

# **CROSS-BORDER INSOLVENCY LAW, THE FUTURE LAW OF AEC IN REGULATING INTERNATIONAL DEBT DISPUTE SETTLEMENTS AMONG THE ASEAN MEMBER STATES**

*Presented at the International Seminar “Internationalizing Business Movement in the  
Globalization of Markets and Economics from the Perspective of the Indonesian  
Business Law”  
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by:

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## **ASEAN SINGLE MARKET (ASEAN CHARTER)**

### **Pasal I (5)**

*“To create single and production base which is stable, prosperous, highly competitive and economically integrated with effective facilitation for trade and investment in which there is free flow of goods, services and investment; facilitated movement of business persons, professionals, talents and labor, and freer flow of capital”*

# Indonesia in The Global Markets

## ASEAN Economic Community

- Free Flow of Goods
- Free Flow of Services
- Free Flow of Investment
- Free Flow of Capital
- Free Flow of Skilled Labor

ASEAN

WTO

APEC

TPP

ASEAN single Market and Production Base

Total Populations 630 millions per 2014

Total GDP exceeds to USD 2,57 trillions per 2014 with the average growth of 4,6%-5% /year

Total Area of 4.486.210 km<sup>2</sup>

ASEAN + 3

China  
Japan  
South Korea

ASEAN + 6

ASEAN + 3  
Australia  
New Zealand  
India

ASEAN - EC

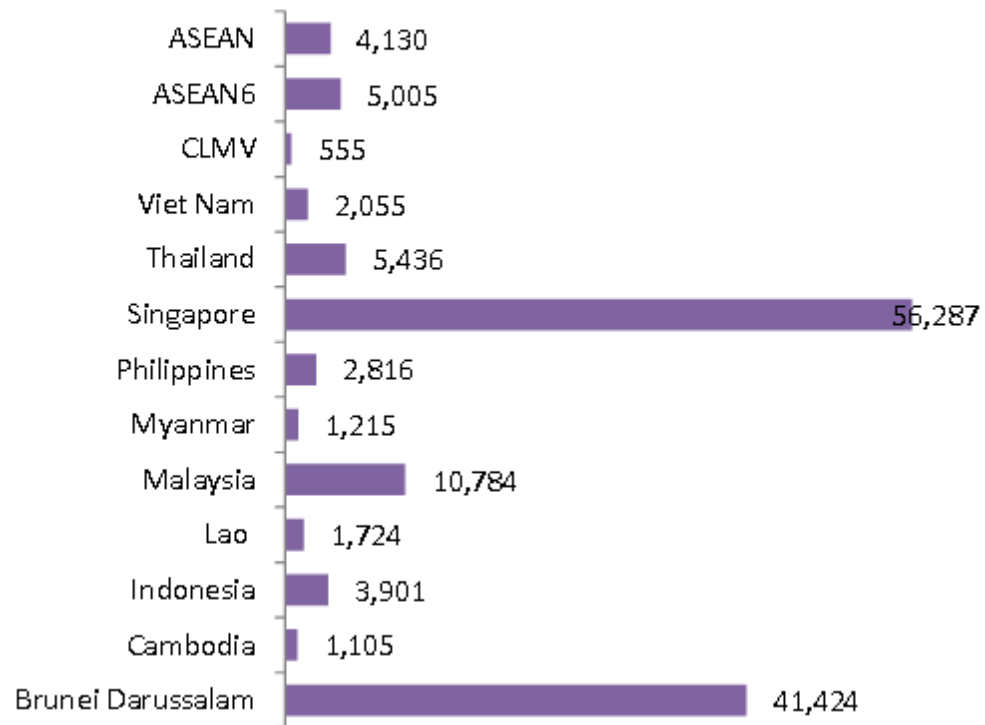
**Table 1. ASEAN's GDP Growth at Constant prices (%), 2006-2014**

Country	2006	2007	2008	2009	2010	2011	2012	2013	2014
<b>Brunei Darussalam</b>	4.4	0.6	-2.4	-1.8	2.6	3.4	0.9	-2.1	-2.3
<b>Cambodia</b>	10.8	10.2	6.7	0.1	6.0	7.1	7.3	7.4	7.0
<b>Indonesia</b>	5.5	6.3	6.0	4.6	6.2	6.5	6.3	5.7	5.1
<b>Lao PDR</b>	8.3	6.0	7.8	7.5	8.1	8.0	7.9	8.0	7.3
<b>Malaysia</b>	5.6	6.3	4.8	-1.5	7.4	5.2	5.6	4.7	6.0
<b>Myanmar</b>	13.6	13.1	12.0	10.3	10.6	9.6	5.6	7.3	7.7
<b>Philippines</b>	5.2	6.6	4.2	1.1	7.6	3.6	6.8	7.2	6.1
<b>Singapore</b>	8.9	9.1	1.8	-0.6	15.2	6.2	3.4	4.4	2.9
<b>Thailand</b>	5.1	5.0	2.5	-2.3	7.8	0.1	6.5	2.9	0.7
<b>Viet Nam</b>	7.0	7.1	5.7	5.4	6.4	6.2	5.2	5.4	6.0
<b>ASEAN</b>	6.1	6.6	4.9	2.2	7.6	5.1	6.0	5.2	4.6
<b>ASEAN5</b>	5.7	6.3	4.5	1.6	7.6	4.7	6.0	5.1	4.3
<b>CLMV</b>	9.1	9.0	7.6	6.5	7.6	7.3	5.6	6.2	6.6

Source: AMSs data submission, as of 26 May 2015

Notes : ASEAN, ASEAN5 and BCLMV growth rate are calculated as a weighted average using PPP-GDP share of the World Total as used in the IMF-WEO Database of April 2015

**Figure 2. GDP per Capita at Current Market Prices (US\$), 2014**



**Table 3. Share of GDP by Sectors (%), 2005-2014**

Country	Agriculture				Industry				Services			
	2006	2009	2013	2014	2006	2009	2013	2014	2006	2009	2013	2014
<b>Brunei Darussalam</b>	1.1	1.2	0.7	0.8	60.3	53.0	64.4	63.0	38.6	45.8	36.8	38.0
<b>Cambodia</b>	28.0	29.5	24.2	23.2	28.6	28.1	29.9	30.7	38.3	42.4	39.0	39.2
<b>Indonesia</b>	14.2	13.6	12.3	12.1	43.7	41.7	39.9	39.7	42.1	44.8	47.8	48.3
<b>Lao PDR</b>	27.8	26.5	21.0	n/a	21.5	20.3	23.5	n/a	29.2	32.9	32.0	n/a
<b>Malaysia</b>	8.3	7.9	7.1	6.9	43.2	37.8	36.4	36.3	47.5	53.2	55.2	55.3
<b>Myanmar</b>	n/a	41.8	n/a	n/a	n/a	21.2	n/a	n/a	n/a	37.0	n/a	n/a
<b>Philippines</b>	13.1	12.5	10.4	10.0	32.5	31.5	32.8	33.3	54.4	56.0	56.8	56.7
<b>Singapore</b>	0.0	0.0	0.0	0.0	30.7	29.0	25.8	25.5	61.9	64.2	66.2	66.8
<b>Thailand</b>	9.0	9.2	8.3	8.3	47.2	46.6	46.0	45.2	43.8	44.3	45.8	46.4
<b>Viet Nam</b>	20.9	19.5	17.6	17.2	38.2	38.0	38.6	39.7	40.8	42.6	43.9	43.8

Source : AMSs submission as of 26 May 2015

# ASEAN-6 digital population 2018



## Indonesia

Population	265.4 M
Internet users	132.7 M
Social media users	130.0 M
Mobile users	177.9 M
Mobile social users	120.0 M



## Malaysia

Population	31.83 M
Internet users	25.08 M
Social media users	24.00 M
Mobile users	21.62 M
Mobile social users	22.00 M



## Philippines

Population	105.7 M
Internet users	67.0 M
Social media users	67.0 M
Mobile users	61.0 M
Mobile social users	62.0 M



## Thailand

Population	69.11 M
Internet users	57.00 M
Social media users	51.00 M
Mobile users	55.56 M
Mobile social users	46.00 M



## Singapore

Population	5.75 M
Internet users	4.83 M
Social media users	4.80 M
Mobile users	4.71 M
Mobile social users	4.30 M



## Vietnam

Population	96.02 M
Internet users	64.00 M
Social media users	55.00 M
Mobile users	70.03 M
Mobile social users	50.00 M

Source: WeAre Social, Hootsuite Jan 2018

**ASEAN**<sup>up</sup> Empowering business in Southeast Asia - [aseanup.com](http://aseanup.com)

<https://aseanup.com/southeast-asia-digital-social-mobile/>



ASEAN vision  
2020 (15  
December  
1997 )

Tree  
Pillar  
s

The  
ASEAN  
Security  
Community  
(ASC)

Work in tandem

MEA is  
declared as  
the goal of  
the ASEAN  
regional  
economic  
integration  
by 2020  
(Bali  
Concord II)

Work in tandem

The ASEAN  
Socio  
cultural  
Community  
(ASCC)

Four  
Character  
istics

1 A single  
market and  
production  
base

5  
Core  
elem  
nts

2 A highly  
competitiv  
e  
economic  
region

3 A region of  
equitable  
economic  
developme  
nt

4 A region  
fully  
integrated  
into the  
global  
economy

Free flow  
of Goods

Free flow  
of  
Investment

Freer flow  
of Capital

Free flow  
of Services

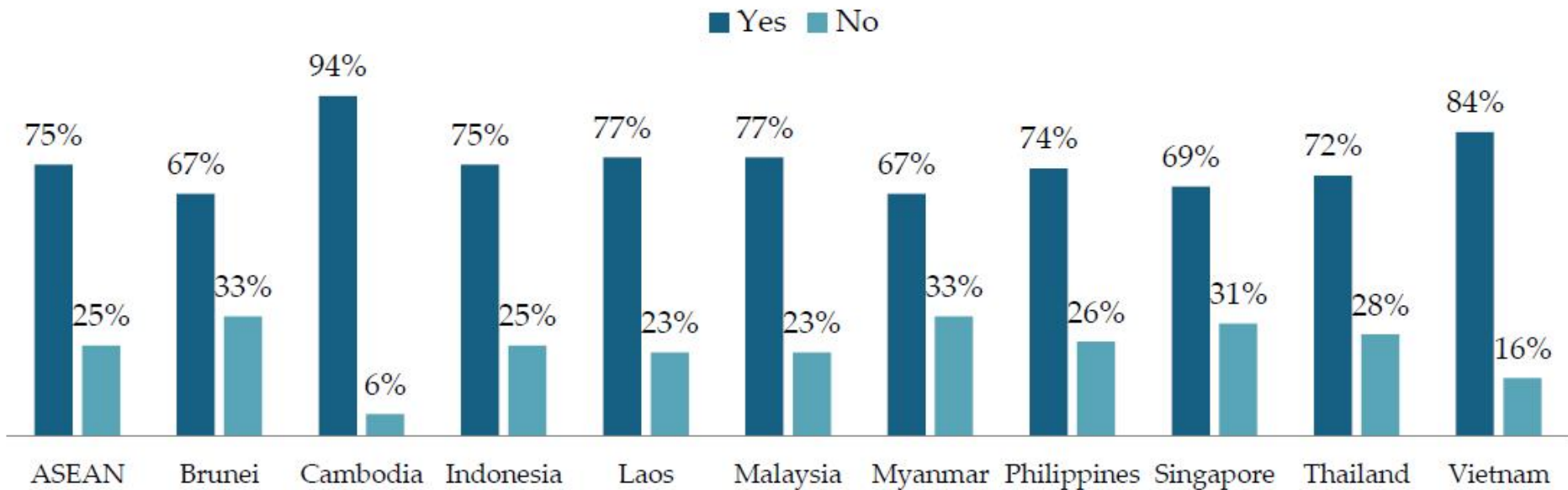
Free flow  
of Skilled  
labor

“...When the ASEAN vision 2020 was declared on 15 December 1997 it was stated in the document of the ASEAN vision 2020 that the ASEAN, total combined Gross Domestic Product (GDP) was only USD 600 billion with the total population of around 500 million people, but now days, with the total population of around 620 million people, the combined GDP of ASEAN Community has increased fivefold to be around of USD 2,5 trillion (in the year 2013), and is continuing to be favorable with the overall growth achievement of 5,1% in the year 2015 including the projected overall growth of 5,4% in the year 2016 according to the OECD Economic outlook 2015.

With such an impressive growth, the combined GDP of ASEAN is even forecasted to approach USD 4 trillion in the year 2020, according to the IMF's World Economic Outlook database 2013, thus convincingly, the growing ASEAN region's muscle as the most emerging market in the world” (*quoted from dispute settlement mechanism under ASEAN legal Frameworks, by Dr. Ricardo Simanjuntak – printed by PT.Gramedia Jkt – Kontan Publishing 2015*)

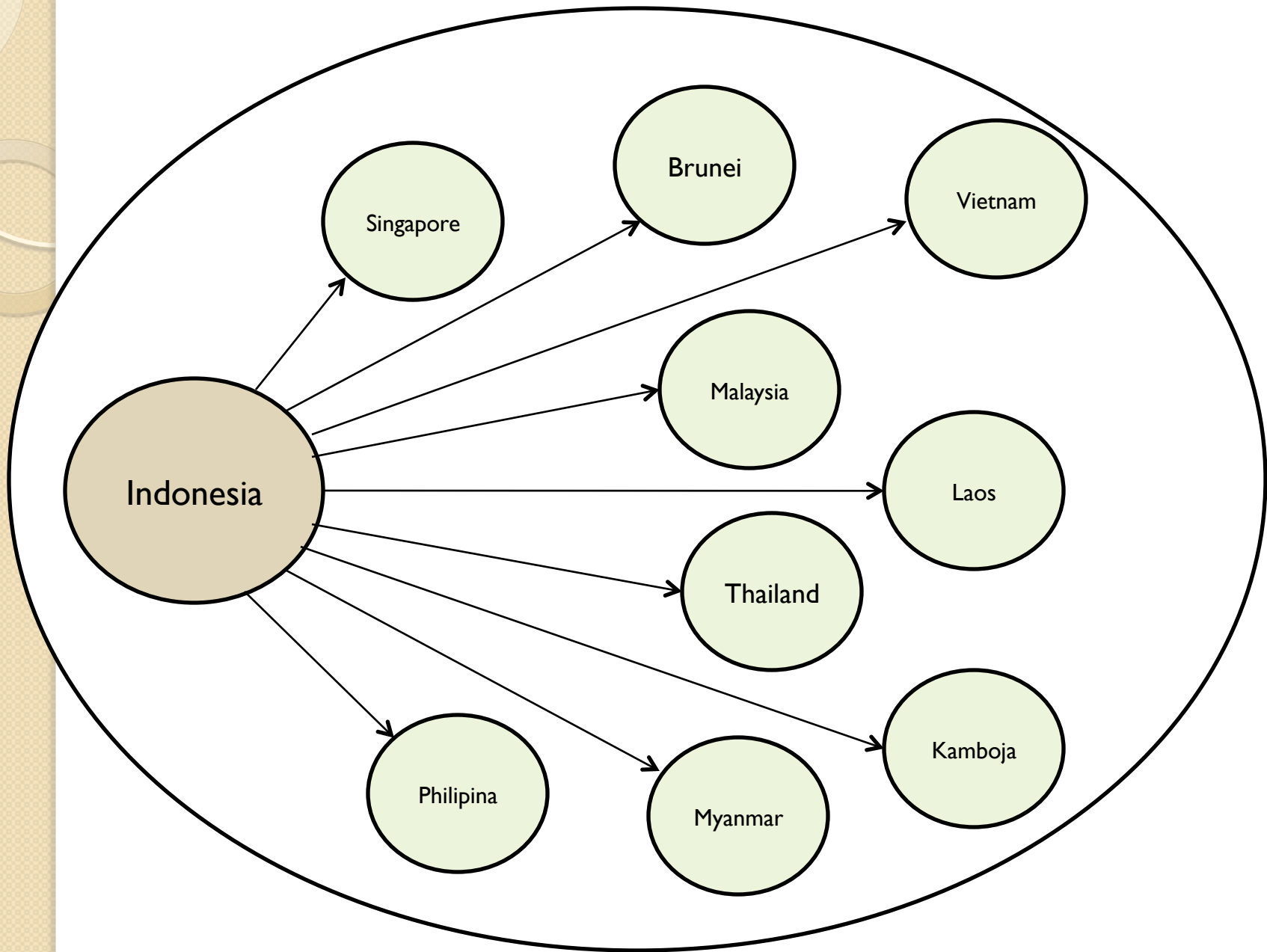
# Importance of ASEAN Integration

Is ASEAN Integration Important to Helping Your Company Do Business in the Region?



Sumber :ASEAN Business Outlook Aurvey 2016





**World bank Guidelines 2001 (Insolvency and Creditors Rights System):**

*“There are two dimensions to the global financial system. On the one hand, national financial system operate autonomously and respond to domestic needs. On the other hand, national systems are tied to and interact daily with the systems of their trading partners. Insolvency and creditors rights systems lie at the juncture of this duality.”*

**Andrew T. Guzman “International Bankruptcy; in defense of universalism, Michigan Law Review”**

*“the growth of International business therefore, has brought with it a growth in the number of international business failure. In recent years, the increased number of international insolvencies has brought attention to the question of how to deal with transnational bankruptcy”*

**BOB WESSELS (Cross Border Insolvency Law, Kluwer Law ):**

*“In order to complete the internal EC Market, the absence of a treaty on insolvency proceedings was viewed as a lack in the legal protection of persons and business. Only national law (including its private international law) is applicable in the event of a (legal) person going bankrupt. At the same time a whole range of cross-border activities is increasingly taken by persons-notably legal persons, companies-trading only within the borders of one member state.”*

**JONA ISRAEL (European Cross border Insolvency regulation, Oxford):**

*“the internal market demands the effective regulation of insolvency also and particularly when a debtors, assets and liabilities are spread over more than one member state. After all, such a “multi-jurisdictional” debtor is exactly what the community is aiming for which its freedoms and goal of optimal allocation of resources on a European scale. The *communitas Europea* dictates a reformulation of cross-border insolvency law according to these demands.”*

**The Absoluteness of the existence of Cross Border Insolvency regulations:**

The Transnational bankruptcy law as the consequence of the REGIONAL COMMON MARKET (ASEAN Single Market & Production)

- **BOB RASMUSSEN** : *“...having assets in multiple countries inevitably leads to the commencement of multiple insolvency proceedings..”*
- **JOY WRESBROOK** : *“(A) global market requires a global bankruptcy law.*

**Sunaryati Hartono : The presence of globalisation has indeed been a reality of life, that, like or dislike, cannot anymore be avoided. Therefore what Indonesia should do is to be prepared to be really ready to take all advantage from the globalisation and, on the other hand be ready to cope with any problem caused by it.**

**Joni Emerson : Globalisation if a historical determination that cannot be avoided by any states or citizens, therefore like or dislike, ready or not ready, we must face the globalisation and all the consequences.**

**RPJPN 2005 – 2025 : It needs to be empasised that externally, the global competition has existed and is getting stronger in creating influence to the plan of national development to come.**

**Therefore, the development as the fudamental duty in fulfilling the freedom of Indonesia must be based on independency, but not in the meaning of the independency within the isolation. The Independency of Indonesia must be proactive, not reactive or defensive.**



The justice in the  
Indonesia Bankruptcy Law  
No. 37/2004

A debtor must pay off all of its debt(s) when due date and payable

If the debtor fails to pay off its debt(s), the debtor will be declared bankrupt by the Indonesia commercial court

The bankruptcy status will cause that all of the bankruptcy assets (bankruptcy estates) be put in a public attachment and the receiver will be appointed to administrate and liquidate the estates to be sold where the proceeds will be used to pay the bankrupt debtor's creditors in accordance with the Article 1131 and Article 1132 of the Indonesia Civil Code (KUH. Perdata).

Debtor Facing  
severe  
Financial  
Problem (law  
37/2004)

1. Can petition itself for bankruptcy (voluntarily)
2. Can petition for suspension of payment of the debts (voluntary PKPU)
3. Cannot do any transaction / transfer of ownership that should have been known as the way to dispute or hide its assets from its creditors before the bankruptcy petition or at the time of bankruptcy petition
4. Cannot make any payment to unsecured creditors before or at the time of bankruptcy petition, that is believed to jeopardize the rights of its creditors.
5. Cannot make any unreasonable transaction/ transfer of ownership to other party (ies) -that is believed to jeopardize the rights of its creditors- within one year before the bankruptcy petition.

Debtor Facing  
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Article 21 of the Law and  
Article 1131 of the KUH  
Perdata

All of the bankruptcy debtor's assets shall be the assets that has existed when the debtor is declared bankrupt and the assets that will then exist in the process of bankruptcy

**How if the debtor's assets are located  
abroad?**

Article 212-214 of the  
bankruptcy law

Even though Law no.37/2004 implements the principle of universality to its decision, but it is theoretically realised not to be recognized abroad, for the absence of the international treaty.

Therefore the Law No. 37/2004 only applies a passive effect to the principle of universality, namely forbidding the local unsecured creditor to seek payment from the bankruptcy assets abroad by its own effort.

How is the role of the receiver in realizing the fundamental duty of receiver regulated in the Article 1131 and 1132 the KUH Perd when the bankruptcy assets are located abroad?

The problem of the receiver without transnational power

The receiver cannot touch the bankruptcy assets abroad, therefore when the bankruptcy assets locally are not enough, the creditors will not be protected maximally for the receivers are unable to sell the foreign assets as a payment

The receiver cannot chose the best way to handle the liquidation of the assets, either through “retail sale” or “going concern sale” for the international assets are untouchable.

Practically, the receiver does not have any ability to monitor the breach of Article 212-214 of the law 37/2004

The inability of the receiver to manage/liwuidate the bankrupt estates ousite Indonesia, would be the reason for bad debtor to find “abroad” as the strategy to keep its assets out from the appointed receiver.

Principle applicable to cross border insolvencies

The principle of territoriality

Reject the extraterritorial effect of foreign court's judgment, the local takes the assets located in its geographic jurisdiction and distributes them only to those creditors who present/register their claims

The principle of universality

A single forum administers all the debtor's assets including domiciled abroad and makes distributions to creditors

The principle of modified universality

The universality principle is modified with a possibility of cooperation with secondary proceedings commenced in another jurisdiction

International  
Aspect of UU  
Kepailitan No.  
37/2004

Article 212 : Creditor that, after the bankruptcy decision, takes the payment, partially or as a whole of its claim, from the bankrupt estates domiciled outside of Indonesia, while the estates are not collaterals to its claim, must return to the bankruptcy estates (managed by the appointed receiver) for all the payment he has received.

Article 213:(1) Creditor that assigns, part or all of its claim to the bankrupt debtor to the third party, with the intention that the third party will take an effort to get the payment from the bankrupt debtor's assets being domiciled abroad, must return to the bankruptcy estates of what he has received.

Article 214 :(1) Every person that assigns all or part of its claim to the third party, with the intention that the third party will be able to set off its debts to the bankrupt debtor with the claim he bought abroad, must return to the bankruptcy estates of what he has received.

Recognises the principle of Universality but realises that it will not be recognisable by foreign states for the implementation of principle of territoriality.

International  
aspect of the  
UU Kepailitan  
No. 37/2004



The Purpose of  
UNCITRAL  
mode of cross-  
border  
insolvency

Cooperation between the courts and other competent authorities of the 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 debtors assets, and

Facilitation of the rescue of financially troubled business, hereby protecting investment and preserving employment

# Purpose and Origin of the UNCITRAL Model Law on Cross-Border Insolvency

## Purpose

1. The UNCITRAL Model Law on Cross-Border Insolvency, adopted in 1997, is designed to assist States to equip their insolvency laws with a modern, harmonized and fair framework to address more effectively instances of cross-border insolvency. Those instances include cases where the insolvent debtor has assets in more than one State or where some of the creditors of the debtor are not from the State where the insolvency proceeding is taking place.

2. The Model Law reflects practices in cross-border insolvency matters that are characteristic of modern, efficient insolvency systems. Thus, the States enacting the Model Law (hereafter “enacting State”) would be introducing useful additions and improvements in national insolvency regimes designed to resolve problems arising in cross-border insolvency cases. Not only jurisdictions that currently have to deal with numerous cases of cross-border insolvency but also those that wish to be well prepared for the increasing likelihood of cases of cross-border insolvency will find the Model Law useful.

3. The Model Law respects the differences among national procedural laws and does not attempt a substantive unification of insolvency law. It offers solutions that help in several modest, but nonetheless significant ways. These include :

- Providing access for the person administering a foreign insolvency proceeding (“foreign representative”) to the courts of the enacting State, thereby permitting the foreign representative to seek a temporary “breathing space”, and allowing the courts in the enacting State to determine what coordination among the jurisdictions or other relief is warranted for optimal disposition of the insolvency;
- Determining when a foreign insolvency proceeding should be accorded “recognition”, and what the consequences of recognition may be;
- Providing a transparent regime for the right of foreign creditors to commence, or participate in, an insolvency proceeding in the enacting State;
- Permitting courts in the enacting State to cooperate more effectively with foreign courts and foreign representatives involved in an insolvency matter;
- Authorizing courts in the enacting State and persons administering insolvency proceedings in the enacting State to seek assistance abroad;
- Providing for court jurisdiction and establishing rules for coordination where an insolvency proceeding in the enacting State is taking place concurrently with an insolvency proceeding in a foreign State;
- Establishing rules for coordination of relief granted in the enacting State in favour of two or more insolvency proceedings that may take place in foreign States regarding the same debtor.

The legal basis of establishing the Court competence in trying bankruptcy petition

The Bankruptcy Law No.37/2004

The debtor's legal domicile.

UNCITRAL Model Law on Cross-border insolvency

Centre of main interest(s) (Comi)  
"Establishment" of the debtor's business activities

COMI

UNCITRAL Model Law on cross border insolvency :

Art 2(b) “Foreign main proceeding” means a foreign proceeding taking place in the state where the debtor in the state where the debtor has the center of its main interests (COMI)

Art 2(f) “Establishment” means any place of operations where the debtor carries out of non-transitory economic activity with human means and good or services

Art 16 (3) In the absence of proof to the contrary, the debtor’s registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor’s main interests.

COMI

EC Cross border Insolvency regulation No. 1346/2000 :

Art 3(1) The court of the member state within the territory or the centre of the debtor's main interest is situated shall have jurisdiction to open insolvency proceedings. *In the case of a company or a legal person, the place of the registered office shall its main interest in the absence of the proof to the contrary.*

Art 3(2) where the COMI is situated within the territory of a member state, the court of member state shall have jurisdiction to open insolvency proceedings against that debtor *only if he possesses an "establishment" within the territory of that other member state*

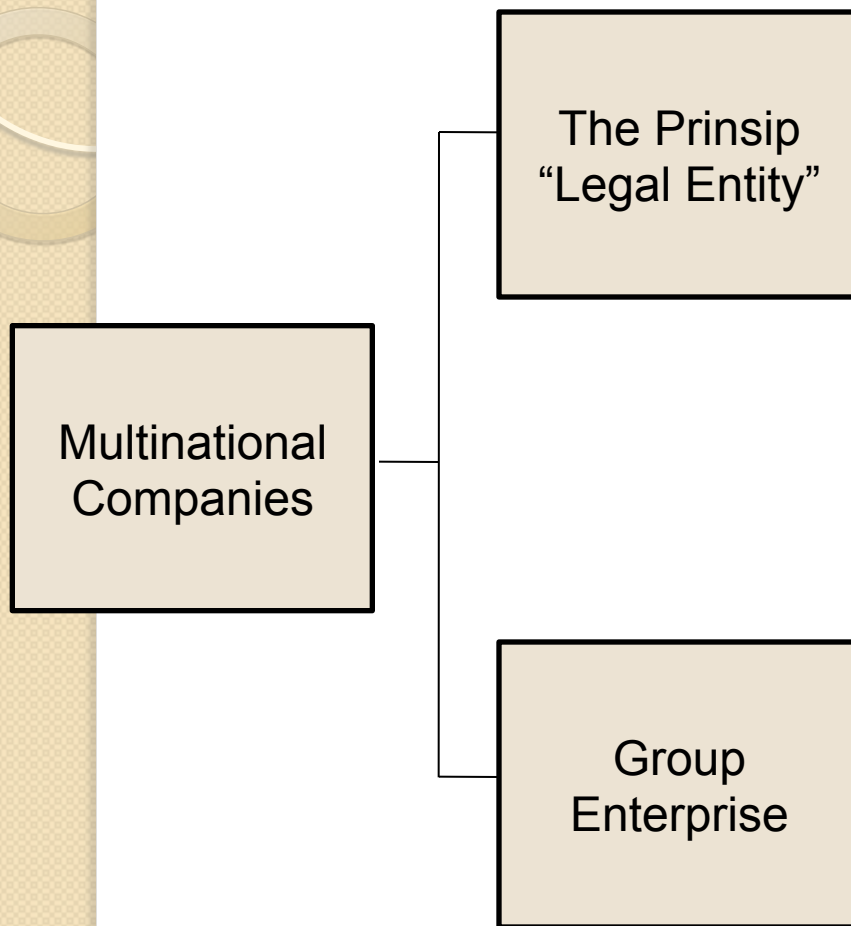
The competency of the court according to bankruptcy law No. 37/2001\4

The commercial court that has a competency to try the bankruptcy petition at the court where the debtor is domiciled

According to the UU PT No. 40/2007, the debtor (PT)'s domicile is stated in its Article of Association, the commonly be used as its central office

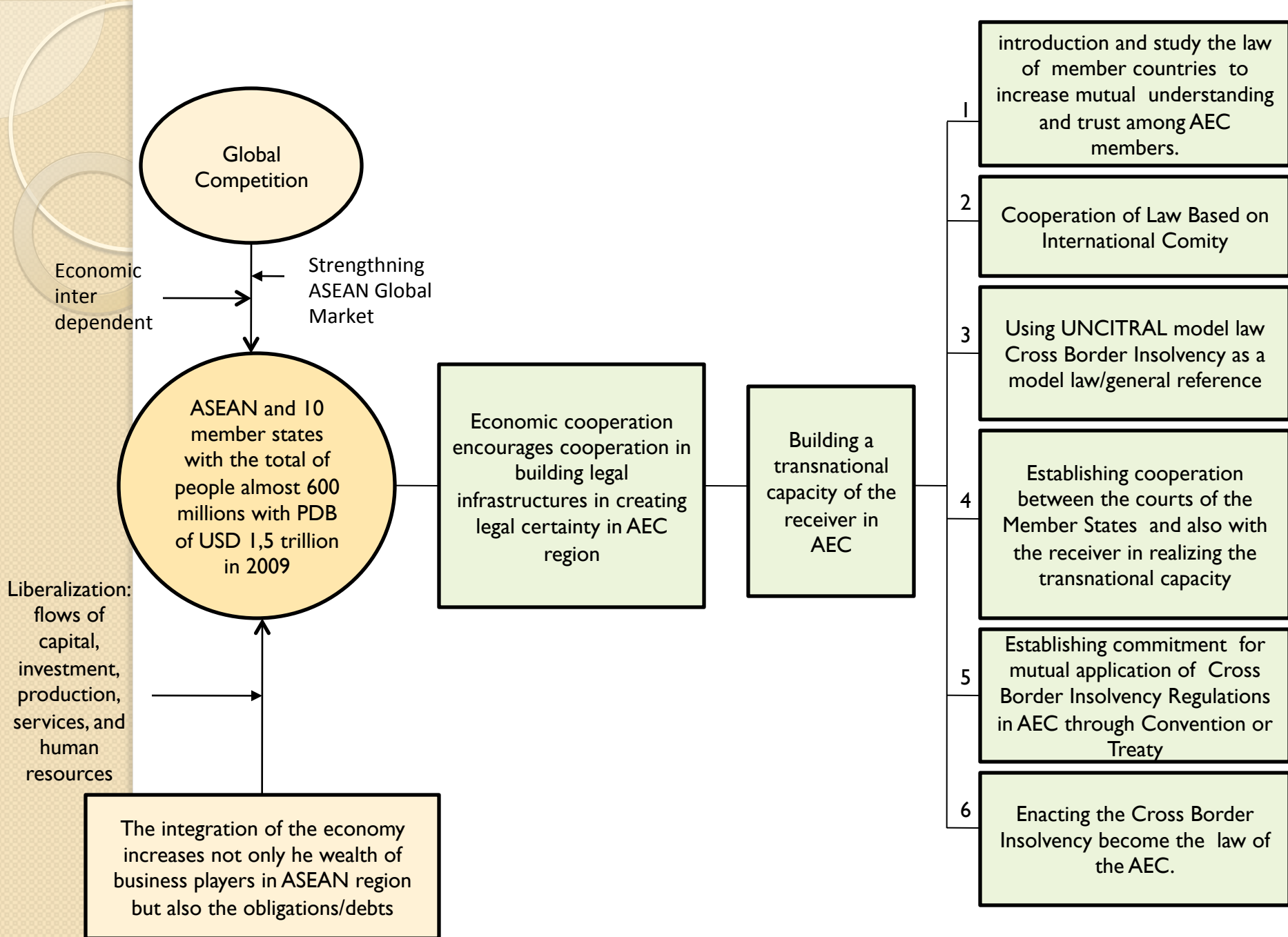
According to the law No. 37/2004, the domicile of the debtor is stated in its Article of Association

When a debtor is not domiciled / incorporated in Indonesia, but runs its business in Indonesia, the competent court is the commercial court where the centre of debtor's business activities is established in Indonesia

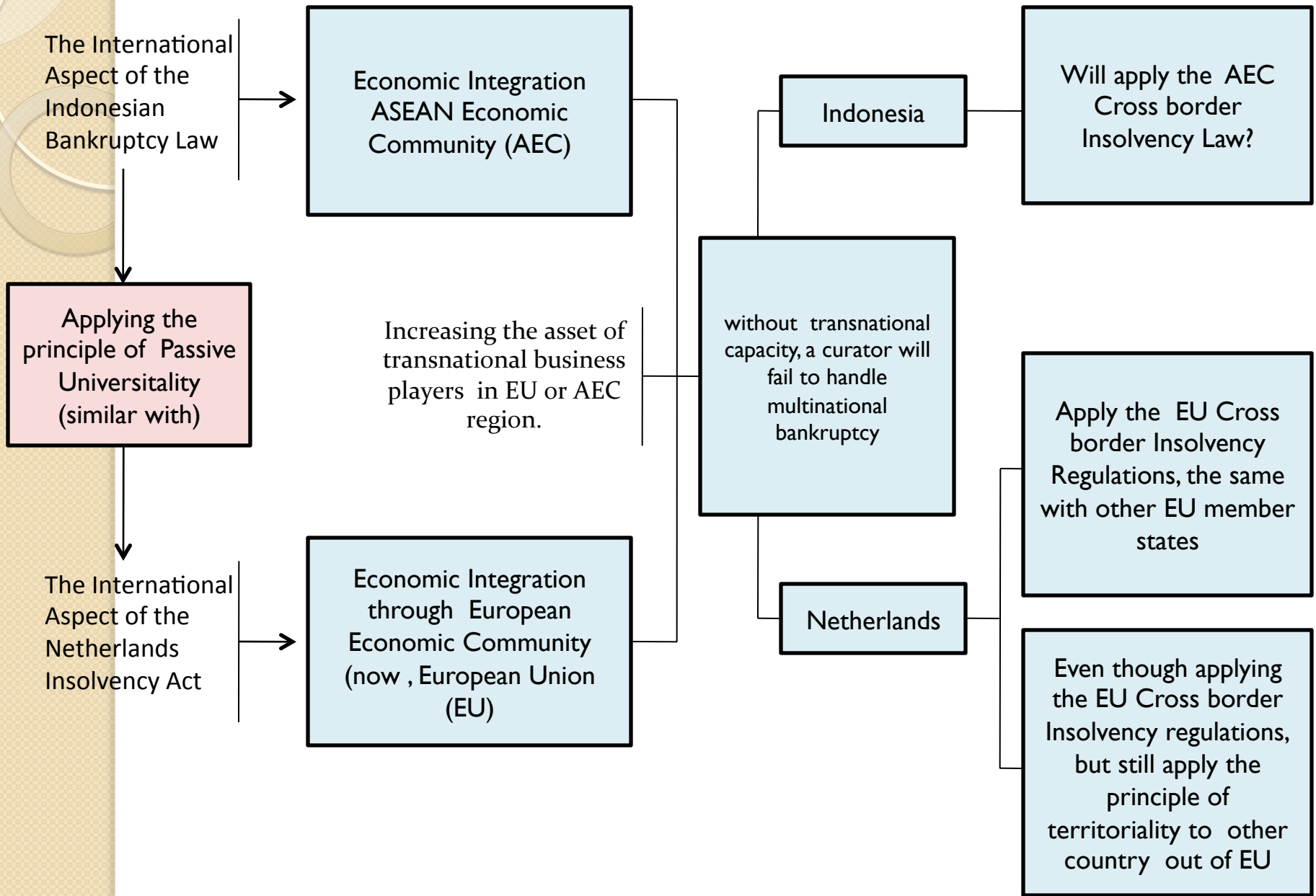


The consequence of “separate legal entity” within a Multinational Enterprise Group (MEG), each of the entity will have their own legal personality or citizenship based on the the state or place where the companies (legal entity) are incorporated and as well as a relevant connecting factor in assisting to identify the proper forum .

On the other side, even though companies are theoretically separate entities, in practice the groups are seen to work transnationally as affiliation. Therefore the principle of separate territorial proceedings might not always match the way multinational groups actually operate, as they are seen as one.







Stages leading to the realization of the law of transnational insolvency MEA

The ASEAN Economic integration will create the economic interdependence among the ASEAN member countries.

*International comity* will be established by the ASEAN vision that will further encourage the member countries to learn and understand their law and regulations.

To state the cooperation for the implementation of the transnational insolvency solution between the member states.

The cooperation of the receiver with the courts of the ASEAN member states to resolve the problem of extraterritorial bankruptcy assets.

The recognition of UNCITRAL model law on cross border insolvency among the ASEAN member states.

Signing the convention / treaty of the application of cross border insolvency law in ASEAN.

The implementation of AEC cross border insolvency regulation as the harmonization of ASEAN bankruptcy law.