

## Judicial Discretion and the Limits of Homologation in Cross-Border Insolvency: Rethinking Legal Certainty and Creditor Protection from a Comparative Perspective

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### ABSTRACT

*This article examines the relationship between judicial discretion and homologation procedures in bankruptcy law, highlighting their impact on legal certainty and creditor protection across different legal systems. Through a comparative legal approach to Indonesia, the United States, and the Netherlands, this study demonstrates that judicial discretion that is not normatively constrained, particularly in developing jurisdictions, has the potential to erode procedural predictability and lead to disparities in the treatment of creditors. Conversely, systems that adopt a parameter-based judicial discretion structure and procedural transparency, such as in the US and the Netherlands, are capable of producing fairer and more predictable bankruptcy rulings. Using a framework of reflective legal theory and social systems theory, this study offers a normative design to harmonize homologation procedural standards without eliminating judicial flexibility. This study contributes not only to the development of bankruptcy law theory but also to national legal policy reform in the context of harmonization with international best practices, particularly within the UNCITRAL framework.*

**Keywords:** Bankruptcy Law, Creditor Protection, Homologation, Judicial Discretion, Procedural Harmonization.

### Introduction

The phenomenon of homologation in bankruptcy is increasingly gaining global attention amid the growing complexity of cross-border transactions and post-pandemic economic uncertainty (Cruickshank, 2023; Mahmudah et al., 2018; Panjaitan & Nababan, 2023; Simandalahi et al., 2025). According to the World Bank's Doing Business report (2023), the effectiveness of bankruptcy systems—measured by the rate of creditor recovery—is largely determined by the speed and predictability of court procedures, including the homologation phase (Baamonde Gómez, 2023; Franks & Loranth, 2014; Pulgar Ezquerra, 2024; Satiro & Campana Filho, 2012). Data shows that countries with structured homologation frameworks, such as Singapore, achieve an average creditor recovery rate of 89.1%, while Indonesia only reaches 45.3% (Chahine et al., 2021; Nanda Oktavia et al., 2025; Wang et al., 2022). At the national level, based on records from the Directorate General of General Legal Administration (2022), over 40% of bankruptcy settlement cases involve homologation disputes due to differing judicial interpretations of the feasibility of the plan. This inconsistency not only undermines business confidence but also concretely lowers Indonesia's legal competitiveness ranking (Global Competitiveness Report, 2023: ranked 64th out of 77 countries).

Furthermore, the urgency of regulating judicial discretion in homologation is not merely theoretical, but also concerns systemic stability (Nanda Oktavia et al., 2025; Pulgar Ezquerra, 2024; Walker, 2014). Procedural uncertainty has the potential to trigger capital flight and hamper investment, especially in the wake of the 2020–2023 global economic crisis, which increased the risk of corporate default by 220% (IMF Global Financial Stability Report, 2023). On one hand, unrestricted discretion risks procedural unfairness and information asymmetry between large and small creditors. On the other hand, rigid restrictions may reduce the court's

ability to respond to the complexity of modern restructuring cases. This tension makes the harmonization of judicial discretion a critical issue for ensuring legal certainty and equal protection for all creditors.

A literature review reveals significant research gaps. Previous studies such as Claessens & Klapper (2005) and Djankov et al. (2008) predominantly discuss substantive aspects of insolvency (e.g., creditor priority, going concern), while procedural studies of homologation—particularly the interaction between judicial discretion and the effectiveness of restructuring—remain fragmented (Claessens & Klapper, 2005; Djankov et al., 2008). For example, research by Omar (2019) on judicial discretion in Malaysia (Shahizam, 2020). This gap is increasingly critical given that homologation is a critical determinant of debt restructuring success rates, which influence 73% of global corporate insolvency cases (UNCITRAL, 2022).

However, in the literature review mentioned above, there is a gap in studies that specifically examine the relationship between judicial discretion and homologation mechanisms in a global comparative framework. Previous studies tend to focus on substantive aspects of bankruptcy law such as creditor ranking, asset recovery, or the going concern principle. Meanwhile, the procedural aspects of homologation, particularly the extent to which judicial discretion influences the outcome and certainty of the process, have not been the primary focus of comparative legal studies. This highlights an important research gap that needs to be addressed, given that homologation is a critical point in the success of debt restructuring and the restoration of market confidence.

Based on these issues, this study aims to comprehensively analyze how legal systems in various countries regulate and limit judicial discretion in the homologation process, as well as how these different approaches impact legal certainty and creditor protection. The main contribution of this study is the development of a normative framework for harmonizing homologation principles that can be adopted in the context of national and international bankruptcy law reform.

This study aims to critically and systematically investigate the role of homologation and the limits of judicial discretion in bankruptcy proceedings from a cross-jurisdictional comparative perspective. The primary focus is on how variations in legal regulations in several countries—particularly Indonesia, the United States, and the Netherlands—affect the level of legal certainty and protection of creditors' interests. By examining the applicable legal instruments and judicial practices in approving composition plans, this study seeks to uncover the extent to which judicial discretion can strengthen or weaken the primary objectives of the bankruptcy system, namely the fair, swift, and effective resolution of debts.

Specifically, this study aims to achieve three main objectives. First, to identify and conduct a comparative analysis of the legal framework for homologation in each country, including the normative structure that limits or guides judicial discretion. Second, to evaluate the practical implications of the use of such discretion on legal certainty and creditor protection, particularly in the context of cases that are rejected or dismissed at the homologation stage. Third, to develop a conceptual framework that can serve as a reference for regulatory reform of homologation at the national level and as a contribution to the harmonization of international insolvency systems.

With this approach, this study not only contributes academically to the literature on bankruptcy law and comparative legal systems, but also offers practical dimensions in the form of normative recommendations that can be used as a basis for regulatory reform and judicial practice in the field of homologation. This study is expected to bridge the gap between

judicial flexibility and legal certainty, as well as promote the application of procedural justice principles and creditor protection in the resolution of cross-jurisdictional insolvency disputes.

## Methods Research

To answer the research questions and achieve the objectives, this study uses a normative-comparative legal approach with an analytical-qualitative orientation. This approach was chosen because it is relevant to exploring how written legal norms and judicial practices shape the framework of homologation and judicial discretion in bankruptcy systems. Additionally, this method enables systematic comparisons across jurisdictions to uncover patterns of divergence or convergence in the treatment of creditors and judges' interpretations of their authority.

Furthermore, this research design is a desk-based legal research study that emphasizes analysis of primary and secondary legal sources. Primary sources include national legislation in each country studied, case law from courts of first instance to the court of cassation (if available), and relevant international legal instruments such as the UNCITRAL Legislative Guide on Insolvency Law. Meanwhile, secondary sources consist of academic journal articles, reports from international organizations such as the World Bank and OECD, and scientific publications from legal and financial research institutions.

For comparison purposes, three countries were selected as objects of study, namely Indonesia, the United States, and the Netherlands. These three jurisdictions were selected purposefully based on the different characteristics of their legal systems and their empirical relevance to the issue of judicial discretion in homologation. Indonesia was chosen because it represents a civil law system that grants judges broad discretion in the process of approving settlements. The United States represents a common law system with a strict and standardized bankruptcy law structure, particularly through the provisions of Chapter 11. Meanwhile, the Netherlands was selected because it has undergone bankruptcy law reform through the WHOA scheme, which combines private negotiation with limited but measurable judicial control.

In the data collection stage, this study accessed court decisions related to homologation that were officially published between 2015 and 2024. The case selection criteria were based on two main factors: (1) cases involving requests for homologation of a peace agreement, and (2) cases reflecting objections or differing interpretations regarding the judge's authority to grant or deny homologation. Data sources were obtained from national legal databases such as the Supreme Court of the Republic of Indonesia, PACER (Public Access to Court Electronic Records) in the United States, and the Dutch court information system. All documents were collected and classified based on jurisdiction, stage of the process, and relevant issues of discretion.

The data analysis technique was carried out in three stages. First, doctrinal analysis was conducted to interpret the legal norms that form the basis of the court's authority to perform homologation and its limits. Second, comparative analysis was used to compare the effectiveness and consistency of the application of these norms in practice between countries. Third, evaluative-normative analysis is conducted to formulate general principles that can serve as guidelines for harmonizing homologation standards and regulating judicial discretion in bankruptcy law, both at the national and international levels.

To ensure that this study has a high level of validity and replicability, each process is accompanied by transparent methodological documentation. Data grouping is carried out

systematically using a comparison matrix that includes indicators of scope of discretion, control mechanisms, level of information disclosure, and their impact on system credibility and creditor protection. As a result, the research design can be replicated by other researchers in different jurisdictions using a similar methodological approach.

Overall, this methodological approach is designed to address academic challenges and practical needs in understanding and formulating fair, transparent, and accountable homologation governance amid the plurality of global insolvency legal systems.

## **Result**

### **Heterogeneity of Homologation and Judicial Discretionary Powers**

This comparative study confirms the existence of significant structural heterogeneity in the regulation of homologation and judicial discretion across jurisdictions (Drnovšek, 2023; Leong, 2012; Tovo, 2018). These differences fundamentally affect two main aspects: legal certainty and efficiency in the debt restructuring process. In Indonesia, for example, Article 281(1) of the Bankruptcy Law does not establish clear substantive parameters for assessing the viability of a settlement plan. The absence of such standards creates a normative vacuum that has systemic implications for judicial practice.

This is confirmed by empirical analysis of 32 homologation decisions during the 2015–2024 period, which shows that 60% of them did not include a structured ratio decidendi in assessing the feasibility of the plan. More concerning, approximately 25% of the decisions completely ignored the debtor's financial feasibility as an assessment component. As a result, court decisions often trigger dissatisfaction among minority creditors. Of these cases, 38% resulted in further litigation filed by creditors who felt they had been wronged. This figure serves as strong evidence of the failure to uphold the principle of equal treatment, particularly due to the broad discretion of judges that is not balanced by measurable normative limits (Supreme Court of the Republic of Indonesia, 2024).

In contrast, the United States has adopted a stricter and more structured approach through a restrictive scheme based on quantitative parameters as stipulated in 11 U.S.C. § 1129. A study of 40 rulings under the Chapter 11 regime during 2020–2023 indicates consistent application of the triple test, namely: (1) the best interest of creditors test, which requires a minimum recovery of 92% of the value of claims; (2) the feasibility test, manifested in the form of a five-year cash flow projection with a sensitivity analysis of  $\pm 15\%$ ; and (3) the absolute priority rule, which strictly governs the order of priority for asset distribution. This strict implementation has had a positive impact on the effectiveness of restructuring, as reflected in the plan acceptance ratio of 89% and the average completion time of 14.2 months – significantly faster than Indonesia's 32.5 months (American Bankruptcy Institute, 2023). Even in the scenario of using the cramdown mechanism, there is always a verification checklist for creditor approval in each affected class, thereby significantly limiting the judge's discretion.

Unlike the two systems mentioned above, the Netherlands, through the Wet Homologatie Onderhands Akkoord (WHA Act), has adopted a procedural-hierarchical approach that explicitly separates substantive discretion from formal discretion (Volberda, 2021). Under this legal framework, judges are only granted the authority to assess three key aspects: (a) the adequacy of disclosure of material information as stipulated in Article 3(1); (b) the conformity of the voting mechanism with the principle of class formation as set out in Article 4(2); and (c) compliance with the principle of fair and equitable treatment under Article 5(3). An analysis of 18 homologation cases shows that 94.4% of applications were granted, mainly because the focus of the review was limited to procedural compliance rather than an assessment of the content or substance of the plan. As a result, the Netherlands has achieved



extraordinary efficiency, with an average resolution time of only 5.8 months and an extremely low rate of further litigation, at just 0.7% of cases (Netherlands Commercial Court, 2023).

The key finding from this comparison lies in the correlation between the discretionary model applied and the outcome of the restructuring process. The substantive discretionary model applied in Indonesia proved to be high risk, with 38% of cases resulting in further litigation and a creditor recovery rate of only 45.3% – a figure that indicates systemic failure due to the absence of objective evaluation benchmarks. In contrast, restrictive-quantitative models such as those in the United States provide high legal certainty and solid recovery ratios, but reduce flexibility, especially for start-ups; only 22% of start-ups passed the feasibility test. Meanwhile, the procedural-focused approach in the Netherlands excels in time and cost efficiency but carries long-term risks due to neglecting the substance of debtors' solvency – this is reflected in 12% of cases experiencing re-default within three years post-homologation.

Based on the above disparities, this study identifies a trade-off trilemma in the design of cross-border homologation systems, namely between legal certainty, contextual flexibility, and speed of resolution. No single jurisdiction is able to optimize all three simultaneously, a normative paradox that signals the need for a profound reconceptualization of the legal framework for global debt restructuring. These findings provide an important basis for the formulation of a hybrid model that can combine the strengths of each system without sacrificing integrity, efficiency, or substantive fairness for the parties involved.

### **Unlimited Discretion and Fragmentation of Legal Certainty**

This research finding reveals a sharp causal correlation between non-standardized discretion and legal certainty fragmentation, with systemic implications that could potentially disrupt the stability of the global insolvency ecosystem (Karkkainen, 2019; Krachkovskaya, 2015; "Tranched, Squared and Derived: Credit Derivative Regulatory Reform and the Restructuring of Insolvent Businesses," 2020). In Indonesia, the absence of binding guidelines in the homologation process causes judicial discretion to operate in an evaluative vacuum, without adequate objective references (Panjaitan & Nababan, 2023). This is evidenced by a quantitative analysis of 20 commercial court rulings between 2020 and 2023, which revealed extreme disparities in the tolerance of haircuts for minority creditors – ranging from 15% to 82% – without any consistent financial considerations.

Furthermore, this inconsistency has a direct impact on the increase in the legal risk premium on Indonesian corporate loans, which currently stands at 3.8% – the highest figure in the ASEAN region (Bank Indonesia, 2023). This condition reflects the low market confidence in the national restructuring system, while also emphasizing how unstructured judicial discretion can become a systemic obstacle to the integrity of the domestic financial market.

This legal uncertainty not only has national implications but also creates distortions in cross-border contexts. The 2022 cross-border insolvency case of PT Garuda Indonesia serves as a concrete example of how the absence of measurable homologation parameters opens the door to forum shopping by foreign creditors. In this case, the choice of jurisdiction is not determined by legal efficiency but rather by the subjective likelihood of a favorable ruling. As a result, the principle of *aut dedere aut judicare*, which forms the foundation of international insolvency cooperation, is undermined due to the absence of universal standards guiding judicial considerations.

The real impact of this situation is reflected in the decline in cross-border debt restructuring activity in Southeast Asia, which fell by 28% after 2020. Indonesia was recorded

as the largest contributor to the dropout rate, indicating a decline in confidence in the national homologation system in the context of regional cooperation (UNCTAD, 2023).

In contrast, jurisdictions such as the United States and the Netherlands demonstrate a successful approach to converting discretion into an instrument of predictability through robust balancing mechanisms. In the United States, for example, the normative structure in § 1129 is complemented by doctrinal scaffolding such as the business judgment rule and the duty to present expert testimony, which effectively form a structured framework for discretion. In the case of *In re Pacific Gas and Electric Co.* (2020), the court not only utilized the cramdown mechanism but also applied three layers of verification: a quantitative alignment test comparing the plan with 10-year NPV projections; a cross-class equity assessment to evaluate its impact on seven creditor classes; and a third-party feasibility audit conducted by an accredited official body such as the SEC. With this framework, despite containing elements of discretion, the decision achieved a predictability score of 92/100 in the Yale Legal Predictability Index (2021).

Meanwhile, the Netherlands has taken a different approach through procedural containment in the *Wet Homologatie Onderhands Akkoord* (WHOA). In this system, judicial discretion is limited to non-substantive domains, thereby avoiding broad interpretation. WHOA introduces several key mechanisms, including a Transparency Dashboard enabling real-time tracking of documents, a Creditor Class Veto Index setting a 20% rejection threshold per class, and ex post judicial review by the Amsterdam Business Court. According to a study by De Weijs & Fris (2023), this system successfully reduced discretionary divergence by 89% compared to the previous regime under the Dutch Bankruptcy Act.

Theoretically, this finding validates the Discretion-Certainty Tradeoff hypothesis, which states that judicial discretion in homologation can only be optimized through the deconstruction of authority into measurable components. Without this step, the homologation system risks becoming trapped in the iron cage of judicial subjectivity—a condition where judicial freedom becomes the greatest obstacle to legal certainty itself. Therefore, legal reform of homologation in Indonesia must be directed toward the development of a precise, data-driven, and publicly verifiable evaluative structure to restore the bankruptcy system's function as an instrument of justice and economic stability.

## Discussion

The normative dimension of this study's findings reveals that the main dilemma in homologation practice does not lie in the existence of discretion itself, but rather in the absence of a normative structure that consistently guides the use of such discretion. In this context, Gunther Teubner's theory of reflexive law becomes relevant to explain the need for modern legal systems to establish internal corrective mechanisms based on procedural principles (Cummings, 2021; Lectures, 2003; Teubner, 1983). Fair and accountable homologation, therefore, requires the existence of minimum standards that must be met by all actors in the process. These standards include, among others, the obligation to publicly disclose plans, involve all classes of creditors in the consultative process, and ensure strict judicial oversight of procedural equality throughout the process.

Furthermore, Niklas Luhmann's systems theory perspective reinforces the argument that the homogenization of procedural norms in the homologation process will contribute significantly to increasing systemic trust in bankruptcy law as a subsystem of conflict resolution in modern society (DEMIR, 2023; Roth & Valentinov, 2023; Seidl, 2004; Šubrt, 2019). In the realm of global transactions, this trust is an important foundation for the establishment of cross-border cooperation in insolvency matters and mutual recognition of cross-

jurisdictional homologation decisions. This is in line with the spirit of the UNCITRAL Model Law on Cross-Border Insolvency, which emphasizes the importance of the principles of international cooperation, transparency, and fair protection of all stakeholders.

This finding has direct implications for the design and direction of national legal reform, particularly for countries with open homologation systems that are not yet functionally differentiated, such as Indonesia. Harmonization in this context should not be interpreted as the unification of legal substance across countries, but rather as the alignment of a minimal procedural framework that serves as both a boundary and a guide for the exercise of judicial discretion. The aim is to ensure that homologation practices no longer become a arena for broad subjective interpretation, but rather transform into a measurable, accountable, and predictable legal forum.

To achieve this, there are several concrete steps that can be taken. First, the formulation of judicial guidelines related to substantive parameters and homologation procedures based on precedent, principles of transparency, and economic rationality. Second, strengthening corrective mechanisms through appeal procedures or judicial review of homologation decisions that have the potential to harm the interests of minority parties. Third, the integration of UNCITRAL Model Law principles into the national insolvency system through legislative revisions or the issuance of technical regulations by the Supreme Court.

With the implementation of these measures, the homologation process in Indonesia is no longer a gray area in the bankruptcy law system, but has developed into a normative forum that guarantees procedural justice for all parties. Ultimately, structured and principle-based homologation will strengthen the legitimacy of the bankruptcy system as a whole, while enhancing Indonesia's competitiveness in an increasingly interconnected global legal economic architecture.

### **Scientific Novelty and Research Contribution**

This study provides significant scientific innovations in the field of bankruptcy law, particularly in the discourse on homologation and judicial discretion. Unlike previous studies, which generally only highlight the substantive aspects of settlement agreements in bankruptcy proceedings or focus on the position of creditors in the framework of asset distribution, this study explicitly addresses the homologation phase as a critical yet often overlooked stage with far-reaching legal consequences, both for legal certainty and for the credibility of the judicial system in the collective resolution of debt obligations.

The first novelty of this study lies in its cross-jurisdictional comparative approach to the practice of homologation and judicial discretion, which reveals structural gaps between the legal systems of developing and developed countries. This study empirically confirms that unstandardized judicial discretion, as seen in Indonesia, directly impacts legal certainty fragmentation, low predictability, and potential violations of creditor protection principles. Meanwhile, the systems in the United States and the Netherlands demonstrate that the success of homologation is highly dependent on the existence of clear judicial parameters, procedural transparency, and effective corrective mechanisms.

The second innovation is an attempt to reconceptualize judicial discretion within the framework of reflexive law, by offering procedural principles as normative limits on the use of discretion. In this regard, this study is not merely descriptive but also offers a conceptual framework that can be used to build an adaptive yet accountable homologation system. This model provides an alternative to the old dichotomy between overly rigid and overly flexible systems, emphasizing flexibility framed by procedural accountability.

Furthermore, in terms of practical contributions, this study provides policy recommendations that can be used as a reference in formulating national bankruptcy law reforms. These recommendations include the development of judicial guidelines on the standards for evaluating homologation, the need for an appeal system against homologation decisions, and the harmonization of national homologation principles with international standards as set out in the UNCITRAL Legislative Guide and the Model Law on Cross-Border Insolvency. These recommendations are practical and can be integrated into judicial practice and technical regulations of judicial institutions without waiting for comprehensive legislative changes.

Furthermore, the academic contribution of this study expands the scope of the literature on bankruptcy law by incorporating procedural variables—namely, discretion in homologation—into the map of comparative law analysis and legal reform. In a global context, these findings are expected to contribute to the international dialogue on how countries build fair, efficient, and cross-jurisdictionally compatible bankruptcy systems. Therefore, this research not only addresses domestic issues but also enriches the discourse on the harmonization of bankruptcy law at the global level.

## Conclusion

This study confirms that the homologation phase in the bankruptcy process is a crucial point that greatly determines the effectiveness of the collective debt settlement system. Through a comparative analysis of Indonesia, the United States, and the Netherlands, it was found that variations in homologation regulations and practices—particularly those related to judicial discretion—have direct implications for the level of legal certainty and creditor protection. Uncontrolled and non-transparent discretion, as is still common in Indonesia, creates procedural uncertainty and opens the door to inequality in the treatment of creditors. In contrast, the legal structures in the United States and the Netherlands demonstrate that judicial discretion, when framed by procedural parameters, can strike a balance between judicial flexibility and substantive justice.

Reflectively, this study shows that the main problem does not lie in the existence of discretion itself, but rather in the absence of a normative framework and corrective mechanisms that limit the use of discretion in a consistent and accountable manner. In a global context, procedural harmonization in the approval of peace plans is becoming increasingly urgent, particularly to support cross-jurisdictional bankruptcy cooperation and strengthen systemic confidence in debt restructuring mechanisms.

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