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INSOLVENCY SYSTEMS AND RISK MANAGEMENT IN ASIA

AN INQUIRY TO INDONESIAN JUDICIAL DECISION MAKING BEHAVIOUR
ON BANKRUPTCY CASES (1998-2002) A JURIMETRICAL ANALYSIS

By

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CHAPTER 1 INTRODUCTION

1. BANKRUPTCY IN INDONESIA

The amendment of the Indonesian Bankruptcy Regulation¹ was not only an impulsive response to the economic and monetary crisis that hampered Indonesia in 1998. Supporters of the amendment of the bankruptcy law expect the amendment to be more than just a reform of the bankruptcy law. Indeed, it was the initial step to start the judicial ‘*snow ball*’ reform in Indonesia, which have been expecting by ‘*Litigants*’ and stakeholders to reform of the badly deteriorated image of Indonesian courts.

There are two motives behind the amendment of the bankruptcy regulation. The first -- as officially mentioned in the general elucidation of the bankruptcy law-- is to establish an effective procedure to settle corporate debts which significantly impact nation’s economy.² As the country entered the early stage of the crisis, the Indonesian Central Bank predicted that USD 67 billion private debt would be mature at the same time.³ Many considered that the previous bankruptcy law had already out of date to serve *as a robust legal tool to facilitate the problem*, since the law and its implementing institution has not been proven capable to handle large and complex bankruptcy for considerably long period.⁴

Second, some expected the amendment of the law be able to provide an opportunity to create model of a modern and reliable court in Indonesia. Although it is not stated explicitly, however, it can be observed from the nature of the amendment. Apart from several substantive revisions, a key feature of the 1998 bankruptcy reform is the establishment of special court called the Commercial Court. This court was set to have exclusive jurisdiction over bankruptcy cases.⁵ It has special procedures, infrastructures and specially- trained judges to hear bankruptcy petitions and bankruptcy-related cases.⁶ Furthermore, the Commercial Court was expected to hear other commercial disputes as well.⁷

Six years after the reform, establishment of special court and reform in the bankruptcy law itself apparently still does not significantly increase the use of bankruptcy in society. Regardless the impact of the crisis predicted earlier, record show that commercial court hears only relatively small number of petitions compared with what was expected. By 2003 the court only hears total of 342 cases with downward trend. The number of petitions filed once showed an upward trend during the first three years before it starts to slide down significantly.⁸

¹ *Verordening op het Failissement en de Surceance van Betaling voor de Europeanen in Nederlands Indie*, can also be referred as *Failissement Verordening*, or in English Bankruptcy Regulation, Staatsblad 1905 No. 217 jis. year 1906 No. 348

² See The General Elucidation on the Bankruptcy Law. Law No. 4/1998

³ Kontan, “*Pengadilan Niaga setelah empat bulan, Pengadilan Niaga masih banyak kelemahannya*” Edisi 15/III/1999, 4 Januari 1999. Compare this figure with the total government of Indonesia’s debt which only amounting to USD 54,1 billion at the same time. See also Mari Pangestu & Manggi Habir, “*The Boom, Bust, and Restructuring of Indonesian Banks*” IMF Working Papers, <http://www.imf.org/external/pubs/cat/longres.cfm?sk=15704.0>

⁴ Bankruptcy petition was never been a popular legal instrument in Indonesia. The number of case submitted to court were always very small, relative to the potential economic activity. The court handled mostly small and insignificant cases.

⁵ The Bankruptcy Law. Law No. 4/1998, Chapter 3 regarding the Commercial Court.

⁶ Aside of Bankruptcy petition, the commercial court also have authority to decided other bankruptcy-related disputes (see article 2 (1) Bankruptcy Law). Bankruptcy-related disputes refers to for example *actio pauliana* dispute (the claw back provision), and dispute in claim verification.

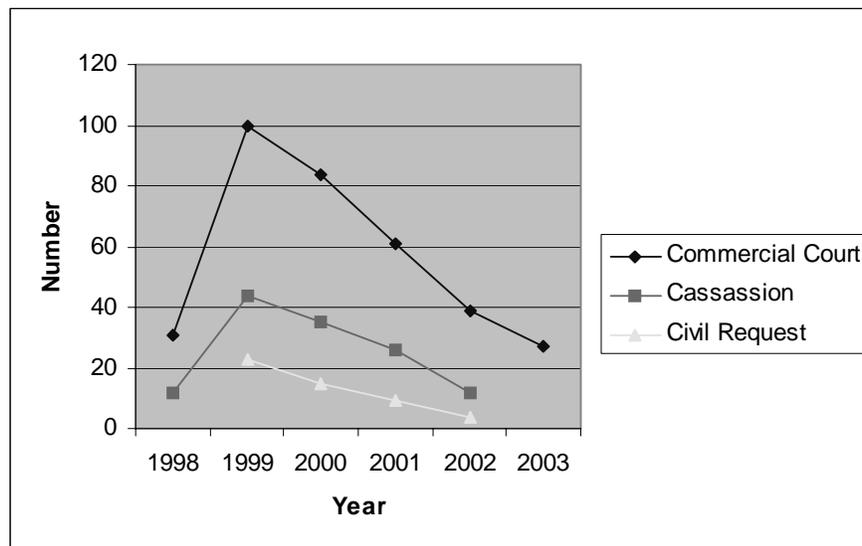
⁷ Article 280, the Bankruptcy Law, Further, in article 280 number (2) it was stated that

“The Commercial Court as mentioned in number (1), beside to hear and to decide bankruptcy petition and suspension of payment will also have the authority to hear other cases in the field of commercials as stipulated by Government Regulation.”

Currently the commercial court jurisdiction had been expanded to also cover the Intellectual Property Right disputes. See Law Number 14 year 2001 regarding Patent, Law No. 15 year 2001 on trade Mark law No. 31 year 2000 on Industrial Design and Law No. 19 year 2002 on Copyright.

⁸ Latest data in 2003

Graphic 1.1. The Development of the Number of Case Filed to the Commercial Court



This figure is interesting as demand for bankruptcy in the country is actually remain high. The Central Bureau of Statistic 2003 survey over the manufacturing sector identified that some 835 large and medium manufacturing companies went bankrupt in 2002, an increase of as many as 650 from the previous year. The agency added that 767 companies had downsized their operation, a 41 percent increase from 447 in 2001.⁹ The figure is based on registered companies in the manufacturing sector only. There is strong indication that if this figure is combined it with the number in the service sector, the figure would definitely be higher.

This figure is just does not match with fact in practice. It is of course, possible that those debtors settled their matters outside the court, or conduct state-supervised restructuring scheme such as the Jakarta Initiative Task Force. Nevertheless, under the scheme of suspension of payment, bankruptcy procedure also provides debtor with the court-supervised restructuring scheme, which give the debtor and the creditor proper protection for settlement with the consequences of bankruptcy if the settlement did not work out. It is therefore strange, to learn the figure achieved by the commercial court.

2. PRODUCT OF PUBLIC DISTRUST OR SIMPLY NO CASE?

The fact that commercial court only hear small number of petitions raise important question. How can it be possible that there is so little bankruptcy submitted to the court while demand to bankruptcy proceeding is actually high? This is an important question which its answer could imply many things, particularly on how public perceived the commercial court and bankruptcy. Some commercial court judges simplify things by saying that there is simply no case left to be submitted. They argued that people no longer need their expertise because there was no demand for bankruptcy. They considered that they have completed their job. Some of them even say that the commercial court has outlived its usefulness.¹⁰

⁹ 'Bankruptcy on the Rise', The Jakarta Post, 5 March 2003,

<http://www.thejakartapost.com/Archives/ArchivesDet2.asp?FileID=20030305.@01>

¹⁰ Pompe, Sebastiaan, "Indonesian Court Creates Unemployment" The Jakarta Post, 26 January 2004

<http://www.thejakartapost.com/Archives/ArchivesDet2.asp?FileID=20040126.E02>

Some observers said, the low number of petitions reflect public's lack of trust to the court. Business society prefers to settle their cases outside than taking it to the court.¹¹ They believe that the bankruptcy law and its judges tend to talk tough on creditors and soft on debtors.¹² Therefore, give small possibility for a creditor to win a case. The creditors believe that the court will not be able to act impartial and inclined to protect debtor.

Furthermore, there is also accusation that the commercial court tends to talk tough on foreign creditors compared to local creditor. They believe that commercial court is some kind of a nationalist court which impose certain discrimination on international creditors. This accusation refers to several cases where foreign creditors failed to obtain court ruling in favor for them, for example several cases involving the International Finance Corporation (IFC) and other international creditors.

However, does the court really tough on creditors while soft to debtors? Early empirical analysis does not support this notion. Out of 315 cases decided from 1998 to 2002, creditors, on the contrary, creditors have won more cases than debtors, be it by a narrow margin (creditors win in 100 cases, debtors in 99). The other cases were either uncontested bankruptcies filed by debtors themselves, were withdrawn, settled or went through successful court-supervised restructuring.¹³

But why has the statistical figure still shows low number of submission then? This research does not deny that there is possible serious inefficiency within the court itself. Controversies remain in some cases. Court performance in administrating the bankrupt company and recovery rate of the bankruptcy proceeds is still questionable. All of which, sufficient to deter public from using bankruptcy. In addition, the litigation culture of Indonesian also contributes significant role here.

However, in order to obtain a proper analysis, one would need to locate problems within each phase of bankruptcy process and analyze, where the possible problem lies, thus, seek proper solution individually.

3. ABOUT THIS RESEARCH

This research is about *the jurimetrical analysis of the Indonesian commercial court decisions on bankruptcy*. The study focuses on possible discrimination by the judges against some type creditors, in a bid to explain whether judicial decision making behaviour reflects public opinion.

The research aims to test *whether the allegation on possible discrimination against some type of creditors is true or not*. Furthermore, this research also aims to find out possible reasoning behind the court verdicts in bankruptcy petitions. The outcome of the research is expected to help litigants and stakeholders to look at the courts' rulings more objectively.

This research will only uses written court decisions. They will consist of cases decided by the Commercial Court and the Supreme Court since the establishment of the commercial court in August 1998 to latest decision in 2003. This will involve almost 300 commercial court decisions and the appealed decisions to the Supreme Court. At least, almost 500 decisions are used in this research. The research does not involve other legal documents such as documents about suspension of payments creditors meetings or other court records.

¹¹ Stated by Amir Abadi Jusuf, one of the executive of the Indonesian Association of Receivers and Administrators-AKPI, as quoted in "*The Bankruptcy Lawsuit Decline by 54% in 2003*" The Jakarta Post, 17 October 2003.

<http://www.thejakartapost.com/Archives/ArchivesDet2.asp?FileID=20031017.L03>.

¹² This notion were raised in many instances, however, the most notably recorded is in The Jakarta Post, Editorial, "*The System is bankrupt*" 21 October 2003,

<http://www.thejakartapost.com/Archives/Archives-act2.asp?Search=court&SearchIn=Title&Section=all&Method=AND&Range=custom&Sorting=DESC&month1=01&day1=01&year1=1998&month2=02&day2=08&year2=2004&Start=41>, this is also discussed by Pompe, Sebastian "*Commercial Court Needs Full Societal Support*" The Jakarta Post, 30 October 2003. <http://www.thejakartapost.com/Archives/ArchivesDet2.asp?FileID=20031030.F01>

¹³ Pompe, Sebastian, "*Commercial Court Needs Full Societal Support*" The Jakarta Post, 30 October 2003, <http://www.thejakartapost.com/Archives/ArchivesDet2.asp?FileID=20031030.F01>

CHAPTER 2 THE RESEARCH FRAMEWORK

*“For the rational study of the law the black-letter man may be the man of the present,
but the man of the future is the man of statistics and the master of economics....
We learn that for everything we have to give up something else, and we are taught to set the
advantage we gain against the other advantage we lose, and to know what we are doing when
we elect.”¹⁴*

In principle, there are many avenues available to study the judicial decision making phenomena. Including using basic quantitative approach to simply compare numbers as quoted above. This research moves beyond that. It uses the jurimetrical approach to analyze commercial court decisions. The research expects the Jurimetrical model not only be able to answer those allegations satisfactorily, but also to provide insights on what are the dominant factors that empirically influence judge’s decision making in a bankruptcy case.

This research is also motivated by the expectation that it will be possible to construct a model to predict judicial decision making behaviour in bankruptcy cases in Indonesia.

1. INTRODUCTION TO THE JURIMETRICAL ANALYSIS

As a branch of legal science, the term ‘jurimetrics’ is relatively unknown and its definition is still open to interpretation.¹⁵ Not many scholars advocate the jurimetrics as a legal tool. Many of them were *american legal realist*, which consistently tried to develop a model for the prediction of judicial decision making. In terms of its definition, jurimetrics has undergone evolution from a very broad definition of ‘*a scientific investigation of legal problems*’ introduced by Lee Loevinger in 1949,¹⁶ into several more thorough definitions. To date, several other scholars have introduced their respective jurimetrics definition, which usually connected to their analysis of the issue. Franken (1975) for example, described jurimetrics as *the usage of quantitative method on legal problems*.¹⁷ De Wildt (1983) described jurimetrics as “*A Discipline in which Legal problems are examined in a quantitative manner*”.¹⁸

Perhaps the most in-depth definition on jurimetrics available to date, is elaborated by Prof. Richard De Mulder from Erasmus University Rotterdam, who describes jurimetrics in three principal elements, namely:¹⁹

1. The empirical study of the form, the meaning and the pragmatics (and the relationships between those) of demands and authorisations issuing from state organisations
2. with the aid of mathematical models, and
3. using methodological individualism as the basic paradigm for the explanation and prediction of human behaviour.

The first element of jurimetrics reveals that it deals with the empirical study of the law in the widest sense. The study is not only intended to study the form of law, but also the meaning and pragmatic aspects of law, whereas

¹⁴ Oliver Wendell Holmes, *The Path of the Law*, 10 *Harvard Law Review* 457, 469, 474 (1897), as quoted from Cooter & Ullen, *Law & Economics*

¹⁵ Combrink-Kuiters CJM, “*Een jurimetrisch onderzoek naar rechterlijke besluitvorming inzake voogdij en omgang*,” Gouda Quint, 1998.

¹⁶ Loevinger, Lee, “*Jurimetrics, The Next Step Forward*” *Minnesota Law Review, Journal of the State Bar Association*, No. 5, Vol. 33, April 1949, p.455-493.

¹⁷ Franken, H, *Maat en Regel*, Gouda Quint, Arnhem, as quoted in Combrink-Kuiters, supra 20, p. 16.

¹⁸ JH De Wildt, *Rechter en vage normen*, Gouda Quint, Arnhem, as quoted in Combrink-Kuiters, supra.19, p. 17.

¹⁹ Prof. Richard DeMulder, *Jurimetrics, Lecturer Handout, LLM Management & IT for Lawyer*, Erasmus University Rotterdam, 2004, not published.

law is defined here as *the demands and authorisations issuing from state organisations*. This definition refers to the basic object of investigation for the legal scientists in this field, which are the legal texts.²⁰

Jurimetrical research uses a model building approach for an empirical analysis. This means that an attempt is made to express the theory in mathematical tools, such as statistical models. Statistical models are becoming necessary as a jurimetrics analysis usually requires quantification due to calculate the probability.²¹

Furthermore, these phenomena will be analyzed on the basis of individual behaviour model, to explain the behavior of people who will be the focus of the study, who are the judges. DeMulder refers to individualism as *the model of man* elaborated in the REMP (Resourceful, Evaluative, Maximizer, Person) model by Jensen and Meckling.²² He argues that the REMP model is the most appropriate model to explain human behaviour, even though in a certain way it considers men as selfish and opportunistic. Therefore, it is somewhat not appropriate to predict judges behaviour in that particular way, however, all in all, the REMP model provides a better explanation and predictability for individual behaviour compared to other models available.²³

In addition, it will give a better model in communicating the result with the stakeholders, namely the managers, businessman, and decision maker, as they are basically using the same rational model in doing their job.

3. THE STEPS IN THE JURIMETRICAL ANALYSIS

This research uses the Jurimetrical approach developed by Prof Richard DeMulder from Erasmus University Rotterdam. The analysis is divided into two main steps, namely:²⁴

1. Analysis of the Case Law.
2. Data Processing.

Ad.1. Analysis of the Case Law.

1. Choose the Legal Domain
2. Retrieve Cases
3. Read Cases
4. Define the Legal Item
5. Decide on List of Cases
6. Build List of Factors
7. Code the factors

ad.2. Data Processing

1. Enter coded data into the spreadsheet
2. Compute the correlations between each factor and decision
3. Compute weights of factors
4. Compute strengths of cases
5. Rank the cases
6. Produce graphs

²⁰ Prof. Richard DeMulder & DR. Kees van Noortwijk, *More Science than Art: Law in 21st Century*, Paper presented in the 12th BILETA Conference, The Future of Legal Education and Practice, 24-25 March 1997.

²¹ *Ibid.*

²² The model of man that outlined man behaviour to be Resourceful, Evaluator, and Maximizer, by Jensen, Michael C, & Meckling, William H, *The Nature of Man, Journal of Applied Corporate Finance*, Summer 1994, V. 7, No. 2, pp. 4 – 19 and Michael C. Jensen, *Foundations of Organizational Strategy*, Harvard University Press, 1998.

²³ The other models of man are, the Economic (or Money Maximizing) Model, the Psychological (or Hierarchy of Needs) Model, the Sociological (or Social Victim) Model, and the Political (or Perfect Agent) Model. See The Model of Man, Jensen, *ibid.*

²⁴ Richard DeMulder, *supra* 19.

Data processing in this research generally use a linear statistical method in a bid to seek possible correlation between all factors and the outcome of the court decisions. This model starts with a regression model based on the following idea :

‘a line of regression is calculated for the verdict (Y) and each factors ($x_1 - x_n$). The formula for such a line of regression can be defined as:²⁵

$$Y = A + B.X$$

Whereas, Y is individual contribution of each factors to the decision. “A” represents intercept (constant), of each individual factor relative to the overall output of the legal item. B represents the slope, of the line relating values of X to values of Y. The number of lines of regression equals the number of facts in the data set,²⁶ hence, in this research, since there are 107 factors, thus, leading to 107 lines of regression used in the data set. The value X represents the factor value, which in this case refers to whether the factor exists within the case (1), or absent (0).

Furthermore, the correlation between the factors and the output of the legal item is also calculated to determine the strength of each factor, so as to established ranks among the strongest positive correlated factors to the strongest negative factors to be.

The strength of each individual case is predicted by calculating the average of individual contribution of each factor to the decision.

Lastly, a normalization process is conducted to each case in order to obtain clearer observation over its strength.

4. OVERVIEW OF THE RESEARCH PROCEDURES

4. A. Data Sources

As the rule of thumb, a Jurimetrical study requires more than 20 cases in order to develop a proper study.²⁷ There is several written publication available in the market including official publication from the Supreme Court. However, they are relatively fragmented and the process of this study requires comprehensive text and if possible a searchable document would increase the speed of the study significantly.

This study uses digital version of bankruptcy decision compiled by The Center for Indonesian Law and Policy Studies (the PSHK). PSHK in cooperation with Hukumonline.com²⁸ supported by the AUSAID and The Asia Foundation (TAF) have published a digital version of the Commercial Court Decisions on Bankruptcy in form of CD ROM. The CD ROM comprises the Commercial Court Decisions on Bankruptcy from 1998 to 2000.²⁹

The CD ROM provides a better tool to be used as the primary source for this research, as it already presents a complete text in the digital format, and provides abstraction table presenting summary of each case to enable easy search process. However, PSHK’s CD ROM has shortcomings because it only covers cases from 1998 to 2000. Therefore, data involving verdicts on bankruptcy from 2000 to 2002 is taken from www.hukumonline.com. The portal is currently updating the CD ROM.

²⁵ C.J.M. Combrink-Kuiters and P.A.W. Piepers, *Statistically Analysing Court Decisions on Custody Disputes*. 9th BILETA Conference, The Changing Legal Information Environment 11th & 12th April 1994 , Scarman House , University of Warwick Coventry

²⁶ *ibid*

²⁷ C.J.M. Combrink-Kuiters and P.A.W. Piepers, *The Implementation of Predictive Capabilities into Legal Computer Advice Systems*, 9th BILETA Conference Building Systems 1st & 2nd April 1993,

²⁸ Hukumonline.com is a prominent Indonesian Legal Portal on the internet, its service comprise of Indonesian legal news, and legal database. See <http://www.hukumonline.com>

²⁹ This digitalization of the court decision, and CD-ROM publication is supported by Australian Agency on International Development (AusAID) and in cooperation with the Hukumonline.com and The Asia Foundation.

4. C. Determination of the Legal Item

The legal item is the core question seeks to be answered in a jurimetrical study. The term '*legal item*' is used to indicate the specific subject upon which, the judge makes a decision.³⁰ The important rule to define "legal item" is to ensure that for the sake of the statistical analyses it must always be possible to state unequivocally how the judge, or panel of judges, has decided on the legal item, either positively or negatively. The legal item therefore has to be formulated in clear and complete manner.³¹

As this research aims to identify allegations that the court discriminates against particular plaintiff based on their origins and protect the debtors, the proper legal item therefore, has to be set as general as possible. This research will use the legal item as follow

"whether the court grants the petition, or on the contrary, rejects the petition submitted by the plaintiff".

Theoretically speaking, there is limited legal item available in bankruptcy litigation, as its core concept only consists of two conditions. First, the plaintiff asks the court to declare the debtor bankrupt. Second, is for the debtor to submit a voluntary petition to declare himself as bankrupt.³² The court response is either to grant or reject bankruptcy.³³ However, there still room left for the debtor, in response to a bankruptcy petition, to apply for a Temporary Suspension of Payment. The court is obliged to grant a Temporary Suspension of Payment if requested by the debtor,³⁴ therefore, cases resulted with the Temporary Suspension of Payment will be disqualified in this research.

It is important however, to note that the court can also dismiss the petition, (instead to rejects it) based on the defendant indirect counter-argument (counter-argument on the matter not related to the substantive issue or known as-*exception*).³⁵ This defense can be revolved on either the absolute authority of the court to hear the case,³⁶ or the court's jurisdiction authority to hear the case.³⁷ Other exceptions deal with processual exception,³⁸ which deals with matter such as, whether similar matters have been decided by other court prior this court and the decision had become final and binding.

Problems such as failure to present proper power of attorney, lawyers' licenses, failure to clearly define name of the defendant and other procedural matters also fall under this category. For the purpose of this research, decisions having this kind of legal item will also be disqualified in this research.

In some cases, the litigation may also end up with out of court settlement. They can generally be recognized from the fact that the case was withdrawn. As they did not involve judges' decision, therefore, cases that ended with out-of-court settlement are disqualified from this research.

For the purpose of the coding process, the court decisions on the legal item will be encoded in a way that when the outcome is for the court to grant the bankruptcy petition, a positive code of "+1" will be given, while if the court rejects the petition, a negative code of "-1" will be given.

³⁰ Prof. Richard DeMulder & DR. CJM Combrink-Kuiters "*Is a computer capable of interpreting case law?*"

³¹ Combrink, *supra*, 27.

³² Article 1 sub (1) Bankruptcy Law. Law No. 4/1998.

³³ See Article 2 sub (1) Bankruptcy Law. Law No.4/1998.

³⁴ Article 214 sub.(2) Indonesia Bankruptcy Law, Law No. 4/1998,

³⁵ Retnowulan Soetantio & Oerip, '*Hukum Acara Perdata dalam teori dan Praktek*', Bandung: CV Mandar Maju, 1997. p.33

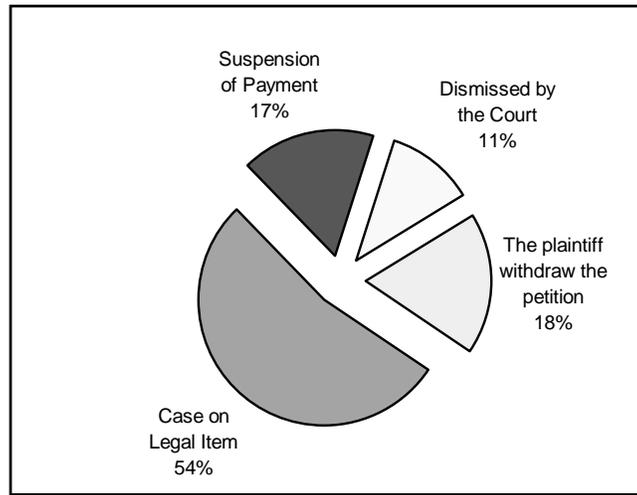
³⁶ The case was brought before the wrong court jurisdiction, i.e. bring forward a civil case to a military court, and other. For information on separation of court jurisdiction in Indonesia, see Article 10, Law No. 14 Year 1970 on Judiciary Power.

³⁷ This deals with geographic authority of a particular court to hear case. The chief principle on the distribution of relative authority can be seen in article 118 Het Indonesische Reglement (HIR).

³⁸ *supra* 37. p.34

Having considered aspects above, it is clear that not all of the total 310 decisions are suitable for the sample, the figure is as follows;

Graphic 2.1. The Sample Profiles
n= 315



Only 54% out of 315 court decisions or 168 is feasible for being a sample in the model. The rest of the decisions do not fall into the category on legal item, as the court does not decide on the legal item.

4. D. The Factors

4.D.1. Determination of the Factors

The list of factors containing characteristic features of the cases is derived from the text studied.³⁹ The lists of the factors is based on the presumption that certain factors have been of importance in the formation of the judge's decision. Furthermore, only factors that were known before the decision are eligible to be taken into account, as incorporating factor which is not known in advance will take away the predictive value of the model. A total of 171 factors are developed in the beginning of the research and the detail of those factors can be observed in attachment 1 for the Commercial Court and attachment 2 for the Supreme Court.

This model uses dichotomous type of factor. All facts were of the dichotomous type and were allotted a code of "+1" in case the fact was present, a code "-1" if the fact was absent and a code of "0" if it could not be determined whether the fact was present or absent. All dichotomous facts, which had a code of "+1" or "0" less than three times were removed, because they were regarded as too rare or too common. (For the statistical analysis, too rare and too common are similar obstacles.) After the removal, 107 factors remained on the list.

4.D.2. General Classification of the Factors

In order to create a structured study throughout this report, series of factors were developed and divided into general classification, namely:

1. Facts in relation to the Debtor

This classification deals with facts related to the existence of the debtor. For example, whether the debtor is an individual, a corporation, or belongs to a certain types of business.

2. Facts in relation to the Creditor

This classification deals with facts related to the existence of the creditor. For example, whether the creditor is an individual, or a corporation, or submitting their petition together with other parties, et cetera.

3. The defense put forward by the Debtor to respond the petition

³⁹ Combrink, *supra* 27, p 335.

This classification records the main arguments put forward by the debtor to respond the bankruptcy petition. In general, the responses are classified into several important arguments that appear in most of the cases.

4. The legal background underlining the petition

This classification provides the legal reasoning which underlines the plaintiff petition, such as whether such reason brought upon a debts arising out of loan agreements or other obligation according to the civil code.

5. Plaintiff's Counsel

This classification deals with the name of plaintiff's counsel.

6. Defendant's Counsel

This classification deals with the name of debtor's counsel.

7. Name of the Judges

This classification deals with the name of judges who hear the case.

8. Name of the judge in Cassation

This classification deals with the name of judges who hear the case in the cassation.

5. EXPECTED OUTCOME

This research process expects to produce two important statistical models:

1. Model 1 : The strength of the factors,

The first model is to measure the strength of the factors relative to the outcome of the legal item (decision). This model will show which factors have significant correlation with the outcome of legal item and which other factors have no significant correlation with the outcome of legal item. Factors having significant correlation value can be interpreted as of importance for court in making their rulings.

2. Model 2 : The prediction of Judicial Decision making behavior

The second model is developed to produce a prediction of judicial decision making behavior. Based on the average of individual contribution of each factor to the decision, the second model will calculate the strength of each individual case, thus can measure which cases are statistically decided correctly by the court or the otherwise.

6. LIMITATIONS OF THE STUDY

Due to the various constraints mainly about time and data, this research is limited to:

The commercial court decision on bankruptcy starting from 1998 until 2002, and leaved out more recent cases.

It makes five out of the total seven years of the operational of the commercial court in Indonesia. In general, this figure is deemed appropriate as a statistical study, as the largest portion of sample exists in this period.

1. The decisions of the Commercial Court (Court of First Instance) and the decisions of Court of Cassation (appeal court in the commercial court). This study does not evaluate the civil review decisions by the Supreme Court.

2. The statistical experiments and focus on the well-proven model.

Traditionally, a Jurimetrical research elaborates various possibilities to construct a better model. However, due to the constraint, this research put aside such exercises.

However, in lights of those limitations, the writer is in the opinion that these facts do not necessarily reduce the value of this research, considering that it is going to be the first Jurimetrical exercise to the Indonesian court decisions. In addition to that, given the significant number of cases studied here, this research marks the initial step to introduce the quantitative study to Indonesian legal phenomena.

CHAPTER 3 ANALYSIS OF THE STATISTICAL MODEL

1. ANALYSIS OF THE FACTORS THAT INFLUENCE JUDGE'S DECISION MAKING BEHAVIOUR

A. General Information on Factors

The most important aspect in analyzing the factors is the correlation value. The Correlation is a measure of the relation between two or more variables. A correlation coefficient can range from -1.00 to +1.00. The value of -1.00 represents a perfect *negative* correlation while a value of +1.00 represents a perfect *positive* correlation. A value of 0.00 represents a lack of correlation.⁴⁰

The Positive Correlation is the relationship between two variables is such that as one variable's values tend to increase, the other variable's values also tend to increase. This is represented by a positive correlation coefficient.⁴¹

The Negative Correlation is the relationship between two variables is such that as one variable's values tend to increase, the other variable's values tend to decrease. This is represented by a negative correlation coefficient.⁴²

This research uses the above-mentioned idea to analyze the strength of the factors relative to the decisions. The factors with a higher positive correlation value in relation to the other factors are considered as contributing positively to the judge's decision. On the other hand, factors with high negative correlation value in relation to other factors are considered as contributing negative towards the prediction.

B. Significance of the Factors

With two tailed Pearson's correlation table, it was known that the threshold value for the model with $n= 100$ and using 5% degrees of significance is 0,195. Meaning, factors can only be said as having significant influence with the outcome of the Legal Item if its correlation value exceeds 0,195. Unfortunately, the study can not obtain a more detailed Pearson table with n more than 100. However, the research argues that the critical value of 0,195 has properly represents the significance level. Since the critical value in both $n = 98$ (cases in the Supreme Court) and $n= 168$ (cases in the Commercial Court) would not be significantly higher than when $n=100$, it can still be benchmarked against this indicator.

Due to the limitation in doing this research, this study only focused its analysis on the four strongest factors on the list. Following is the list of factors that significantly influence the judge's decision on court of first instance and court of appeal. Complete list of the strength of the factors is available in annex 1.

Table 3.1.
The Four Factors having strongest correlation in Commercial Court level and Appeal Level

No	First Instance (Commercial Court)		Appeal (Supreme Court)	
	Variables	Correlation Values	Variables	Correlation Values
Positive Correlation				
1	The Creditor was represented by BT & Partners	0,3043	Judge Mrs. MK preside	0.3201
2	The Debtor voluntary apply for the petition	0,2034	The Case is decided before 2000	0.3155
3	The Plaintiff is an individual *	0,1794	Sales and purchases of goods	0.2171
4	The Debtor was represented by J K A & Partners *	0,1767	The plaintiff is a construction company	0.2128
5			Judge Mr Jhn preside	0,2127

⁴⁰ *Statistic Homepage Glossary*, <http://www.statsoft.com/textbook/glosfra.html>, last visited May 2004

⁴¹ *Ibid*

⁴² *Ibid*

6			DA & Partner represent the Plaintiff	0,1993
7			The plaintiff brought the other creditor to appear before the court	0,1949
Negative Correlation				
1	The Debtor is still doing his business	-0,3633	The debt exceeding USD 1 million	-0.2602
2	The Debtor was represented by HP & Partners	-0,2640	HP & Partners Represents the Debtor	-0.2463
3	The Debtor argues that the debt can not be summarily proven	-0,2492	Judge Mr. Shr preside *	-0.1818
4	The Debtor argues that the debt is not due and payable	-0,2366	Judge Mr. Arbj preside *	-0,1792
5	Debtor is a Publicly Listed Company	-0,2302		
6	The Debtor argues that other creditor does not exist	-0,2027		
7	The Debtor argues that the plaintiff has no capacity to submit the petition	-0,1967		

Factors with (*) mark does not significantly influence the outcome of the legal item.

These are factors that significantly influence the decision making behaviour of commercial court judges, during the time span of 1998-2002. It can be observed that there is only small number of factors that significantly correlated with the outcome of legal item, compared to total 101 factors identified for the commercial court level and some 88 factors for court of appeal level.

The figure shows that factors in relation with debtor's or creditor's counsel appear to have significant influence over the outcome of the legal item in both court levels. No factor on judges' name appears to have significant influence on the commercial court level, while it does in the Supreme Court level.

Some factors in relation with debtor argument also appear as having significant correlation with the outcome of legal item. While apparently no such factors are influential enough in the Supreme Court level.

Indeed, very few factors in relation with debtor's or creditor's capacity hold significant influence over the outcome of legal item. If they do, only factor that debtor is a publicly listed company and factor that plaintiff is a construction company appear to have significant correlation.⁴³ These factors are relatively neutral, it is difficult to irregularity about these facts. In addition, no fact in relation with the origin of creditor holds significant correlation with the outcome of the legal item. This is on the contrary with the allegation mentioned earlier, that court discriminates foreign creditor in awarding bankruptcy. At this stage, this research can sufficiently conclude that statistical analysis rejects the notion that capacity of creditor significantly influences the court in awarding bankruptcy.

C. Spurious Factors

In developing a model to measure strength of each factor, an extra attention should be made to avoid spurious factors that potentially generate misleading conclusion to be included in the model. Spurious factors obtain its strength due to some unseen factors which in the model will appear as a worthy correlation, nevertheless closer examination will show that such correlation is invalid.

⁴³ The fact that debtor is a publicly listed company holds significant correlation towards the commercial court's rejection over the petition, while fact that creditor is a construction company holds significant correlation toward court of appeal's ruling for bankruptcy.

The study has identified a spurious factor appeared in the model. The appearance of the factor ‘*BT & Partners represents the Plaintiff*’ as the strongest positively correlated factor for the decision making in the Commercial Court was beyond expectation, as the name ‘BT & Partners’ itself is not widely known among the bankruptcy practitioners. The research then decides to further analyze the cases involving BT. The following are cases involving BT & Partners and other factors relate to petitions, which it represents.

Table 3.2. The Cases involving BT & Partners as Plaintiff’s Counsel

Case Number	Litigants	Other Creditor	Decision	P-BT & Partners	D-JKA & Partners	D-MT & Partner	The Debt is exceeding USD 1 Million
46/2000	Guntur Winarta v. PT.Sinar Primer Abadi	--	1	1	0	0	0
49/2000	Miter Management Limited v. PT. Istana Prestisindo	Minto Trading Limited	1	1	0	0	0
50/2000	Gingo Investments Limited, v. PT. Aryagita Wahana International	Parkway Trading Limited	1	1	0	0	1
55/2000	Gemmy Investments Limited v. PT. Metrotama Dunia	PT Sumber Jaya Makmur Sentosa	1	1	1	0	1
56/2000	Gingo Investments Limited v. PT. Widiawulia Prima Multicorporation	Wistor Trading Limited	1	1	1	0	1
57/2000	Kenya Services Limited v. PT. Indoland Jaya	Gemmy Investment Limited	1	1	0	0	1
58/2000	Parkway Trading Limited v. PT. Sumber Keramik Kharisma Dinamika	Minto Trading Limited	1	1	1	0	1
59/2000	Comfort Group Limited v. PT. Kreasi Super Dinamika Multicorporation	Enchanting Properties Limited	1	1	1	0	1
60/2000	Enchanting Properties Limited v. PT. Arya Bumi Graha	Gemmy Investment Limited	1	1	0	0	1
61/2000	Kenya Service Limited v. PT. Macro Nusantara	Gingo Investment Limited	1	1	0	1	1
62/2000	Enchanting Properties Limited v. PT. Ongko Dinamika	Comfort Group Limited	1	1	0	0	1
63/2000	Minto Trading Limited v. PT. Aria Hasta Piramindo	Parkway Trading Limited	1	1	0	1	1
64/2000	Miller Management Limited, v.PT. Aryaputra Graha	Minto Trading Limited	1	1	0	1	1

Source : The Coding Sheet, processed

Based from the above-mentioned data, some pattern can be identified here,

1. All debtors belong to the same concern (group of company), which is the Ongko Group.⁴⁴
2. Some plaintiffs appear interchangeably as the other creditor in the other cases, and the otherwise.
3. All debts amounted more than USD 1 million
4. Two lawyers were noted to represent most of the debtors, which one of them turns out to be the strongest positive influencing factors.
5. The court granted all petitions.
6. Out of 13 cases, the court repeatedly appoints only 3 receivers.⁴⁵
7. All bankruptcies were closed within 3 months because of insufficient funds in the bankrupt estate. While this is a proper legal ground to terminate a bankruptcy,⁴⁶ the period of three months is excessively short to properly investigate the estate.⁴⁷

⁴⁴ Kompas Daily, “Kredit Macet Grup Ongko 2,6 Triliun lebih” 28 January 2000, <http://www.kompas.com/kompas-cetak/0001/28/ekonomi/kred02.htm>, Last visited May 2004.

⁴⁵ The 3 receivers appointed to work in this case, only Ahmad Kholid, Rocky AV Awondatu, and Paul Sukran.

⁴⁶ Article 15 the Bankruptcy Law.

According to Indonesian Bank Restructuring Agency official, 11 out of total 25 companies under the Ongko Group are *paper* companies,⁴⁸ which are fictitious, they are established only to avoid the Legal Lending Limit imposed by the Central Bank.⁴⁹ These paper companies did not have any operational business and their assets values were nil.⁵⁰

Under Indonesian law, when a debtor declared bankrupt,⁵¹ the liquidation of debtor's asset does not stop the creditor's right full remaining amount of payment. All creditor's right remains enforceable in the future until the creditors rehabilitate debtor by way of full payment or explicit discharge. Dissolution of a debtor company however, will skip such process, as no creditor will be able to collect if the debtor company had ceased to exist.

By having these paper companies legally dissolved, the principal debt will be vanished as well. Thus will make the rightful creditor unable to legally collect his money.

This is of course only possible, if the other creditors agree to immediately dissolve the bankrupt company without doing further inquiry to trace where the money goes, by agreeing with receiver's proposal to immediately dissolve the bankrupt company. Therefore, the creditors' roles are also important in generating these cases. By observing that almost all creditors were set up in a tax haven country, in addition to the facts that they appear interchangeably in those cases, it raises a question would that be also possible that these creditors are also paper companies?

The cases involving BT & Partners are too irregular to be said as cases we could find daily litigation practice. It is of course requires further study to find out whether these cases were naturally developed cases or artificial cases. Further, these cases contain some important factors for the model, such as the creditor is a foreign company and debt exceeds USD 1 million. Therefore, this research decide to disqualify all cases related with the factor BT from the calculation before it can be further determined the status of these cases.

The correlation value of the factors after the spurious factors are removed can be viewed in annex 1. The results are interesting, significant shifts in the correlation value are taking places. The new model in the commercial court shows the following shift in the factor's strength:⁵²

"If the condition of the bankruptcy estate does not allow the bankruptcy process to be carried out, the District Court may order an examination free of charge upon a suggestion of the supervisory judges and if there is a creditors' committee, after hearing the committee or after hearing or legally summoning the bankrupt debtor, to revoke the bankruptcy declaration and the revocation of bankruptcy shall be made in the form of a judge's decision and shall be decided before a public session"

See also the provision on article 104 Bankruptcy Law that regulate the state of insolvency. In the case that receiver is in the opinion that the value of debtor's estate cannot fulfil the debtor's obligation to the prioritized and separatist creditors, the receiver can propose to the judges to terminate the bankruptcy.

⁴⁷ Marie Christie J. A. Schröder-van Waes and Kevin Omar Sidharta, *"Upholding Bankruptcy Legislation, Court Performance Assessment Study, 1998-2004"*. unpublished. p. 78.

⁴⁸ The term 'paper' company refer to a company that only exist in the paper, while has no actual existence in the real world.

⁴⁹ Ongko Group itself is a conglomerate consists of 25 companies, namely PT Arya Bumi Graha, PT Arya Putra Graha, PT Aryagita Wahana International, PT Citra Mahkota Abadi, PT Indoland Jaya, PT Istana Prestisindo, PT Kreasi Supradinamika Multicorpora, PT Landasan Terus Sentosa, PT Mustika Niagatama, PT Ongkosurya Lokajaya, PT Sumber Keramik Kharisma Dinamika, and PT Widiarmulya Prima Multicorpora, PT Bunas Finance Indonesia, PT Bunas Multifinance Indonesia, PT Green Hill Garden, PT Indokisar Jaya, PT Keramik Indonesia Asosiasi, PT Misoru Utama, PT Nusautama Medicalindo, PT Ongko Multicorpora, PT Sanggraha Dhika, PT Segitiga Atrium, PT Segitiga Plaza Hotel, and PT Welwin Finance Hongkong, . supra. 44

⁵⁰ Ronald Sinaga, Group Head, Loan Work Out and Collection Asset Management Credit Division, the Indonesian Bank Restructuring Agency. *ibid*.

⁵¹ Article 117 sub (1) letter (c) Company Law, the Creditor may requests the court to dissolve the company, if, a) the company is unable to pays its debt after declared bankrupt b) company's estate is insufficient to pays up all the company's debt after the bankruptcy is terminated.

⁵² See attachment on the comparison between the strength of the factor.

1. The strength of the factor “The Plaintiff is a Foreign Company” dropped significantly from rank 23 to rank 75 down into negative correlation pole with correlation value $-0,1163$.⁵³

2. The strength of the factor “The Debt exceeding USD 1 Million” become number 8 negatively correlated factor, with correlation value $-0,2129$.⁵⁴

One important conclusion after disqualification of these cases is that in both court levels factor that debt value is more than USD 1 million is now among the factors that significantly correlate to the court’s rejection to award bankruptcy.

If this proposed conclusion is acceptable, thus, it offers indication that the value of the debt along with lawyer that represent debtor has bigger probability to be negatively correlated with the outcome of the decisions, instead of the identity and the capacity of either creditors or debtors. Whether this might lead into something more interesting conclusion about overall behaviour of the commercial court, further qualitative research need to be conducted.

2. CASES THAT DOES NOT TURN OUT THE WAY IT’S PREDICTED- SIGN OF PROBLEM IN JUDICIAL DECISION MAKING BEHAVIOUR?

In this research, the outliers refer to the cases, which decided differently with the prediction made by the model. The main purpose of studying these outliers is among the other things, to examine the consistency of the model developed in this research. It expects to examine whether this model is a full proof model, or developed just by coincidence. The outliers can also serve as an important avenue to analyze the problems in this model in a bid to enable improvements for similar research in the future. Interestingly, the outliers can also serve as an indicator for any problems in judicial decision making if the model is the proper one.

The outliers can be identified in the graphic 3.1 and 3.2 as decision bars which pointed to different direction with the way it has predicted.

As general observation, the model developed in this research produces relatively consistent data prediction for both court levels. Consistent in a sense that statistical model predicts most of the decisions correctly. The outliers can be said less than 30% of total decision predicted. The graphics tell us that commercial court decisions were less predictable than the Supreme Court, as it produces more outliers than the Supreme Court does.

Statistically, this phenomenon is acceptable, especially in dealing with such a huge number of cases and long period of observation, which involves variation of the court opinions and in Indonesia’s context, understanding on particular matters. Further, this research still does not arrive in the step where the actual *turning point* from negative to positive prediction is identified. Because the point where the prediction line crosses the x-axis do not necessarily means that such a point also serve as the point of reverse. Knowledge of the exact turning point would increase the accuracy on determining outliers. However, since time does not allow such lengthy procedures to be properly taken, this research will be focused on the general analysis only.

Due to time limitation, this research will study sample of outliers. The sample will cover only three or four of the extreme outliers in each court level. These outliers will be analyzed and compared with the legal analysis to find out the proper explanation for such outliers, whether the problem lies within the prediction model or in the court decision-making process.

⁵³ Even though the corellation is still not significant. Nevertheless, the corellation of the factor “Plaintiff is a foreign company” which previously was correlated more to the court to award bankruptcy shift to the court to reject bankruptcy.

⁵⁴ In the model developed before the spurious factors are disqualified, correlation value for this factor was insignificance ($-0,1275$). The new correlation value has exceeds the significance thresholds level by two tailed Pearson table with 5% degree of significance.

The following is the list of the outliers studied in this research:

Table 4.4
Selected Outliers in the Commercial Court and the Supreme Court

	The Commercial Court	The Supreme Court
Negative Correlations	No. 14/Pailit/2000/PN.Niaga/Jkt.Pst PT Dok & Perkapalan Kodja Bahari (Persero) v. PT Tridharma Wahana	No. 5/Pailit/2000/PN.Niaga/Jkt.Pst No. 10 K/N/2000 PT Bank Astria Raya (in liquidation) v. PT Asmawi Agung Corporation
	No. 10/Pailit/2002/PN.Niaga/Jkt.Pst Paul Sukran, (receiver of PT Dharmala Sakti Sejahtera Tbk. (in liquidation)) v. PT AJ Manulife Indonesia	No. 41/Pailit/2000/PN.Niaga/Jkt.Pst No. 25/K/N/2000 The Indonesian Bank Restructuring Agency v. PT Landasan Terus Sentosa.
	No. 81/Pailit/2000/PN.Niaga/Jkt.Pst PT Kadi International v. PT Wisma Calindra	No. 71/Pailit/2000/PN.Niaga/Jkt.Pst No. 34/K/N/2000 Indonesian Bank Restructuring Agency v. PT Muara Alas Prima
		No. 1/Pailit/1999/PN.Niaga/Jkt.Pst No. 06 K/N/1999 IBJ Asia Limited Hong Kong et. al., v. PT Cakrawala Andalas Televisi
Positive Correlations	No. 53/Pailit/1999/PN.Niaga/Jkt.Pst PT Indomas Paramacitra's Voluntary Petition	No. 25/Pailit/1998/PN.Niaga/Jkt.Pst No. 03/K/N/1999 UD Sarana Bakti Voluntary Petition
	No. 46/Pailit/1999/PN.Niaga/Jkt.Pst PT Surya Citra Televisi v. PT Gebyar Cipta Kreasi	No. 26/Pailit/1999/PN.Niaga/Jkt.Pst No. 15/K/N/1999 PT Liman International Bank v. PT Wahana Pandugraha
	No. 67/Pailit/1999/PN.Niaga/Jkt.Pst PT Danamon Finance v. PT Rantai Panca Daya et. al	No. 29/Pailit/1998/PN.Niaga/Jkt.Pst No. 05/K/N/1999 PT Surya Tata Internusa v. PT Abdi Persada Nusantara

The sample shows two important reasons for which caused the outliers, i.e:

1. The court failed to implement the law correctly.

Some outliers were due to the failure of the court to implement the law correctly. For example, some outliers studied in this research show that court has made incorrect interpretation on how to conduct summary proof principle in Paul Sukran v. PT AJ Manulife case and PT Kadi International v. PT Wisma Calindra case. These are cases that actually can not be summarily proven, nevertheless was decided by the court as the otherwise.⁵⁵ It is interesting however, to note that the Manulife bankruptcy was one of the infamous bankruptcy decision ever made by the commercial court. This decision was later overturned by the supreme court in appeal.

From the outliers, research also identifies incorrect court decisions in voluntary petition of PT Indomas Paramacitra and UD Sarana Bakti. In both cases, the court argues, in order to submit a voluntary bankruptcy petition, a debtor should submit a statement from public auditor stating that such debtor is already insolvent before the court could award bankruptcy. These decisions are incorrect, as the law never set such requirements,

⁵⁵ To be eligible for bankruptcy declaration a creditor should fulfill following conditions 1) There are (at least) two creditors 2) There is (at least) one debt that is due and payable, 3) Both aspects above can be summarily proved.

and the following decisions on voluntary petitions do not obliged the debtor to include a statement from public auditor.

Other outliers identify incorrect decision in PT Surya Tata Internusa v. PT Abdi Persada Nusantara case, where the court define the word debt narrowly to only cover obligation arising out from a loan transaction. A definition which later revised by the Supreme Court. Lastly, outliers also point out incorrect decision on PT Liman International Bank v. PT Wahana Pandugraha where the court mistakenly define the provision on the other creditor according to the bankruptcy law.

2. The litigants put forward wrong argument

The rest of the outliers were due to the failure of litigants-especially debtors-to argue properly. The coding method in this research does not make any qualification about the content of the arguments put forward by the litigants. Therefore, when the litigants put forward an argument, the procedure is to directly put it into the coding sheet. Failure to argue properly will drive the prediction into misleading direction.

Several false arguments put forward by debtor's counsel were caused by lack of knowledge on the bankruptcy law and apparently also caused by making references to incorrect court opinions. Some examples on the wrong argument caused by making references to incorrect precedent was regarding the definition of debt, where the court themself was once noted as having different interpretation of the debt.

Sample of Counsel's failure to argue properly was noted in PT Bank Astria Raya (in liquidation) v. Asmawi Agung Corporation case. In this case, debtor put forward two main arguments. Firstly, about the power of attorney of the creditor. PT AAC mistakenly argues that since PT BAR is a Bank under liquidation, the bankruptcy petition cannot be filed by the liquidation team, as the regulation on bank liquidation does not specifically provide the liquidator with authority to put forward a bankruptcy petition.⁵⁶ The court rejected the arguments, saying that the power of attorney are regulated by article 123 Procedural Code, and has nothing to do with regulation on liquidation.

Secondly, about the capacity of the creditor as the separatist creditor.⁵⁷ PT AAC mistakenly argues that the creditor is a separatist creditor, i.e. secured by mortgage, pledge or fiduciary transfer (the so-called securities '*in rem*' holder), thus, has to firstly waive their exclusive rights as separatist, prior submitting the bankruptcy petition.⁵⁸ Apparently PT AAC's counsel falsely categorized the term 'personal guarantee', which is actually the security '*in personam*' with another type of security, which is the security '*in rem*'.

In more steadier decision making environment, the outliers usually points only to the deviation made by the court for particular reasons, for example indication of corruption, or there is a shift in decision making trend etc.

While it is premature for this research to establish an allegation of any unlawful practice taking place within the decisions identified as outliers, it is very important to understand that the bankruptcy law in Indonesia has not been exposed to the public for a considerably long time. The bankruptcy law and its amendment were known as using summary approach, meaning regulate provisions in summary manner and leave the interpretation and

⁵⁶ Government Regulation Number 68/1996 as amended by GR No. 40/1997 on Bank liquidation.

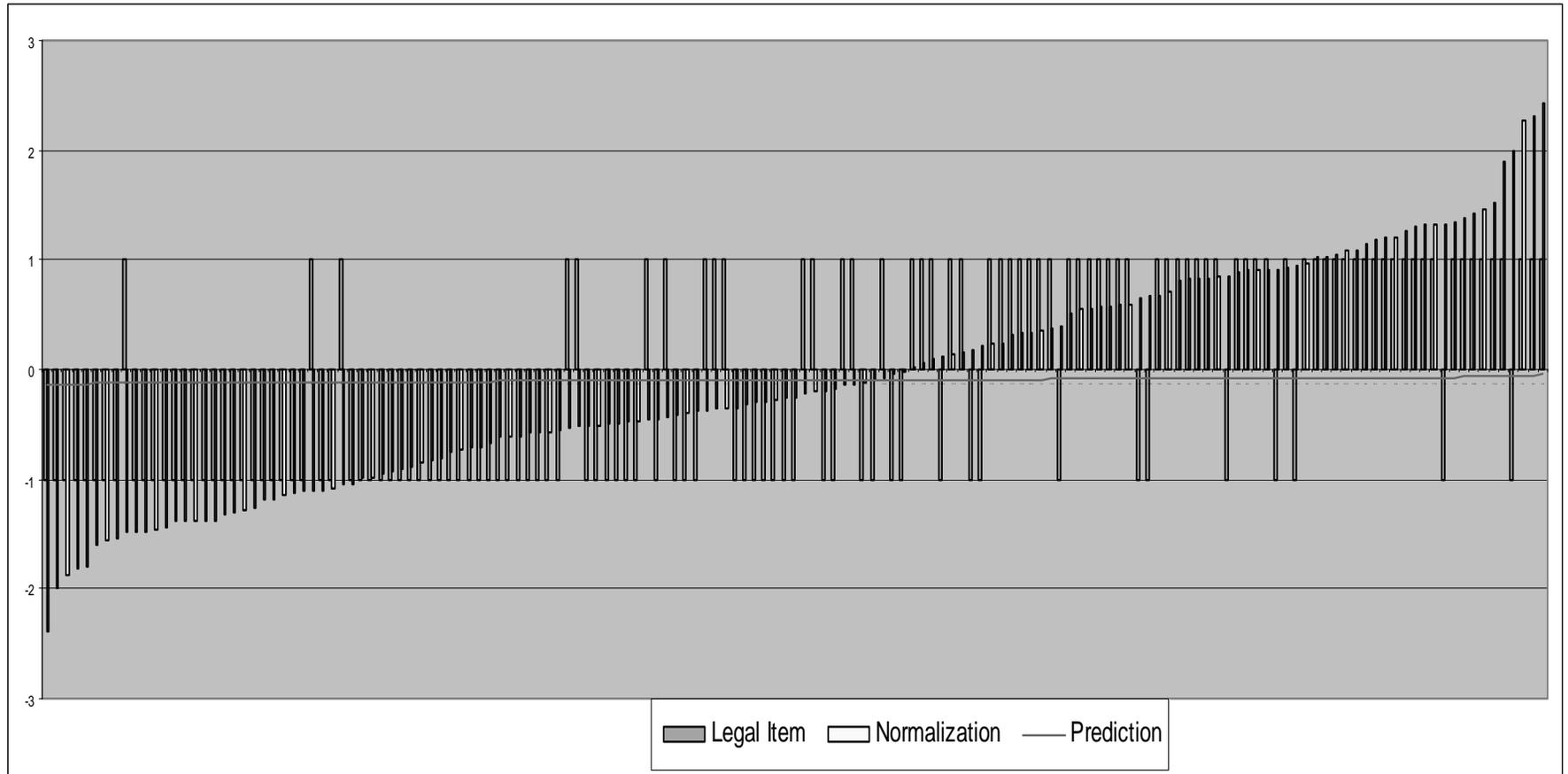
⁵⁷ Comment about separatist creditor and commercial court.

⁵⁸ Please be note that whether a Separatist Creditor can submit a bankruptcy petition is still subject to lengthy legal discussion, as the Bankruptcy Law silent on this matter. The court was inconsistent, in some instances courts does grant the bankruptcy for petition made by such creditors, while in other instances rejects it.

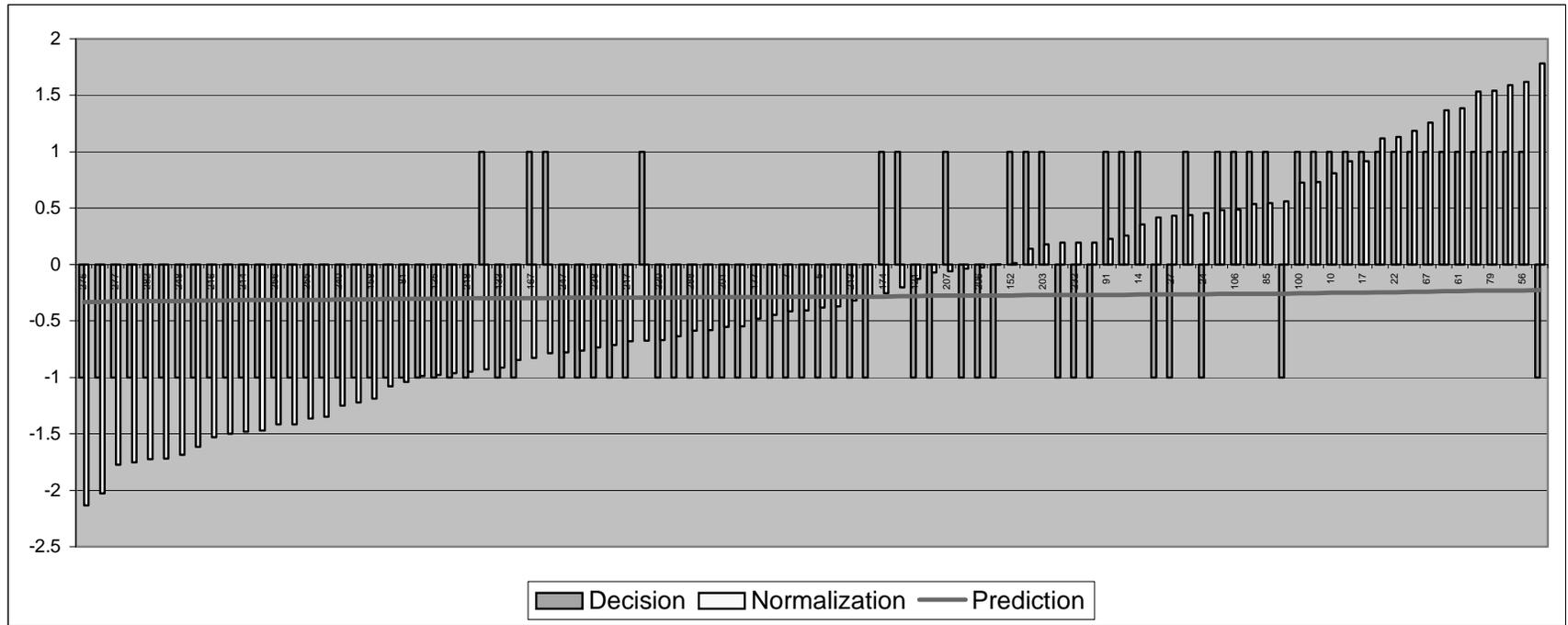
The Supreme Court decision No. 07/K/N/1998 Bank Niaga et. al v. PT Dharmala Agrifood rules that *The Separatist Creditor who failed to release his right as separatist beforehand is not a "creditor" as mentioned in article 1 sub (1) Bankruptcy Law.*

implementation to practice. Therefore, it should not be too surprising if the first two years was spent largely to share the interpretations of the law. Many inconsistencies took place during this period, either conducted by the litigants, or even the judges, both intentionally or unintentionally. However, the next two years are steadier, as many of these interpretation problems were settled by way of jurisprudence. Nevertheless, these inconsistencies might leave some residuals in the analysis that influence the outcome of the calculation

GRAPHIC 3. 1. THE CASE PREDICTIONS AND OUTCOMES FOR THE COMMERCIAL COURT CASES



GRAPHIC 3. 2. THE CASE PREDICTIONS AND OUTCOMES FOR THE SUPREME COURT CASES



CHAPTER 4 CONCLUSIONS

1. CHARACTERISTIC OF CASES STUDIED IN THIS RESEARCH

One of the most important conclusion can be drawn from this research is that this research was conducted over an unstable population. As already mentioned, the year 1998-2002 was an internalization period, where the judges and litigants were still in the learning process. Judges and lawyers have to implement the provisions of the bankruptcy law promptly with relatively no precedent to be followed, in addition that this might be their first acquaintance to bankruptcy law. Number of outliers appeared in the model is probably sufficient to deter litigants with inconsistencies.

As already mentioned, inconsistent interpretation of the law appeared mostly during this period, especially in the commercial court. Less outlier produced in the Supreme Court implies more predictable decision making behaviour in Supreme Court level, thus can be said as the Supreme Court provides higher degree of legal certainty, even though in early days of its operation the research still identify some outliers in cases decided by them. According to this model, Supreme Court had functioned properly to correct problems and mistakes created by the lower court, i.e. overturned incorrect lower court decisions that was appealed to supreme court, as all outliers produced in the commercial court were overturned by the Supreme Court, if they were ever appealed.

For the development of jurimetrical study, the fact that the Supreme Court overturned most of the outliers appealed to them validates the judicial decision making behaviour prediction model developed in this research. It shows that the statistical model has developed valid outliers so far.

2. ANSWERING SOME IMPORTANT QUESTIONS

A. Does the Court really impose different treatment toward different kind of creditors?

It is sufficient to say that according to the statistical data, the court is indifferent towards any kinds of creditor (plaintiff). The research identifies that the nationality of the creditors, the type of business that creditors involve, does not have significant correlation with the judicial decision making behaviour shown by the court in both level. Except for the factor that the plaintiff is a construction company, as it ranks third strongest positive factor for the Supreme Court.⁵⁹ Meaning, the appearance of a construction company as plaintiff will significantly influence the Supreme Court to award or not to award bankruptcy.

For the court, this is good news, as it counters the first public perception that court talks tough on foreign creditors was not proven in this model. Both local and foreign creditors experience relatively similar treatment. Both factors do not appear to have significant influence towards the judicial decision making behaviour. For example, the Indonesian Bank restructuring Agency (IBRA) a national's bank restructuring program launched by the government in 1998-2004 as one of the major national creditor in this period.⁶⁰ Logically, if the court does discriminate types of creditors, how they treat IBRA would be a perfect example on whether they prioritize local creditor. However, the model shows IBRA has insignificance correlation value as well.⁶¹

Relatively similar illustration also appeared in the Supreme Court, as similar conclusion can still be made. The creditor's nationality still does not correlate significantly with the outcome of the decisions.⁶²

⁵⁹ Correlation value of 0,2127.

⁶⁰ One of the main tasks of IBRA was to restructure the national bank industry (private and government bank) by way of transferring the bank's non-performing loans to the agency and restructures it. According to the Banking Law, Law No. 10/1998 IBRA has three main duties, restructuring the banks transferred to IBRA, recovering bank assets including both physical assets and loans, and recovering state fund formerly disbursed to the banking sector.

⁶¹ Correlation Value -0,00735

⁶² The factor 'the plaintiff is a foreign company/nationality' is sliding down to weaker negative correlation in the Supreme Court, and ranked 45 out of 88 factors with the correlation value of -0,0456, but still correlates better than IBRA.

B. Does the court really inclined to protect debtors?

The second opinion, the allegation that the court has inclined to protect the debtors is even more serious issue. However, as already mentioned previously, preliminary statistical analysis had shown that court has recorded relatively neutral decision making behaviour by not significantly protecting neither creditor nor debtor.

The *mean* value of valid cases studied is -0,0980 or almost 50-50 with very small inclination towards negative. While in the Supreme Court level however, some negative trend appeared, the Supreme Court reject more petitions than to award it with the mean value of -0,2826.⁶³

With regards to the trend that Supreme Court inclined to rejects more petitions than to award it, the research refuse the argument that this indicates court's inclination to protect debtor. It is merely due to the profile of cases appealed to the Supreme Court which apparently have stronger negative predictions rather positive. This argument supported by more stable prediction on judicial decision making behaviour produced in the Supreme Court.

C. Are there irregularities that influence judicial decision making behaviour in both court levels?

Other than suspicious cases which have been put aside⁶⁴ and some inconsistencies on court opinions as elaborated above, the model generally implies relatively consistent judicial decision making behaviour. For public in general, Commercial Court might be less predictable considering the number of inconsistencies took place. However, the Supreme Court promises more predictability in a sense that it consistently corrects most of what is considered as statistically improper decisions made by lower court if ever they appealed.

However, the model also identified interesting correlation of two factors which fall under category significant. These factors are, if debtor was represented by lawyer named HPH and if the debt value exceeds USD 1 million.⁶⁵ These two factors significantly correlate with outcome that court would reject to award bankruptcy in both court levels. In a sense that whenever these two factors appear together, both Commercial Court and Supreme Court consistently rejects to award bankruptcy.

Most debtors having debt more than USD 1 million and sued for bankruptcy was actually large scale debtors with large debts. Such debtors suffered profound impact from economic crisis back in 1997. Poor corporate governance practice which often associated with business practice during that period and morale hazard had theoretically created strong interest for them to avoid from being declared bankrupt. It is not clear why HPH as debtor's counsel could flawlessly achieve no loss record, considering that some cases he represent were also quite controversial.⁶⁶ Nevertheless, as a high paid lawyer, he is naturally could only be afforded by large scale debtors with large amount of debt, there is only one instance where HPH does not represent debtor with debt less than USD 1 million.

This might contributes negative public perception to the court decision making behaviour. Since these kind of cases usually invite a lot of public attention, therefore it is not too surprising if it builds public opinion in a certain way. Nevertheless, further qualitative research with regards to the integrity of the facts that build correlation value of lawyer HPH and debt exceeding USD 1 million would be very beneficial to ensure factual reasoning behind this phenomenon.

⁶³ From total 92 decisions qualified to be studied, only 33 petitions granted for bankruptcy by the Supreme Court, while the remaining 53 petitions were rejected. The mean for decision by the Supreme Court is -0,2826.

⁶⁴ See discussion on spurious factor, about 11 cases were disqualified from this research, this is amounted less than 7 % of total case studied.

⁶⁵ The factor 'the amount of debt exceeding USD 1 million and debtor represented by lawyer HPH appears as significantly correlated with the rejection of court not to award bankruptcy with correlation value of -0,2601 in Supreme Court and correlation value -0,2175 in Commercial Court.

⁶⁶ Lawyer HPH appears as debtor's counsel in 11 cases.

3. RELIABILITY OF THE MODEL & SOME FURTHER THOUGHTS

Indeed, this model is yet to become the ultimate model in predicting the judicial decision-making behaviour as the methods are still being developed along with the development of knowledge, and Information Technology.

Nevertheless, it is fair to conclude that this model has provided reliable prediction model for the bankruptcy cases decided by the Commercial Court and the Supreme Court given all of its shortcomings. Even though some outliers exist in the model, the preliminary analysis over sample of outliers has lead to satisfactory explanations.

It is important to understand that this model establishes its analysis based on the value of the law, and combined it with the phenomena which occurred before the court delivers its decision. The result of the model depends on the dynamic developments during the litigation proceeding, such as legal arguments by both parties, the capability of the involving parties and so forth.

But still, possibility to develop this research for other purpose is widely open. This model can be expanded into a prediction tool which can be practically used by managers and decision makers, or as a tool for evaluate judicial performances of judges. Extension of data studied could promise more understanding on judicial decision making behaviour phenomena, for example, if the research could obtain exact recovery rate of each creditors, or other phenomena, which still waits to be explored.

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ANNEX - COMPARISON OF THE FACTOR STRENGTHS

	Commercial Court		Supreme Court		Commercial Court without Spurious Factors	
1	P-BT & Partners	0,3043	J-Mrs MK	0,3201	The Debtor voluntarily apply for the petition	0,2386
2	The Debtor voluntarily apply for the petition	0,2034	<2000	0,3155	The Plaintiff is an individual	0,1941
3	The Plaintiff is an individual	0,1794	Sales and Purchases of Goods	0,2171	The Debtor is an Individual	0,1527
4	D-JKA & Partners	0,1767	The Plaintiff is a Construction Company	0,2128	The Debtor is a Male	0,1367
5	D-MTJ & Rekan	0,1361	J-Mr Djoh	0,2128	The Debtor is a Female	0,1270
6	Fin. Trans other than loan	0,1301	P-DA & Partners	0,1993	Sales and Purchases of Goods	0,1152
7	The Debtor is a Female	0,1108	The Plaintiff brought the other creditor to appear before the court	0,1950	The Debtor Business is in the non-Financial Service Sector	0,1149
8	The Debtor is an Individual	0,1086	D-ABNP	0,1739	J-Soej	0,0987
9	The Debtor Business is in the non-Financial Service Sector	0,1043	J-Mr Soed	0,1714	P-L & Partners	0,0985
10	The Plaintiff asks for the Conservatory Attachment	0,1022	The Plaintiff is not a Financial Company	0,1553	P-L & K	0,0876
11	J-Mr HB	0,1008	The Debtor Business is in the non-Financial Service Sector	0,1495	Straight corporate credit Transaction	0,0835
12	The Debtor is a Male	0,0964	J- Mr SON	0,1435	<2000	0,0810
13	P-Lcs & Partners	0,0793	J-Mr YH	0,1435	J-Mrs. CHP	0,0780
14	Sales and Purchases of Goods	0,0732	The Debtor is an Individual	0,1435	J-Mr SS	0,0613
15	J-Mr Har	0,0732	The Debtor is a Female	0,1402	J-Mr IGNP	0,0570
16	The Debtor based in Jakarta	0,0685	J-Mr. SK	0,1332	J-Mr Har	0,0570
17	P-L & K	0,0655	The Debtor is a Guarantor	0,1273	J-Mr HP	0,0536
18	J-Mr Soej	0,0647	P-FTAW	0,1179	J-Mr UH	0,0528
19	J-Mr MSN,	0,0625	The Debtor voluntarily apply for the petition	0,1179	The Debtor is a Guarantor	0,0525
20	J-Mrs. CHP	0,0567	The Debtor is a Male	0,1029	J-Mr Tjah	0,0522
21	J-Mr RJ	0,0565	Agreement other than straight corp-credit	0,1003	The Plaintiff brought the other creditor to appear before the court	0,0446
22	The Debtor is a Construction Company	0,0565	J-Mr HPP	0,0994	J-Mr R Joed	0,0360
23	<i>The Plaintiff is a Foreign Company</i>	0,0465	No date of maturity in the agreement	0,0778	The Debtor based in Jakarta	0,0345
24	J-Mr SS	0,0459	The Plaintiff is an individual	0,0736	No date of maturity in the agreement	0,0261
25	The Debtor is a Guarantor	0,0279	The Plaintiff is a State Owned Company	0,0628	J-Mr HB	0,0184
26	J-Mr UH	0,0257	D-L&K	0,0628	D-AS & Partners	0,0161
27	J-Mr HP	0,0241	P-T&T	0,0439	D-ABNP	0,0161
28	J-Mr IGNP	0,0210	Acceleration Clause	0,0439	The Debtor is a Construction Company	0,0139
29	>2000	0,0068	The Debtor argues that debt does not fall under the definition of debt	0,0380	J-Mr VH	0,0104
30	Straight corporate credit Transaction	0,0047	The Plaintiff submits the petition jointly with other creditor	0,0310	The Plaintiff asks for the Conservatory Attachment	0,0080
31	J-Mr Tjh	0,004601	The Debtor asset is larger than the amount of debt	0,0206	The Plaintiff is a Company Under Liquidation	0,0065
32	J-Mrs. PS	0,003471	The Debtor is a Company under Liquidation	0,0206	Fin. Trans other than loan	0,0046

	Commercial Court		Supreme Court		Commercial Court without Spurious Factors	
33	The Plaintiff brought the other creditor to appear before the court	0,002571	The Plaintiff is a limited liabilities company	0,0131	J-Mrs. NAB.	0,0046
34	No date of maturity in the agreement	0,001511	The Debtor is still doing business	0,0014	J-Mr SMS	-0,0008
35	D-AS & Partners	0,000938	There is more than one debtor	-0,0014	The Plaintiff is not a Financial Company	-0,0073
36	D-ABNP	0,000938	P-AHG & Partners	-0,0140	The Plaintiff is a Public Company	-0,0093
37	<2000	-0,0068	The Plaintiff is a Company Under Liquidation	-0,0174	The Plaintiff submits the petition jointly with other creditor	-0,0098
38	J-Mr SMS	-0,01579	J-Mrs MS	-0,0288	P-D & Co	-0,0099
39	J-Mr VH	-0,01906	The Debtor argues that debt is not due and payable	-0,0298	J-Mr EMM	-0,0183
40	The Plaintiff is a Company Under Liquidation	-0,02061	The Debtor based in Jakarta	-0,0301	D-L & L	-0,0188
41	P-D & Co	-0,02863	The Debtor is a Construction Company	-0,0427	P-FTAW	-0,0188
42	D-L & K	-0,03409	Also under review by other court	-0,0431	Also under review by other court	-0,0279
43	P-FTAW	-0,03409	The Debtor is a non-Bank Financial Institution	-0,0437	Agreement other than straight corp-credit	-0,0282
44	J-Mrs. NAB.	-0,03685	J-Mrs. SS	-0,0456	P-DA & Partners	-0,0334
45	The Plaintiff is a Public Company	-0,03874	The Plaintiff is a Foreign Company	-0,0456	There is more than one debtor	-0,0345
46	P-DA & Partners	-0,04427	The Debtor argues that the debt cannot be summarily proven	-0,0474	The Debtor is an Insurance Company	-0,0359
47	The Plaintiff submits the petition jointly with other creditor	-0,04784	The Debtor argues to settle dispute out of court	-0,0483	J-Mr PW	-0,0406
48	J-Mr EMM	-0,04838	The Debtor is a State Owned Company	-0,0483	J-Mr. MSN,	-0,0453
49	The Debtor is an Insurance Company	-0,05474	Fin. Trans other than loan	-0,0493	P-AHG & Partners	-0,0478
50	The Plaintiff is not a Financial Company	-0,05511	J-Mr Soek	-0,0493	The Debtor asset is larger than the amount of debt	-0,0478
51	Also under review by other court	-0,05739	The Plaintiff asks for the Conservatory Attachment	-0,0647	The Plaintiff is a Bank	-0,0625
52	The Debtor asset is larger than the amount of debt	-0,06319	The Debtor is a legal body other than limited liability company	-0,0784	P-TN & co	-0,0662
53	P-AHG & Partners	-0,06319	J-Mr TAM	-0,0784	The Plaintiff is a State Owned Company	-0,0662
54	J-Mr PW	-0,06531	J-Mr SH	-0,0784	P-HPABK	-0,0662
55	There is more than one debtor	-0,06849	The Plaintiff is a Legal Body other than limited liability company	-0,0784	D-L & Partners	-0,0662
56	Agreement other than straight corp-credit	-0,07222	P-D & Co	-0,0793	D-HS & Associates	-0,0662
57	The Plaintiff is a Legal Body other than limited liability company	-0,07715	Was decided by Ad-Hoc Judge	-0,0793	P-DOM & Associates	-0,0662
58	D-OH & Associates	-0,07715	The debt was denominated in foreign currency	-0,0809	The Debtor is a legal body other than limited liability company	-0,0662
59	J-Mr Sub	-0,07715	J-Mr. PEL	-0,0830	The Plaintiff is a Construction Company	-0,0690
60	The Plaintiff is a State Owned Company	-0,07739	The Plaintiff is a Secured Creditor	-0,0937	The Debtor argues to settle dispute out of court	-0,0727
61	P-HPABK	-0,07739	The Plaintiff is Indonesian Bank Restructuring Agency (IBRA)	-0,0937	The Plaintiff is a Legal Body other than limited liability company	-0,0735

	Commercial Court		Supreme Court		Commercial Court without Spurious Factors	
62	P-TN & co	-0,07739	J-Mr SP	-0,0937	D-OH & Associates	-0,0735
63	The Debtor is a legal body other than limited liability company	-0,07739	J-Mr IBW	-0,1040	J-Mr Sub	-0,0735
64	D-Lcs & Partners	-0,07739	The Debtor is an Insurance Company	-0,1058	The Plaintiff is a Secured Creditor	-0,0779
65	P-DOM & Associates	-0,07739	D-L & Partners	-0,1115	The Plaintiff is Indonesian Bank Restructuring Agency (IBRA)	-0,0802
66	D-HS & Associates	-0,07739	J-Mr TS	-0,1115	>2000	-0,0810
67	The Plaintiff is a Secured Creditor	-0,07943	J-Mrs VJLK	-0,1115	J-Mrs. PS	-0,0921
68	The Debtor is a Limited Liabilities Company	-0,08643	P-B & Associates	-0,1115	J-Mr HS	-0,0927
69	The Debtor argues to settle dispute out of court	-0,08839	D-FTAW	-0,1115	P-T & T	-0,0927
70	The Plaintiff is a Construction Company	-0,09108	The Debtor is a Limited Liabilities Company	-0,1141	P-YA & Rekan	-0,1043
71	The Plaintiff is Indonesian Bank Restructuring Agency (IBRA)	-0,09944	The Plaintiff is a Non-Bank Financial Company	-0,1194	Acceleration Clause	-0,1043
72	The Debtor is Business is an industrial sector	-0,10205	Loan Transaction	-0,1234	J-Mr DBS	-0,1043
73	J-Mr HS	-0,10436	The Debtor is Business is an industrial sector	-0,1336	Decided by Ad-Hoc Judge	-0,1154
74	P-T & T	-0,10436	D-AS & Partners	-0,1373	J-Mrs. Elj	-0,1154
75	J-Mr DBS	-0,10944	P-DOM & Associates	-0,1373	The Plaintiff is a Foreign Company	-0,1163
76	P-YA & Rekan	-0,10944	D-HS & Associates	-0,1373	P-B & Associates	-0,1282
77	Acceleration Clause	-0,10944	The Debtor argues that the other creditor does not exist	-0,1512	D-FTAW	-0,1282
78	The Plaintiff is a Bank	-0,11609	The Plaintiff is a Public Company	-0,1551	J-Mr PKKA.	-0,1282
79	<i>The Debt debt is exceeding USD 1 Million</i>	-0,12752	J-Mr AKM	-0,1594	J-Mr All	-0,1282
80	Decided by Ad-Hoc Judge	-0,12754	The Plaintiff is a Bank	-0,1655	The Debtor is Business is an industrial sector	-0,1283
81	J-Mrs. Elj	-0,12754	The Debtor argues that plaintiff have no capacity to submit the petition	-0,1655	The Debtor is a Limited Liabilities Company	-0,1324
82	P-B & Associates	-0,13444	The Debtor is a Public Company	-0,1700	The Debtor is a non-Bank Financial Institution	-0,1349
83	J-Mr PKKA.	-0,13444	P-L & K	-0,1793	The Plaintiff is a Non-Bank Financial Company	-0,1431
84	J-Mr All	-0,13444	J-Mr Arb	-0,1793	The Debtor argues that debt does not fall under the definition of debt	-0,1468
85	D-FTAW	-0,13444	J-Mr Soeh	-0,1818	J-Mr SP	-0,1485
86	The Plaintiff is a Non-Bank Financial Company	-0,14568	D-HP & Partners	-0,2463	The Debtor is a State Owned Company	-0,1485
87	<i>The debt was denominated in foreign currency</i>	-0,15024	The Debt debt is exceeding USD 1 Million	-0,2602	The Debtor argues that plaintiff have no capacity to submit the petition	-0,1562
88	The Debtor is a non-Bank Financial Institution	-0,15471	>2000	-0,3155	The Debtor is a Company under Liquidation	-0,1666
89	The Debtor is a State Owned Company	-0,15572			The Debtor argues that debt is not due and payable	-0,1703
90	J-Mr SP	-0,15572			The Plaintiff is a limited liabilities company	-0,1933

	Commercial Court		Supreme Court		Commercial Court without Spurious Factors	
91	The Plaintiff is a limited liabilities company	-0,15646			The Debt debt is exceeding USD 1 Million	-0,2130
92	The Debtor is a Company under Liquidation	-0,17463			The Debtor appear before the court	-0,2135
93	The Debtor argues that debt does not fall under the definition of debt	-0,17472			The Debtor is a Public Company	-0,2155
94	The Debtor appear before the court	-0,19037			The Debtor argues that the debt cannot be summarily proven	-0,2229
95	The Debtor argues that plaintiff have no capacity to submit the petition	-0,19671			The debt was denominated in foreign currency	-0,2440
96	The Debtor argues that the other creditor does not exist	-0,20279			D-HP & Partners	-0,2523
97	The Debtor is a Public Company	-0,23021			The Debtor is still doing business	-0,2738
98	The Debtor argues that debt is not due and payable	-0,23662			The Debtor argues that the other creditor does not exist	-0,3069
99	The Debtor argues that the debt cannot be summarily proven	-0,24925				
100	D-HP & Partners	-0,26396				
101	The Debtor is still doing business	-0,36327				

Notes

J = Judges

P = Plaintiff

D = Debtor

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