictions. It is unfortunate that at present, ASEAN has nothing to offer in settling the issue of cross-border insolvency, as even no single regulation or legal instrument is formulated by the ASEAN. On the contrary, the EU has put its maximum attention to such an issue in decades. EU has successfully formulated and implement the insolvency proceedings through their two majors' regulations, which are EC Regulation 1346/2000 and EU Regulation 2015/848. These regulations are used and practiced among EU member countries, excluding Denmark, in settling the disputes on cross-border insolvency cases. The issue of foreign court jurisdiction is one of the critical points that ASEAN may learn from what the EU has

¹⁹ Mucciarelli, F. M. (2016). Private International Law Rules in the Insolvency Regulation Recast: A Reform or a Restatement of the Status Quo?. *European Company and Financial Law Review*, 13(1), 1-30.

²⁰ Bogdan, M. (2017). The New EU Rules on Electronic Insolvency Registers. *Masaryk University Journal of Law and Technology*, 11(1), 175-182.

done through the formulation of two regulations. Besides, before ASEAN member countries reach an agreement at the ASEAN level to replicate what the EU has done thus far, these member countries may adopt a Model Law at the national level in the form of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency, which has been adopted by several countries to complement the bankruptcy law in a modern way.

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