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The proliferation of international trade and investment coupled with the 2008 financial crisis and recent economic slowdown has highlighted the importance of cooperation and clear standards in cross-border insolvency proceedings. However, the use of special purpose vehicles ('SPVs'), a common investment tool, casts doubt on the fairness and enforceability of restructuring plans. This article, while examining the Indonesian restructuring of PT Bakrie Telecom ('BTEL'), illustrates how the use of SPVs to issue bonds on behalf of a parent company excludes investor participation in insolvency proceedings of the parent company by virtue of investors being creditors of the SPV. It further outlines how, in line with existing principles of directors' duties upon a company's insolvency, investors should be represented through the claims of the SPV against the parent company.

I Introduction

As countries struggle to harmonise laws in an effort to foster investment, the global banking sector has, to some extent, established its own mechanism for harmonisation. The use of special purposes vehicles ('SPVs') as a tool for investing in developing economies is increasingly prevalent with the majority of the 2.2 trillion[1] foreign direct investment (FDI) in 2015 flowing through such entities.[2] In addition to tax savings, an important advantage is the ability to apply the foreign law with which banks are familiar, usually English or New York law. In Southeast Asia, SPVs are often established in Singapore or Hong Kong, jurisdictions with established legal systems and competent judiciaries.[3] However, insulation from the law of the developing economy cuts both ways and, in the case of insolvency proceedings, investors find themselves without recourse against the end recipient of funds because the investors are creditors of the SPV, not its parent company.

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1 World Bank, *Foreign Direct Investment, Net Inflows* (2016) <http://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD>.

2 United Nations Conference on Trade and Development, 'Investment Flows through Offshore Financial Hubs Declined but Remain at High Level' (2016) 23 *Global Investment Trends Monitor* 1, 2 <http://unctad.org/en/PublicationsLibrary/webdiaeia2016d2_en.pdf>.

3 Peter Hodson, 'Offshore Financial Centres: The Asia Pacific Solution' (2001) 7 *Trusts and Trustees* 26, 26.

Calling upon the example PT Bakrie Telecom's ('BTEL') debt restructuring, this article examines the impact of SPV-issued-bond structures on insolvency proceedings in the Indonesian context. A country with over USD20 billion[4] of annual FDI and with nearly 90 per cent of all non-state corporate dollar notes issued via offshore SPVs,[5] Indonesia is representative of other developing economies that utilise the SPV-bond investment structure. Informed by interviews with lawyers and accountants in Indonesia, the article first introduces the BTEL case and details the SPV-bond investment structure. Section III explains the relationship with the insolvency process, first explaining the bankruptcy system in Indonesia and the impact on cross-border insolvency. Next, Section IV discusses mechanisms to minimise investor risk through solutions requiring reform of existing law.

II SPV-bond investment structure

SPVs are a commonly utilised tool for investing in offshore jurisdictions, especially developing economies. Depending on the nature of the investment, SPVs may be established by the investing entity or recipient of investment funds. The former is utilised when offshore investors seek control of a firm in the target jurisdiction. Transferring control of holding companies in low tax jurisdictions allows investors to realise capital gains while reducing tax liability or avoiding costly approval procedures for transferring company ownership that exist in some jurisdictions.[6] Domestic investors may also utilise SPVs via the round trip investment model to avail themselves of government incentives aimed at attracting foreign investment.[7]

Companies seeking to raise money can establish SPVs in offshore jurisdictions to issue bonds on their behalf. In addition to tax considerations, placing SPVs in a jurisdiction with a reliable and experienced judiciary, such as Singapore or Hong Kong, may alleviate investors' fears while investing in developing countries. As a result, this structure is commonly used by Indonesian companies seeking foreign investment.

The restructuring efforts of BTEL, a large Indonesian telecom company, highlight the problems with the common investment structure for developing economies. The utilisation of SPVs in financial centres limits investor recourse to the SPVs. This structure excluded investors in BTEL from participating in the Indonesian restructuring process, resulted in a lawsuit in New York and stands in stark contrast to other proceedings where coordination between the creditors and debtor facilitated the restructuring, with recognition in multiple jurisdictions.[8]

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4 World Bank, above n 1.

5 Christopher Langner, 'Hedge Funds Cry Foul over Indonesian Debt Workout', *Bloomberg* (online), 3 March 2015 <https://www.bloomberg.com/news/articles/2015-03-02/hedge-funds-cry-foul-over-indonesian-debt-workout-asean-credit>.

6 David Buss, David Hryck and Robert Rothman, 'Tax Minimization Strategies Using Offshore Holding Companies' (2005) 83 *Taxes* 13.

7 Wei Shen and Casey Watters, 'Is China Creating a New Business Order? Rationalizing China's Extraterritorial Attempt to Expand the Veil-Piercing Doctrine' (2015) 35 *Northwestern Journal of International Law and Business* 469.

8 The restructuring of PT Berlian Laju Tanker ('BLT'), eg, was recognised in Indonesia, Singapore, and the United States.

A History of BTEL

BTEL is part of the Bakrie Group, an Indonesian conglomerate founded by Achmad Bakrie with diverse holdings including, among others, oil and gas, media, telecommunications, property development, infrastructure and mining.[9] The group is tied to another major transnational insolvency in the mining centre, PT Bumi Resources.[10] BTEL was established as a subsidiary of Bakrie & Brothers in 1993 under the name PT Radio Telecom Indonesia, commonly known as Ratelindo. In 2003, the company changed its name to PT Bakrie Telecom and expanded its business throughout Indonesia, going public in 2006 on the Indonesian stock exchange. In 2007, the Indonesian government granted licenses for BTEL to establish an international direct dialling network connecting the island of Batam to Singapore and the United States. BTEL's early success came to an end after the 2008 financial crisis and by 2010 it reported net losses which resulted in a state of negative equity in 2013.[11]

B The BTEL PKPU

Upon entering the Indonesian debt restructuring process, commonly referred to as a PKPU ('*Penundaan Kewajiban Pembayaran Utang*'),[12] BTEL's creditors entered negotiations with the company and ultimately approved the plan. However, bondholders that invested through the Singapore SPV were excluded from the process spurring bondholders who owned 28 per cent of the $380 million in total bonds to challenge the Indonesian plan in the New York state court.[13] While the exclusion of bondholders appears unfair, complaints of the US bondholders over exclusion from the BTEL proceedings lack legal merit under the Indonesian statutory regime as the bondholders were creditors of Bakrie Telecom Pte Ltd, the Singapore SPV, not BTEL.

Figure 1

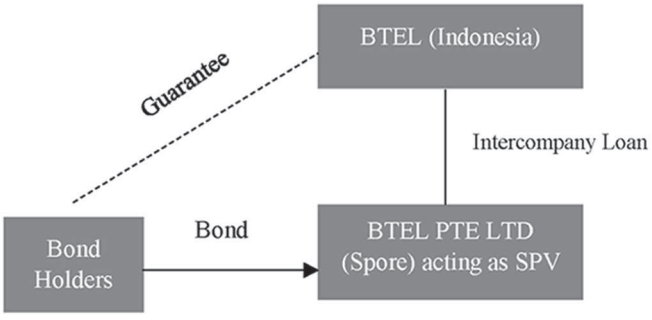
9 Kate Hodal, 'The Bakrie Family: An Indonesian Business Dynasty Mired in Controversy', *The Guardian* (online), 25 September 2012 <https://www.theguardian.com/world/2012/sep/25/bakrie-indonesia-nat-rothschild>.

10 David Yong, 'Bumi Resources Gets Five-Month Extension of Debt Moratorium', *Bloomberg* (online), 22 May 2015 <https://www.bloomberg.com/news/articles/2015-05-22/bumi-resources-gets-five-month-extension-of-debt-moratorium>.

11 Praga Utama and Andi Ibnu, *Bakrie Telecom Cuts Jobs* (11 March 2015) Tempo.co <http://en.tempo.co/read/news/2015/03/11/056649076/Bakrie-Telecom-Cuts-Jobs>.

12 Meaning 'Postponement of Debt Payment Obligation'.

13 Langner, above n 5.



The inability of foreign investors to enforce their rights against the end recipient of funds creates uncertainty and not only harms investors, but also may reduce the availability of credit and increase its cost in proportion to the perceived risk. However, absent fraud on the part of BTEL, the bondholders are missing a valid claim against the company.[14] This structure cuts both ways. Seeing as bondholders were creditors of the Singapore SPV, they were not entitled to vote in the BTEL insolvency. However, this also meant that BTEL could not alter the nature of the bonds as they were contractual rights shared between the SPV and bondholders, not BTEL and the bondholders. Under the plan ratified by the Indonesian Commercial Court, large unsecured creditors' claims (including those derived from the bond proceeds) will be paid 30 per cent with the remaining 70 per cent of the debt exchanged for 10-year mandatory convertible bonds ('MCBs') with a conversion price of 200 Indonesian Rupiah per share, approximately four times the share price at the time of the plan confirmation.[15] While the bondholders are not parties to the insolvency proceeding, BTEL's plan will effectively reduce the payment on the SPV's claim to 30 per cent unless the share value quadruples because the conversion price will be greater than the value of the shares after converting. Therefore, by supporting the plan, the leaders of the SPV may have breached their duty to the creditors by taking an action they knew would make the SPV insolvent.[16]

14 For a discussion of treatment of insolvent enterprise groups see Jenny Dickfos, Colin Anderson and David Morrison, 'The Insolvency Implications for Corporate Groups in Australia — Recent Events and Initiatives' (2007) 116 *International Insolvency Review* 103; Jennifer Dickfos and David Morrison, 'Australia's Adoption of UNICITRAL's Insolvency Recommendations with Respect to Enterprise Groups: A Critique' (2013) 4 *Insolvency Law Journal* 273.

15 Eveline Danubrata, 'Bakrie Telecom Debt Ploy Exposes New Foreign Investor Pitfall in Indonesia', *Reuters* (online), 19 February 2015 <http://www.reuters.com/article/bakrie-telecom-debt-idUSL4N0VQ1JD20150218>.

16 Anil Hargovan, 'Tax Debts and Directors Liability for Insolvent Trading' (2015) 67 *Governance Directions* 302, 302; Anil Hargovan, 'Judicial Guidance on De Facto Director Liability for Insolvent Trading' (2017) 69 *Governance Directions* 111, 113; Colin Anderson and David Morrison, 'Should Directors Be Pursued For Insolvent Trading Where a Company Has Entered into a Deed of Company Arrangement' (2005) 13 *Insolvency Law Journal* 163, 165; Jason Harris, 'Director Liability for Insolvent Trading: Is the Cure Worse than the Disease?' (2009) 23 *Australian Journal of Corporate Law* 266; Jason Harris and Anil Hargovan, 'Still A Sleepy Hollow? Directors' Liability and the Business Judgment

C Guarantee

In line with the common practice to ensure payment, BTEL guaranteed the bonds issued by the SPV. Outside of insolvency, this would allow recourse against both BTEL and the SPV. However, this poses two problems within the context of Indonesian bankruptcy or a suspension of payments. First, under Indonesian law, a creditor can only pursue a guarantor for the payment of debt once collections efforts against the debtor have been exhausted. This requirement can be waived by the guarantor and, as such, investors would do well to insist upon a waiver providing for the option to collect and pursue bankruptcy simultaneously against both entities. This leads to the second problem, which is that the same debt may not be claimed against two parties.

As a civil law country, courts are not bound by earlier decisions, which creates a degree of uncertainty in the legal process.[17] This complicates the problem regarding when to call in a guarantee, before or after the beginning of a PKPU. If the guarantee is called in after the PKPU, is a claim holder still a creditor as to the guarantor? As the guarantor is obligated to pay only to the extent of the debtor's obligation, arguably any claim against the guarantor is extinguished when, in a PKPU, the plan cures the default or extinguishes liability. However, if the guarantee is called prior to filing claims in the proceeding, there will be two debtors for the same claim. The law is unclear on how to address this issue in practice and the lack of clarity has led to claims being either partially or entirely rejected. However, in some other recent PKPU cases, such guarantee-based claims were accepted.[18]

III Procedural barriers to cross-border insolvency

As discussed above, the insolvency of BTEL received global media attention and sparked outrage among international investors, leading to a lawsuit in a New York Supreme Court. However, the case is representative of many in Indonesia and other developing economies as BTEL utilised the SPV-bond structure. The system, also facilitating the use of foreign law, is used primarily for tax purposes.[19] In fact, it is estimated that half the world's trade passes through tax havens that account for only 3 per cent of global GDP.[20]

Rule' (2017) 31 *Australian Journal of Corporate Law* 319; Andrew Keay and Michael Murray, 'Making Company Directors Liable: A Comparative Analysis of Wrongful Trading in the United Kingdom and Insolvent Trading in Australia (2005) 40 *International Insolvency Review* 27, 30; Christopher F Symes, 'A New Statutory Director's Duty for Australia — A "Duty" to be Concerned about Employee Entitlements in the Insolvent Corporation' (2003) 12 *International Insolvency Review* 133, 134–5.

17 Vincy Fon and Francesco Parisi, 'Judicial Precedents in Civil Law Systems: A Dynamic Analysis' (2007) 26 *International Review of Law and Economics* 519.

18 *PT Arpeni Pratama Ocean Liners* (PKPU) (2011); *PT Berlian Laju Tanker* (PKPU) (2012).

19 Edward Luce, 'Special Purpose Vehicles: A Happy Business Medium', *Financial Times* (London), 18 March 1997; Steven L Schwarcz, 'The Use and Abuse of Special-Purpose Entities in Public Finance' (2012) 97 *Minnesota Law Review* 369.

20 John Andrew McLaren, *Will Tax Havens Survive in the New International Legal Environment*? (PhD Thesis, RMIT University, 2010) <https://researchbank.rmit.edu.au/eserv/rmit:12312/McLaren.pdf>; Timothy Addison, 'Shooting Blanks: The War on Tax Havens' (2009) 16 *Indiana Journal of Global Legal Studies* 703, 704; For more on international tax liability see Shen and Watters, above n 7; Michael Kobetsky et al, *Income*

Regardless of the location of the SPV, invested funds and other assets usually remain in the jurisdiction of the company using the SPV-bond investment structure to raise capital. In the case of BTEL, the assets remained in Indonesia and subject to the country's statutory regime and jurisdiction of the Indonesian Commercial Court. Therefore, in understanding the implications of SPV-bond investment structure in Indonesia, it is important to understand the Indonesian insolvency system.

A The Indonesian corporate bankruptcy regime

The modern Indonesian bankruptcy law is relatively new and was developed in response to the 1998 Asian financial crisis. That year, the Indonesian People's Representative Council ('*Dewan Perwakilan Rakyat*') ratified the first amendment to the Bankruptcy Ordinance since its enactment by the colonial Netherlands-Indies Government in 1906[21] when the bankruptcy law was intended for Europeans and other foreigners.[22] The bankruptcy law[23] was further amended in 2004[24] to define terms and address ambiguities and problems in the 1998 version which arose in the implementation thereof.[25] Indonesian law provides two formal procedures that may be invoked regarding a company: bankruptcy, which aims at liquidation but may result in restructuring, and the suspension of payments (PKPU), which aims at restructuring but may result in liquidation. It is important to note that although these approaches are often referred to as insolvency proceedings in English, under Indonesian law, insolvency is not a prerequisite for bankruptcy[26] and there is no insolvency test for bankruptcy or a suspension of payments.[27] In fact, the term 'state of insolvency' ('*keadaan insolvensi*') is specifically used by the Indonesian bankruptcy law to define a certain moment in the bankruptcy proceedings.

An involuntary bankruptcy petition may be commenced against a debtor if the debtor has at least two creditors and is in default on at least one debt.[28] The debts require 'simple proof' and may not be in dispute.[29] However, if the

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Tax: Text, Materials and Essential Cases (Federation Press, 9th ed, 2015); Catherine Brown, 'Tax, Trusts and Beneficial Ownership: Perils for the Unwary Practitioner' (2003) 23 *Estate Trust and Pensions Journal* 9.

21 *Bankruptcy Law No 4 of 1998* (Indonesia) ('*Bankruptcy Law 1998*'). See also Stacey Steele, 'The New Law on Bankruptcy in Indonesia: Towards a Modern Corporate Bankruptcy Regime?' (1999) 23 *Melbourne University Law Review* 144.

22 Roman Tomasic et al, 'Insolvency Law Administration and Culture in Six Asian Legal Systems' (1996) 6 *Australian Journal of Corporate Law* 248.

23 In Indonesia, as with the United States, the term 'bankruptcy' refers to the insolvency proceedings regarding both natural and juridical persons.

24 *Law No 37 of 2004 on Bankruptcy and Suspension of Obligation for Payment of Debts* (Indonesia) ('*Bankruptcy Law*').

25 Subianta Mandala, *Indonesian Bankruptcy Law: An Update*, Organization for Economic Co-operation and Development (2006).

26 Ibid.

27 Michael S Carl and Dewi Savitri Reni, Corporate LiveWire, 'A Brief Look at Suspension of Debt Payment Obligations in Indonesia', March/April 2013, *Expert Guide: Bankruptcy & Restructuring* (online) 58 <https://issuu.com/jakepowers/docs/expert_guide_-_bankruptcy___restructuring_2013_-_s>.

28 *Bankruptcy Law* art 2(1); Mandala, above n 25.

29 *Bankruptcy Law* art 8(4); Carl and Reni, above n 27.

debtor is a bank, insurance company, securities company (including a securities brokerage), or falls under certain classes of state-owned enterprises ('SOEs'), the ability to file a bankruptcy petition is redirected from the ordinary creditor to the affiliated regulatory agency.[30] Once a creditor's bankruptcy petition is granted, a receiver and supervisory judge will be appointed and a 90-day stay period will be imposed on the bankruptcy estate. During the bankruptcy process, the receiver takes control of the debtor's assets. Subsequently, the receiver will inventory the debtor's assets and liabilities. The creditors will be invited to submit their claims for verifications. During this period, the debtor may propose a composition plan to creditors and attempt to remove the company from bankruptcy. In order to be successful, the composition plan must be approved by over half the unsecured creditors who have verified claims and attend the voting meeting. The votes must also represent at least two-thirds of the value of such claims. Should a plan be approved by creditors, it must also be ratified by the court.

If no composition plan is submitted in the creditors meeting for the verification of claims, the composition plan is rejected in the voting process by the creditors, or the composition plan is approved by the creditors but not ratified by the Commercial Court, the legal state of insolvency will be declared. The receiver will then liquidate the debtor's assets and distribute the proceeds to creditors under the supervision of the judge.

Suspension of payments, commonly referred to as PKPU, is the only form of in-court corporate rehabilitation available under Indonesian law. Once filed, if the Commercial Court grants the PKPU, it will be announced in the State Gazette and two additional newspapers, and the court is required to grant a provisional stay preventing the collection of debt. The moratorium also extends over the ability of secured creditors to exercise their security interest. After granting the provisional stay, the court has 45 days to call a meeting of creditors. The stay is intended to provide the debtor relief from collection efforts to facilitate generating a plan for repayment and rehabilitation of the company that creditors will find satisfactory and may be extended up to 270 days, including the first 45 days, in what is referred to as a 'permanent' moratorium.

A final plan can only be submitted once and must be approved by both secured and unsecured creditors. The plan requires the support of over half the creditors representing at least two-thirds of value in both classes that have verified claims and attend the voting meeting.[31] Should a plan be approved by creditors, it must also be ratified by the court. While the court will normally accept a plan authorised by the meeting of creditors, the court must nonetheless ensure the plan is feasible and fair. If the debtor is hiding assets, engaged in fraudulent transactions or was unfair to the debtor or any creditors, the court should not ratify the plan.

Once passed, a plan will become binding on all creditors, except dissenting secured creditors,[32] and payments will resume under the plan with the debtor

30 Mandala, above n 25.

31 *Bankruptcy Law* art 281(1).

32 There is no clear treatment for dissenting secured lenders who are entitled to the lessor of the value of their debt or the value of the security.

regaining control over any assets previously seized by the receiver. Restructuring plans generally provide for reduced interest rates, waiver of penalties, extended payment terms, haircuts, write-offs, debt to equity swaps, and any combinations thereof. However, if the debtor fails to reach an agreement with creditors and have the plan ratified by the court prior to the end of the stay, the company will be declared bankrupt and subsequently liquidated.

B Cross-border insolvency

Approaches to cross-border insolvency fall under two general theoretical umbrellas: territorialism and universalism.[33] Territorialism is the traditional approach under which separate insolvency proceedings must be initiated in each jurisdiction where the debtor has assets and each court only exercises authority over the assets within its jurisdiction.[34] This has been termed the 'grab rule' because jurisdiction extends to what each court can seize.[35] More recently the trend has been towards universalism, the concept that one court should administer the insolvency with respect to all the debtor's assets worldwide.[36] Reducing the costs associated with multiple proceedings maximises the value for creditors and increases the likelihood of successful restructuring. However, in reality, the court presiding over the main proceeding is dependent upon the cooperation of foreign jurisdictions to implement the court's orders.[37] This has led to the concept of modified universalism,[38] which is embodied in the *UNCITRAL Model Law on Cross-Border Insolvency*. Under the *Model Law* approach, there is one main proceeding in the debtor's centre of main interest ('COMI') and ancillary proceedings may be initiated in other jurisdictions. As stated by Lord Hoffman in *Cambridge Gas Transport Corp v Official Committee of Unsecured Creditors of Navigator Holdings plc*:

> Fairness between creditors requires that, ideally, bankruptcy proceedings should have universal application. There should be a single bankruptcy in which all

33 Sandeep Gopalan and Michael Guihot, *Cross-Border Insolvency Law* (LexisNexis Butterworths, 2016). See also Christopher Symes and John Duns, *Australian Insolvency Law* (LexisNexis Butterworths, 2012).

34 Edward S Adams and Jason K Finke, 'Coordinating Cross-Border Bankruptcy: How Territorialism Saves Universalism' (2008/2009) 15 *Columbia Journal of European Law* 43; Paul J Omar, 'The Landscape of International Insolvency Law' (2002) 11 *International Insolvency Review* 173.

35 Sara Isham, 'UNCITRAL's Model Law on Cross-Border Insolvency: A Workable Protection for Transnational Investment at Last' (2001) 26 *Brooklyn Journal of International Law* 1177, 1180–1; Jay Lawrence Westbrook, 'A More Optimistic View of Cross-Border Insolvency' (1994) 72 *Washington University Law Quarterly* 947; Look Chan Ho, *Cross-Border Insolvency: Principles and Practice* (Sweet and Maxwell, 2016).

36 Liza Perkins, 'A Defense of Pure Universalism in Cross-Border Corporate Insolvencies' (2000) 32 *New York University Journal of International Law and Politics* 787.

37 Jens Dammann and Henry Hansmann, 'Globalizing Commercial Litigation' (2008) 94 *Cornell Law Review* 1.

38 Jay Lawrence Westbrook, 'Chapter 15 at Last' (2005) 79 *American Bankruptcy Law Journal* 713, 716; Lee Aitken, 'Modified Universalism: Confined, Or Confirmed' (2015) 41 *Australian Bar Review* 27; Marcus Staff, 'Common Law Assistance and Cross-Border Insolvency: From Modified Universalism to Supra-Territoriality' (2015) 8 *Corporate Rescue and Insolvency* 3, 3.

> creditors are entitled and required to prove. No one should have an advantage because he happens to live in a jurisdiction where more of the assets or fewer of the creditors are situated.[39]

While it may be impossible to achieve true universalism, the *Model Law* embraces modified universalism by facilitating the recognition and assistance to foreign main proceedings in the debtor's COMI. Modified universalism as embodied in the *Model Law* relies upon countries to adopt into their domestic law an approach for recognising and assisting foreign insolvency proceedings. The Philippines was the first Southeast Asian country to adopt the *Model Law*, with Singapore becoming the only other country upon adopting the law in 2017[40] after largely embracing the *Model Law* approach through development of a common law insolvency regime over the last several years.[41] However, the version adopted by the United States under ch 15 of its *Bankruptcy Code* is the most commonly utilised version of the law.[42] Recognition is largely automatic, only requiring basic statutory formalities to be met, with questions over the debtor's COMI only occasionally posing a barrier to recognition.[43] While courts may recognise a foreign proceeding without offering additional relief,[44] at least partial relief is granted in a majority of cases.[45]

The *Model Law* calls upon courts to grant relief necessary for the orderly and fair administration of the cross-border insolvency while, recognising the varying standards and types of relief available, maintaining a neutral stance regarding what relief should be afforded to the main proceedings.[46] Prior to recognition, a court may provide interim relief if necessary to protect assets or

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39 [2007] 1 AC 508 at [16] (overturned). For discussion of the case see Sandy Shandro, 'European Update' (2007) 25 *American Bankruptcy Institute Journal* 34, 34; Adam Rushworth and Andrew Scott, 'Decisions of British Courts during 2012 Involving Questions of Public or Private International Law' (2013) 83 *British Year Book of International Law* 271.

40 *Financial Rehabilitation and Insolvency Act (FRIA) of 2010* (Philippines) ch VIII s 139; *Companies (Amendment) Act 2017* (Singapore) ss 354.

41 *Re Taisoo Suk* [2016] SGHC 195 (14 September 2016); *Re Opti-Medix Ltd (in liq)* [2016] SGHC 108 (3 June 2016); *Beluga Chartering GmbH (in liq) v Beluga Projects (Singapore) Pte Ltd (in liq)* [2014] SGCA 14 (26 February 2014); Jesse Zhihe Ji, 'Cross-Border Rehabilitation: An Impediment to Ship Arrest in Singapore?' (Working Paper No 4, NUS Centre for Maritime Law Working Paper, 15 March 2017) <https://papers.ssrn.com/sol3/ papers.cfm?abstract_id=2933955>; Smitha Menon and Stephanie Yeo, 'High Court Allows Appointment of Foreign Bankruptcy Trustee in Singapore for the Purpose of Foreign Insolvency Proceedings' (July 2016) *CaseWatch* <http://www.wongpartnership.com/index. php/files/download/2261>; Andrew Chan and Edward Tiong, 'Singapore Court of Appeal holds Section 377(3)(c) of *Companies Act* Does Not Apply to Foreign Company in Singapore That is Not Carrying on Business in Singapore' (14 March 2014) *Legal Bulletin* <http://www.allenandgledhill.com/pages/publications.aspx?list=LBulletinAreas&pub_id=534&view=d>.

42 Christopher Ross Steele, 'Cross-Border Insolvency: Substantive Consolidation and Non-Main Proceedings' (2011) 7 *Pratt's Journal of Bankruptcy Law* 307.

43 Jay Lawrence Westbrook, 'An Empirical Study of the Implementation of the United States of the Model Law on Cross Border Insolvency' (2013) 87 *American Bankruptcy Law Journal* 247.

44 See, eg, *Re Oversight & Control Commission of Avanzit, SA*, 385 BR 525 (Bankr SDNY 2008).

45 Westbrook, above n 43.

46 Jenny Clift, 'The UNCITRAL Model Law on Cross-Border Insolvency — A Legislative

the interests of creditors.[47] Once a proceeding is recognised, the *Model Law* states that the court should automatically extend a stay over enforcement proceedings against the debtor and a moratorium against the debtor transferring or encumbering assets.[48] However, limitations and exceptions to the moratorium and the extent of additional relief vary between jurisdictions adopting the *Model Law* and the public policy exception allows courts to scrutinise foreign plans.[49] This sometimes leads courts to decline to remit assets to the foreign proceedings until local creditors receive what they would under local law, a stance facilitated by the neutral framework of the Model Law but in opposition to the universalist principles it represents.[50] This flexibility also allows each jurisdiction to decline relief if the proceeding is unfair to an extent that it would violate the policies of the jurisdiction.

The best mechanism to deal with cross-border insolvency is through a pre-packaged insolvency proceeding in Indonesia which can subsequently be recognised by a ch 15 in the United States, in other UNCITRAL *Model Law* jurisdictions, and/or can be simultaneously implemented in another jurisdiction as a scheme of arrangement. In a pre-packaged insolvency, the creditors and debtor reach an agreement outside the formal insolvency proceedings.[51] The consent of creditors alleviates the court's burden of ensuring fairness. However, sometimes a formal structure is necessary to bring all parties to the table or to bind dissenting creditors, in which case, it is important to ensure all creditors are afforded the option to vote and are treated fairly under the plan. Any test of fairness, however, should be flexible as jurisdictions employ varying statutory regimes, each with their own rules and standards for confirming corporate rescue plans.

The Indonesian bankruptcy law is a contradiction, embracing universalism in that Indonesian bankruptcy proceedings have a global effect[52] and territorialism in that Indonesia does not recognise foreign judgments but will consider them as evidence in a domestic proceeding. This approach is not

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Framework to Facilitate Coordination and Cooperation in Cross-Border Insolvency' (2004) 12 *Tulane Journal of International and Comparative Law* 307.

47 United Nations Commission on International Trade Law, *Model Law on Cross-Border Insolvency 1997* (adopted 30 May 1997) ch III art 19 ('*Model Law*'); Irit Mevorach, 'On the Road to Universalism: A Comparative and Empirical Study of the UNCITRAL Model Law on Cross-Border Insolvency' (2011) 12 *European Business Organization Law Review* 517, 543. See also Felicity Deane and Rosalind Mason, 'The UNCITRAL Model Law on Cross-Border Insolvency and the Rule of Law' (2016) 25 *International Insolvency Review* 138.

48 *Model Law* art 20.

49 Lindsay Loudon Vest, 'Cross-Border Judgments and the Public Policy Exception: Solving the Foreign Judgment Quandary by Way of Tribal Courts' (2004) 153 *University of Pennsylvania Law Review* 797; Michael A Garza, 'When is Cross-Border Insolvency Recognition Manifestly Contrary to Public Policy?' (2015) 38 *Fordham International Law Journal* 1587.

50 Jose M Garrido, 'No Two Snowflakes the Same: The Distributional Question in International Bankruptcies' (2011) 46 *Texas International Law Journal* 459.

51 Peter Walton, 'Pre-packin' in the UK' (2009) 18 *International Insolvency Review* 85; Mark Wellard and Peter Walton, 'A Comparative Analysis of Anglo-Australian Pre-packs: Can the Means Be Made to Justify the Ends?' (2012) 21 *International Insolvency Review* 143, 143–81.

52 *Bankruptcy Law* arts 21, 212–14, 264.

uncommon[53] and unwillingness to recognise foreign judgments stems, at least in part, from an emphasis on sovereignty resulting from subjugation to foreign powers during the colonial period and World War II. While the one-sided application of universalism harms comity with other nations, claiming extraterritorial effect plays an important function by empowering other countries to assist Indonesian proceedings. Claiming extraterritorial effect provides great political rhetoric; however, in reality a country cannot enforce its law extraterritorially without the cooperation of foreign jurisdictions. As such, what benefits justify the seemly contentious assertion that a nation's laws should apply to foreign jurisdictions? The answer lies in the operation of the UNCITRAL *Model Law* and, to some extent, common law cross-border insolvency proceedings. Countries that adopt the UNCITRAL *Model Law* may recognise and support foreign proceedings, usually in the form of remitting locally held assets to the foreign insolvency administrator. However, if the main proceeding only claims local jurisdiction, it has no basis claiming jurisdiction over foreign assets and the foreign court may recognise the proceeding, but be unable to assist the court in the main proceeding in distributing assets over which the court of the main proceeding lacks jurisdiction under its own domestic law.

Although the Indonesian bankruptcy law is silent regarding the recognition of foreign judgments, if a claim is governed by foreign law, a judgment by that jurisdiction normally should be accepted by an Indonesian court or receiver as dispositive regarding the amount of a claim. The court, however, is under no obligation to enforce the foreign judgment. This is important in regards to insolvency for two reasons. First, a foreign judgment should, absent a conflict of law issue, remove any dispute regarding a claim. Second, it should cause the indirect recognition of foreign insolvency proceedings with respect to foreign debt. For example, to initiate an insolvency proceeding in Indonesia, a creditor must be able to prove that the debtor has a debt which is due and payable. If a claim, such as alleged by bondholders in BTEL, is governed by foreign law and the debtor files bankruptcy in that jurisdiction, a stay could come into effect making the claim no longer due and payable. As a result, that creditor would lack standing to initiate a proceeding in Indonesia. This could harm foreign creditors seeking to claim against assets in Indonesia as, under the same logic, if a foreign insolvency reduces the liability on a claim governed by the law of that jurisdiction, the Indonesian court may recognise the reduced claim in the Indonesian proceeding.

C Procedural fairness and claims restructuring

The goals of the *Model Law* include the '[f]air and efficient administration of cross-border insolvencies' and maximising the value of assets.[54] Furthermore, art 6 provides protection against unfair provisions applied by a foreign proceeding by allowing a court to refuse 'to take an action governed by [the Model Law] if the action would be manifestly contrary to the public policy' of the jurisdiction. This is also in line with the common law requirement that

53 See, eg, *Enterprise Bankruptcy Law 2007* (People's Republic of China) ch I art 5.
54 *Model Law* Preamble.

the court examine what 'the rehabilitation process entails, including its impact on domestic creditors and whether it is fair and equitable in the circumstances'.[55]

Within the cross-border context, corporate rescue plans are evaluated for the equitable treatment of creditors at two points: the plan adoption at the main proceeding and during ancillary proceedings where other jurisdictions determine whether to recognise and assist the main proceeding. As part of the initial proceeding, courts may assess fairness on both the procedural and substantive levels;[56] however, procedural fairness is often used as evidence of substantive fairness with courts unlikely to second guess creditors acting in good faith. The SPV-bond structure, however, complicates the situation by excluding investors. Jurisdictions may differ over whether the court has an obligation to assess the fairness to the creditors of the SPV, as non-parties to the proceeding. Additionally, by controlling the SPV, the company is able to control the votes of a creditor, further calling the procedural fairness into question.

In jurisdictions that allow multiple classes of secured and unsecured creditors, procedural fairness takes the form of ensuring creditors are properly represented by the class structure. As such, the SPV votes, if allowed, could be placed in a separate class.[57] While plans in most jurisdictions require final court approval, usually on the basis of fairness and feasibility, creditor approval through properly determined classes is usually accepted by courts as establishing the fairness and feasibility of a plan. As a result, the lines between procedural and substantive fairness is often blurred in judicial opinions.

As the Indonesian PKPU procedure only provides for two classes of creditors, the mechanism for ensuring fairness falls primarily to judicial ratification of the plan. Once a plan is approved by creditors in Indonesia, the court must review the plan, which cannot be ratified if the process involved fraud or unfair means, or if the plan provides unfair preference to certain creditors.[58] However, it appears, and Indonesian practitioners report, that the courts have never rejected a plan. This lack of assurance of procedural and substantive fairness presents a challenge for foreign courts in deciding whether to recognise and assist Indonesian proceedings and stems, at least in

55 *Re Taisoo Suk* [2016] SGHC 195 (14 September 2016) [17]. See also *Hong Kong Institute of Education v Aoki Corporation* [2004] 2 HKLRD 760 [152]. See, eg, Ian Fletcher, *Insolvency in Private International Law* (Clarendon Press, 1999).

56 For a discussion of procedural fairness, see Samuel L Bufford, 'Coordination of Insolvency Cases for International Enterprise Groups: A Proposal' (2012) 86 *American Bankruptcy Law Journal* 685.

57 See, eg *Royal Bank of Scotland NV v TT International Ltd* [2012] SGCA 9 (31 January 2012) [52] ('*Royal Bank of Scotland*') stating '[R]elated party creditors should have their votes discounted in light of their special interests to support a proposed scheme, by virtue of their relationship to the company; wholly owned subsidiaries should have their votes discounted to zero and are effectively classified separately from the general class of unsecured creditors'; Chou Sean Yu, Manoj Pillay Sandrasegara and Chan Hock Kong, 'The Court of Appeal's Landmark Decision on Schemes of Arrangement' (February 2012) *CaseWatch* <http://www.wongpartnership.com/index.php/files/download/871>; Wai Yee Wan, 'Recent Developments in Schemes of Arrangement in Singapore: Classification of Creditors and Scheme Manager's Conflicts of Interest' [2013] *Journal of Business Law* 552.

58 David K Linnan, 'Insolvency Law and Institutions in Indonesia' in Roman Tomasic (ed), *Insolvency Law in East Asia* (Ashgate Publishing, 2006) 355.

part, from issues pertaining the resources and the sophistication of the court. While the specialised Indonesian Commercial Court has jurisdiction over bankruptcy cases,[59] the court system as a whole lacks resources and adequate training to deal with complex cases.[60] In the context of BTEL, local practitioners doubted the ability of judges to understand concepts, like mandatory convertible bonds, sufficiently to make an adequate assessment of the fairness of a plan. Contention regarding the judges' role in assessing the reasonableness or fairness of business transactions is not unique to Indonesia, with judges in many jurisdictions establishing doctrines such as the business judgment rule[61] that afford corporate leadership great latitude and allow judges, who are trained in the law and not business, to avoid evaluating business decisions.

Another problem in assessing fairness is that in Indonesia the perception of corruption is high and lawyers report distrust of the legal system.[62] The situation is getting better, but the unethical are becoming more sophisticated. This may be because debtors overall are becoming more sophisticated and accustomed to the statutory bankruptcy system.[63] The problem went relatively unchecked in insolvency proceedings until the case of Telkomsel, where the judges were ultimately removed from the case and demoted in response to collusion and suspected bribery.[64] In a previous case involving the local partner of Canadian insurer Manulife, when shares of AJMI, an asset of the bankruptcy estate were to be sold, it was alleged that the debtor previously sold the shares to an offshore company.[65] This resulted in the arrest of the debtor's receiver, an AJMI executive and police investigations of judges and court personnel.[66] Both *Telkomsel* and *Manulife* illustrate how the system can be abused.

During interviews as part of the research, insolvency lawyers in Indonesia report that there are likely to be many cases of debtors creating claims to support their plans under PKPUs. As a matter of practice, debtors will not file for a PKPU unless they have the necessary votes among both classes of

59 Government of Indonesia, *Supplementary Memorandum of Economic and Financial Policies* (10 April 1998) International Monetary Fund <https://www.imf.org/external/np/loi/041098.htm>.

60 Sebastiaan Pompe, *The Indonesian Supreme Court: A Study of Institutional Collapse* (Southeast Asia Program, Cornell University, 2005) 4.

61 See, eg, Janet Dine and Marios Koutsias, *The Nature of Corporate Governance: The Significance of National Cultural Identity* (Edward Elgar, 2013) 144–8.

62 Pompe, above n 60; Transparency International, *Corruption Perception Index 2015* (2016) Transparency International <https://www.transparency.org/cpi2015>.

63 Darminto Hartono, 'Debtor and Creditor Learning: Changes over Time in Indonesian Bankruptcy Reorganization Approaches' in David K Linnan (ed), *Legitimacy, Legal Development, and Change: Law and Modernization Reconsidered* (Ashgate Publishing, 2012).

64 Joel Hogarth, 'Telkomsel Highlights Indonesia's Bankruptcy Shortcomings' (24 April 2013) *International Financial Law Review* <http://www.iflr.com/Article/3196298/Telkomsel-highlights-Indonesias-bankruptcy-shortcomings.html>.

65 David Linnan, 'Manulife Indonesia: A Meditation on Three Mythologies' in Helen Lansdowne, Philip Dearden and William Neilson (eds), *Communities in Southeast Asia: Challenges and Responses* (University of Victoria, BC Centre for Asia-Pacific Initiatives, 2002) 530; Linnan, above n 58.

66 Linnan, above n 58.

creditors to pass the restructuring plan. Similarly, structuring of creditor claims must take place prior to petitioning for a PKPU. Using unpaid employee bonuses to establish employees as creditors is purportedly a common mechanism to securing supporting votes in the unsecured creditor class, as a failed plan would lead to bankruptcy, liquidation and the loss of the employees' jobs. The law also provides a loophole that facilitates such structuring of votes through the assignment of debt. Under Indonesian law, the only requirement to make an assignment debt legally valid is to notify the debtor. As such, the number of claims in the unsecured creditor class can easily be manipulated by a creditor agreeing to assign portions of its debt to other entities until the number of claims is sufficient to provide the plan a majority vote. In theory, if the debt is assigned for compensation equal to the distribution under the plan and the plan is successfully ratified and implemented, both parties would break even. However, most Indonesian businesses are family run and relationships are an important part of business;[67] therefore, finding a cooperative creditor and parties willing to receive an assignment in support of the plan is reasonable, even absent additional financial benefit. This process only applies to the unsecured creditors and the plan will still require approval by secured creditors under the abovementioned approval quorum.

While some structuring is legitimate, the PKPU of PT Davomas Abadi, a cocoa maker, shows the tactics less scrupulous parties may employ to ensure passage of a plan to the detriment of legitimate creditors.[68] The terms of the plan were remarkable with a 7-year grace period on interest and principal, an 18-year extension of payment and no arrears interest.[69] The plan came two years after Davomas negotiated with its then limited number of creditors. The company subsequently claimed to have 60 new creditors with claims of approximately USD21 million.[70] The creditors, officially bondholders, all approved the plan and assigned a power of attorney to the same proxy. After an investigation, attorneys for the original creditors uncovered that listed creditors were fraudulent, and obtained affidavits from some alleged creditors denying that they authorised a power of attorney and knowledge of any claim against the company.[71] The creditors ranged from employees and farmers to British Virgin Island companies with uninhabited Hong Kong apartments as the principle place of business.

The court refused the affidavits claiming they were unreliable and once the objecting creditors produced the alleged creditors, the court refused to allow the alleged creditors to testify. The court also claimed that even if fraud existed, the Indonesian Commercial Court would need a final and binding criminal judgment to recognise the wrongdoing, in spite of the fact that the bankruptcy law requires the panel of judges to reject a plan that results from

67 Doddy Setiawan, Bandi Bandi, Lian Kee Phua, and Irwan Trinugroho, 'Ownership Structure and Dividend Policy in Indonesia (2016) 10 *Journal of Asia Business Studies* 230.

68 *Pt Davomas Abadi*, Perkara No 02/PKPU/2000/PN Jkt Pst.

69 Gary Goodpaster, 'Indonesian Bankruptcy: The Case of the Phantom Creditors' (2000) 2 *Australian Journal of Asian Law* 218.

70 Ibid.

71 Ibid.

fraud or collusion.[72] Denied the right to testify, one alleged creditor shouted: 'I never bought any Davomas Abadi notes. I was never a creditor of Davomas Abadi, I never signed a power of attorney ...'[73] The court nonetheless adjourned and ratified the plan. In spite of cases like *PT Davomas Abadi*, practitioners report that the Indonesian Commercial Court has never rejected a case based on fraud, collusion or unfairness to a party.

The ability of debtors to manipulate the voting structure through transferring claims, coupled with the statutory limitation of only permitting two classes of creditors, already poses a challenge in establishing procedural fairness when seeking recognition of an Indonesian plan abroad. However, the use of the SPV-bond structure makes the process nearly untenable as investors are excluded and the debtor is able to utilise the structure to usurp the voting rights of the bondholders. Furthermore, the unwillingness of courts to refuse ratification when a plan is substantively unfair removes any presumption of fairness and requires recognising courts to evaluate the substance of every plan. This is a challenging position for a court as, due to the exclusion of investors resulting from the SPV structure, the court is unable to rely upon the votes of creditors as evidence in assessing fairness.

IV Methods to address investor exclusion under the SPV-bond structure

As discussed above, in the context of cross-border insolvency there are two points where a plan is examined to ensure fair and equitable treatment of creditors and therefore two points where the exclusion of SPV creditors threatens the plan. These are the point of the plan adoption at the main proceeding and during ancillary proceedings where other jurisdictions determine whether to recognise and assist the main proceeding. The jurisdiction of the main proceeding, in this case Indonesia, in effect has the burden of treating creditors in a fair and equitable manner to facilitate recognition and assistance from foreign jurisdictions. When investors are excluded under the SPV-investment model, the recognising jurisdiction must determine how to assess the fairness of the plan in deciding whether to provide assistance to the main proceeding.

A Approaches at the recognition stage

The task faced by courts in ancillary proceedings is complicated when investors are excluded in the main proceeding as the court can no longer rely on the process as a means of ensuring fairness. The options for courts in this situation are limited to examining the process to see if the interests of the excluded investors were represented or analysing the plan to ensure substantive fair and equitable treatment of the excluded parties under the plan. Ensuring excluded creditors are notified of the ancillary proceeding is an essential step in ensuring fair and equitable treatment. If no excluded creditors object to recognition or assistance, then the court may feel secure granting the requested assistance.

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72 *Bankruptcy Law 1998* art 284(1).
73 Goodpaster, above n 69.

If creditors object, the courts should examine the main proceeding. Creditors, knowingly having entered into a contractual relationship with the SPV, should also be aware that they will be excluded from the proceeding. However, the debtor should also act in good faith with respect to the investors and not utilise the SPV to vote in a manner contrary to the interests of the investors. If evidence exists that the SPV was used in an effort to structure the voting prior to the insolvency proceeding or if it votes contrary to the interests of the SPV's bondholders, the court should find the 'fair and equitable' requirement lacking and deny or limit relief so as to protect the interests of excluded investors.

B Approaches during the initial proceeding

The fact that substantive rights provided under domestic insolvency regimes vary between countries is alone insufficient to deny recognition under the *Model Law*, and similarly, weaker procedural mechanisms for ensuring substantive fairness alone should not prevent courts in ancillary jurisdictions from providing assistance under common law. However, it remains essential during the main proceeding to ensure creditors are not excluded from the process as a result of the investment structure. This section advocates adopting two approaches to alleviate the problem: eliminating the voting rights of interested parties and transferring control of the SPV to bondholders.

1 Eliminating insider voting rights

The concept that interested parties should be prevented from voting in a class with disinterested creditors is established in other jurisdictions. As a general rule, it is essential to value 'debts in an independent manner without regard to the likely way in which the creditor holding the debt may vote'[74] while placing creditors in classes where creditors are 'sufficiently similar that they can consult together with a view to their common interest'.[75] Under this approach, if the rights of creditors are impacted equally, there is no need for separate classes.[76] The standard, also adopted by many corporate bankruptcy laws, protects minority shareholders and ensures a minimum standard of fairness that facilitates recognition and assistance in similar jurisdictions. However, in jurisdictions like Indonesia that lack this protection, either because the creation or structuring of claims to support a plan may occur or because all creditors are grouped into two classes, plans must be scrutinised before remitting assets to the main proceeding.[77]

The test for classifying creditors 'is based on similarity or dissimilarity of legal rights against the company, not on similarity or dissimilarity of interests not derived from such legal rights'.[78] Requiring creditors to be organised

74 Edward Bailey and Hugo Groves, *Corporate Insolvency: Law and Practice* (LexisNexis Butterworths, 3rd ed, 2007).

75 *UDL Argos Engineering & Heavy Industries Co Ltd v Li Oi Lin* [2001] 3 HKLRD 634 [27] ('*UDL Argos*').

76 *Re Telewest Communications plc* [2004] BCC 342 [28].

77 Structuring of claims may, however, violate the *Criminal Code* in Indonesia. See, eg, art 399.

78 *UDL Argos* [2001] 3 HKLRD 634 [27].

according to similarity of interest, and not according to how the administrator believes parties will vote, embodies the principle that the plan should be approved by creditors absent of the manipulation via claim structuring by the debtor. The standard ensures both procedural and substantive fairness which facilitates the recognition by non-main proceedings that recognise schemes as insolvency proceedings. Similar to ch 11 in the United States, where dissenting creditors are guaranteed at least what they would receive in a liquidation, liquidation is a basis for assessing the interests of creditors to a scheme. The Singapore Court of Appeal stated in *Royal Bank of Scotland NV v TT International Ltd*:

> To be clear, creditors will not be considered dissimilar just because they are treated differently by the scheme. Indeed, schemes may prefer certain creditors just as liquidation outcomes might. However, if the scheme favours or prejudices a group of creditors (against other creditors) differently from how they would be favoured or prejudiced in a liquidation, such as to give them an additional non-private interest to vote for or against the scheme (which would make it impossible for them to consult the other creditors with a view to their common interest), then that group of creditors should be classed separately.[79]

Creditors with an interest in the debtor would be favoured or prejudiced differently than other creditors as creditors with an equity interest could gain more by reducing payments and preserving equity. As such, interested creditors should be prevented from voting in the same class as uninterested creditors. This approach works for schemes of arrangement or bankruptcy proceedings that permit multiple classes. However, in jurisdictions such as Indonesia where there is only one class of unsecured creditors, interested creditors cannot be separated into a class. In such cases, the votes of insiders should be discounted or eliminated to ensure the interests of other creditors are properly represented. Of course, Parliament could also adopt a multiple class system. However, that would introduce an added level of complexity into the system that Parliament likely intended to prevent by introducing the system with a single class of unsecured creditors. The least complex approach, therefore, may be to eliminate the votes of interested creditors.

2 Transferring control of the SPV to its creditors

Under the SPV-bond investment structure, the SPV serves as a channel between the investors and the end recipient and relies upon funds from the financed company to repay bondholders. While the bondholders are creditors of the SPV and not the debtor, the failure of the debtor to pay bondholder claims to the SPV will make the SPV insolvent. Transferring the voting rights of the SPV to creditors in an insolvency proceedings places substance over form and protects the rights of creditors. This approach is in line with two interrelated principles involving insolvency. First, that the directors of an insolvent company owe a duty to the company's creditors. Second, that if the SPV were already insolvent, the receiver or trustee would be under a duty to vote in the interests of the SPV's creditors during the insolvency proceeding of the invested company.

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79 [2012] SGCA 9 (31 January 2012) [133]; Chou, Sandrasegara, and Chan, above n 57; Wan, above n 57.

As to the first issue, the general rule is that 'a director does not by reason only of his position as director owe any duty to creditors or to trustees for creditors of the company'.[80] However, once a company becomes insolvent the directors' duties extend to the creditors of the company. As stated by the House of Lords:

> A duty is owed by the directors to the company and to the creditors of the company to ensure that the affairs of the company are properly administered and that its property is not dissipated or exploited for the benefit of the directors themselves to the prejudice of the creditors.[81]

In the case of the SPV-bond investment structures, the extension of this principle to the creditors of the SPV is warranted both because it aligns with the spirit of protecting the interests of creditors when a company is insolvent and because the debtor controls the SPV. The mere fact that the insolvency of the SPV comes subsequent to the debtor ceasing or decreasing payments should not eliminate the duty of the SPV directors — directors appointed and otherwise controlled by the debtor. Applying this duty would also alleviate the risk of the debtor establishing the SPV to defraud creditors and thereby could decrease costly litigation such as the BTEL lawsuit filed in New York.

The timing of the SPV's insolvency also prevents a receiver or trustee from representing the interests of creditors in the insolvency of the parent company. If the SPV was initially insolvent creditors could, depending on the law of the SPV's jurisdiction, seek to place the SPV in involuntary bankruptcy. The creditors could then seek the appointment of a trustee who would be required to represent the interests of the SPV's creditors in its parent company's proceeding. The objective of protecting the interests of creditors that is embodied both in the modification of directors' duties to include the creditors of an insolvent company and in allowing for a trustee to represent the interests of creditors should not be defeated as a result of the SPV-bond investment structure insolating investors from the debtor's proceeding.

Transferring the SPV's voting rights to the creditors of the SPV, coupled with denying the votes of interested parties, would ensure investors are treated fairly and facilitate recognition and enforcement of Indonesian plans in other jurisdictions. This, in turn, would provide greater certainty for foreign investors and thereby may decrease investment costs and facilitate increased capital inflows.

V Conclusion

Cross-border insolvency is increasingly common and clear legal regimes are important to facilitate regional investment and growth. While standards and approaches vary between countries, the core value of the universalist approach is equal treatment of similarly situated creditors and fair treatment of all

80 *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1991] 1 AC 187; Michael D Hobson, 'The Law of Shadow Directorships (1998) 10 *Bond Law Review* 184, 194–5.

81 *Winkworth v Edward Baron Development Co Ltd* [1987] 1 All ER 114. See also *Walker v Wimborne* (1976) 137 CLR 1. The duty does not prevent operation of an enterprise, see eg, Trish Keeper, 'Court of Appeal Clarifies New Value Required for Defence against Insolvent Transaction Claims — *Farrell and Rogan as Liquidators of Contract Engineering (in rec and liq) v Fences & Kerbs*' (2013) 21 *Insolvency Law Journal* 212.

parties. However, this value is undermined by the structure commonly utilised to invest in developing economies such as Indonesia. Under the SPV-bond investment structure, investors are creditors of the SPV and not the end recipient of the funds. Should the recipient become insolvent, the investors will be excluded from the insolvency proceeding in the same way investors were excluded from BTEL's PKPU.

SPVs are an important instrument in structuring foreign investment. However, to ensure fair treatment and protect the reasonable expectations of investors, the law must develop to protect the SPV creditors when the SPV's parent becomes insolvent. In line with principles that transition the duties of directors to include the interests of creditors when a company is insolvent, the votes of the SPV should represent the interests of its creditors in the parent's insolvency. Through disallowing the votes controlled by the parent company and granting representation to the SPVs creditors, the process would more likely meet the fair and equitable standard needed for the plan to be enforced in other jurisdictions. Absent legislative intervention, investors must be aware that bonds offered through an SPV make the investor a creditor of the SPV and not party to the insolvency of the financed company. This exposes the investor to additional risk and investors must weigh the risks associated with the investment structure when deciding to purchase bonds from an SPV.