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Analysis Of Cross-Border Insolvency Dispute Resolution In Insolvency Practice In Indonesia

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Abstract: The resolution of Cross-Border Insolvency disputes in bankruptcy practice in Indonesia, with a focus on court decision Number 26/PAILIT/2010/PN.Niaga.JKT.PST. This highlights the lack of specific regulations in Indonesian law regarding cross-border bankruptcy, which causes legal uncertainty in resolving such disputes. This research uses a normative juridical approach to examine the application of rules and norms in positive law. The case analysis includes a bankruptcy petition against Manwani Santosh Tekchand filed by OCBC Securities Private Limited, which raises issues regarding the evidentiary strength of the special power of attorney granted to the Attorney. This article emphasizes the importance of clear rules and legal certainty to protect creditor rights and facilitate the execution of debtor assets. The court decisions discussed in this article highlight the legal implications of cross-border bankruptcy resolution, stating that foreign court decisions can be valid and convincing evidence regarding debts and the relationship between debtors and creditors if they meet formal requirements as authentic deeds. However, foreign court decisions cannot be recognized and implemented by Indonesian courts unless there is a ratified convention or the principle of reciprocity. The article concludes that the resolution of cross-border bankruptcy disputes in bankruptcy

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practice in Indonesia is limited by existing regulations and suggests the possibility of litigation or filing new bankruptcy applications based on debt instruments.

Keywords: Cross Border Insolvency, Regional Retribution, Economic Recession

INTRODUCTION

Business development around the world is now at a stage where borders between countries are no longer an obstacle, and in line with the goal of every business actor, which is to seek maximum profit, the expansion of business activities beyond national borders is not a new thing in the era of globalization and free trade (*free trade*). The increasing business activities of companies that move out of their legal position cause quite complex impacts such as net entanglement that raises financial value widely and strengthens transnational relations in the fields of finance, law, and politics¹.

Transnational relations also carry commensurate economic risks for business actors, namely financial *distress*². Business actors, both individuals and companies that have protracted financial problems to experience bad loans and liquidity disruptions, will deal with a series of insolvency and bankruptcy mechanisms. Such problems become increasingly complex because of the international scale which has come to be known as cross-border bankruptcy or *cross-border insolvency*³.

In the era of globalization, a country's territorial sovereignty is increasingly depleted, considering that all countries must be open because of their transnational position and world development is limited to other countries. global transparency, democratization, civil society, and human rights.
⁴Bankruptcy law is a national law that only applies within the jurisdiction of that

¹ Pedro Jose F Bernardo, "Cross-Border Insolvency and the Challenges of the Global Corporation: Evaluating Globalization and Stakeholder Predictability through the UNCITRAL Model Law on Cross-Border Insolvency and the European Union Insolvency Regulation," *Ateneo LJ* 56 (2011): 799.

² William H Beaver, "Financial Ratios as Predictors of Failure," *Journal of Accounting Research*, 1966, 71-111.

³ Joana Costa and Rafael Castro, "SMEs Must Go Online – E-Commerce as an Escape Hatch for Resilience and Survivability," *Journal of Theoretical and Applied Electronic Commerce Research* 16, no. 7 (2021): 3043-62.

⁴ Endang Sutrisno, *Bunga Rampai Hukum & Globalisasi* (Genta Press, 2007).



country so that the bankruptcy law of one country does not extend to the bankruptcy law of another country. Insolvency itself, on the other hand, is a court decision leading to the general forfeiture of all existing and future insolvency assets.⁵ Insolvency is a further implementation of the principle of equal rights and proportional distribution of *pari passu* in the property law system. The principle of credit balance means that all of the debtor's assets in the form of personal or movable belongings, as well as personal possessions and belongings now owned by the debtor, belong to the debtor who will later be obliged to pay the debtor's obligations.⁶

On the other hand, the principle of parity means that the property becomes a common security for the creditors and the income must be divided equally among the creditors. Indonesia has Law 37 of 2004 on Insolvency Related to Insolvency and Payment Deferral Obligations, but the law does not specifically regulate cross-border insolvency-related to cross-border debt obligations. To date, the implementation of a bankruptcy settlement system in cross-border bankruptcy cases has often been problematic⁷.

Related to *cross-border insolvency*, legal certainty is needed for legal subjects in conducting cross-border business transactions, including legal certainty in bankruptcy matters. However, the problem is that national law in Indonesia itself, especially Law No. 37 of 2004 concerning bankruptcy and postponement of debt payment obligations, has not been regulated regarding cross-border bankruptcy issues carefully, so it does not provide legal certainty in terms of cross-border bankruptcy⁸.

However, formal ins imentation in executing debtor assets abroad will experience difficulties especially when dealing with the jurisdiction of other countries, so it needs to be seen whether the laws of other countries where the bankruptcy assets are located recognize the bankruptcy decision.⁹ This can be

⁵ Susanti Adi Nugroho and M H SH, *Bankruptcy Law in Indonesia: in Theory and Practice and Application of Law* (Kencana, 2018).

⁶ M Hadi Shubhan, "Prinsip Hukum Kepailitan Di Indonesia" (UNIVERSITAS AIRLANGGA, 2006).

⁷ Dicky Moallavi Asnil, "UNCITRAL Model Law on Cross Border Insolvency Sebagai Model Pengaturan Kepailitan Lintas Batas Indonesia Dalam Integrasi Ekonomi ASEAN," *Undang: Jurnal Hukum* 1, no. 2 (2018): 323-46.

⁸ David G Mayes, "Who Pays for Bank Insolvency in Transition and Emerging Economies?," *Journal of Banking & Finance* 29, no. 1 (2005): 161-81.

⁹ Adi Satrio, R Kartikasari, and Pupung Faisal, "Execution of Insolvent Debtors' Assets Outside Indonesia Linked to Fulfillment of Creditors' Rights," *Ganesha Law Review* 2, no. 1 (2020): 96-108.



reviewed based on article 436 Rv, where based on this article the decision of a foreign judge cannot be enforced in Indonesia declaring bankruptcy, this can be analogous to the decision of an Indonesian judge cannot be enforced against the debtor's bankruptcy property located abroad.¹⁰

Another thing is supported by the decision of the Central Jakarta Commercial Court No: 26/Pailit/2010/Pn.Niaga.Jkt.Pst. In the judgment, it was explained that there was a refusal by the panel of judges to grant the application for bankruptcy declaration, while in the judgment it was clear that the defendant had been declared bankrupt in Singapore. This is also the center of attention for researchers as well as supporting the argument that there are problems in solving *Cross cross-border insolvency* di Indonesia¹¹.

Based on the above problems, there needs to be a condition to think about ways and conditions if there is economic activity that is not as expected in its implementation which can cause debtors to default so that bankruptcy occurs, there needs to be legal certainty for creditors to be able to take or execute assets from debtors, this certainly has urgency in this modern era, Therefore, the author believes the urgency of this study is about the existence of legal vagueness in the settlement of *Cross Border Insolvency* disputes in Indonesia which is considered necessary for certainty if economic activities are not running well, namely with clear rules so that creditors can execute debtors' assets to restore their rights.

REGIONAL GEOLOGY

A. Principles of Legal Certainty

The Indonesian state is an adherent of the continental European legal system which is derived from the colonial state in the colonial era. Written law is typical of continental Europe with a *groundwork*. Offenses or crimes can be punished if there is a law or written law in advance. Unlike the *Anglo-Saxon* legal system that uses the rule of law derived from judges by digging in courts, continental Europe is very thick with elements of legal certainty. Efforts provided by Indonesia's positive law to provide guarantees to victims or suspects are delegated by the constitution through legislation¹². The role of judges in the continental European legal system looks passive compared to the AngAnglo-

¹⁰ Shubhan, "Prinsip Hukum Kepailitan Di Indonesia."

¹¹ Bernardo, "Cross-Border Insolvency and the Challenges of the Global Corporation: Evaluating Globalization and Stakeholder Predictability through the UNCITRAL Model Law on Cross-Border Insolvency and the European Union Insolvency Regulation."

¹² David G Mayes, "Who Pays for Bank Insolvency?," *Journal of International Money and Finance* 23, no. 3 (2004): 515-51.



Saxongal system which is more active, although in its development for Indonesia ju, edges cannot reject cases that enter on the grounds that there is no law¹³, but still refer to written law.

At the urging of the International Monetary Fund, the government issued a Government Regulation in Lieu of Law No. 1 of 1998 concerning amendments to the Bankruptcy Law (Faillissements verordening), which then stipulated the Perpu into Law No. 4 of 1998. Since the enactment of Law No. 4 of 1998, the government has established an institution authorized to decide and resolve bankruptcy cases, namely the Commercial Court. However, the number of cases that went to the Commercial Court then decreased significantly, this was due to the ineffectiveness of bankruptcy laws at that time. Therefore, improvements were made to the Bankruptcy Law No. 4 of 1998, by forming Law No. 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations. This bankruptcy law has a wider scope both in terms of norms, material scope, and the process of settling accounts receivable. This improvement is carried out on the grounds of the development of legal needs in the community while the existing legal provisions that have been in force have not been adequate as a legal means to solve the problem of receivables fairly, quickly, openly, and effectively.

B. Cross-Border Insolvency

a. Scope Cross Border Insolvency

Basically, the scope of cross-border bankruptcy is almost the same as general bankruptcy, consisting of debtors, creditors, and liabilities, but cross-border bankruptcy also has different elements. A foreign element is a link to another jurisdiction outside the "forum" specified by the treaty (the country where the court tried the case), and the link is actually a fact of the case. According to Sudargo Gautama, "a legal event that is said to contain foreign elements in it, namely if in the legal event there is one party to the legal event of foreign nationality or foreign legal position or there is property abroad" ¹⁴.

b. Principles Cross Border Insolvency

Each State has principles adopted in determining whether a foreign decision regarding *cross-border insolvency* can apply or have legal

¹³ Indonesia, "Law on Insolvency and Suspension of Debt Payment Obligations."

¹⁴ Dicky Moallavi Asnil, "UNCITRAL MODEL LAW ON CROSS BORDER INSOLVENCY WITH GUIDE TO ENACTMENT SEBAGAI MODEL PENGATURAN KEPAILITAN LINTAS BATAS INDONESIA DALAM INTERAKSI EKONOMI ASEAN," 2018.



consequences within its jurisdiction. The principles that can be adopted by a country are divided into 2 (two), namely: 1) The territorial principle, namely the principle that declares bankruptcy, conducts bankruptcy proceedings, and decides settlements must be limited to the territory of the country where the trial begins from the court that examines, adjudicates, and adjudicates the bankruptcy declaration or the court that examines, adjudicates, and decides the bankruptcy statement. The decision to declare bankruptcy takes effect in the country where the bankruptcy decision was made.¹⁵ 2) The principle of universality applies both to the assets of all debtors in the country where the bankruptcy judgment was made and to the assets of insolvent debtors abroad is the principle assumed.¹⁶

Countries adhere to different principles, and some countries apply the principles of universality and territoriality simultaneously. It uses the principle of universality to judge its own country's decisions, meaning that its own judges' decisions are recognized in other countries. Instead, territorial principles should be respected by judges of other countries. In other words, a country that applies the territorial principle cannot apply the decisions of judges of other countries.

c. Internal Problems Cross Border Insolvency

Cross Border Insolvency cannot be separated from the problems arising from various bankruptcy cases faced by national authorities. Conflicts that often arise during *cross-border insolvency* are related to recognition and enforcement. Enforcement takes a broader and deeper meaning than using recognition.¹⁷ Enforcement decisions have far-reaching consequences, for example, some courts or administrative agencies may take affirmative action rather than recognizing that affirmative action is not necessary.¹⁸

RESEARCH METHODS

This research will be prepared using a type of normative juridical research, which is research focused on examining the application of rules or norms in positive law. This study uses Grammatical Interpretation because it will carry out

¹⁵ Daniel Suryana, "Bankruptcy Law: Bankruptcy of Foreign Business Entities by the Indonesian Commercial Court," 2007.

¹⁶ Shubhan, "Prinsip Hukum Kepailitan Di Indonesia."

¹⁷ Arindra Maharany, "Legal Review of the Application of International Legal Instruments in Cross-border Insolvency Arrangements in Indonesia," *Singapore, Malaysia, Thailand, South Korea, and Japan, Faculty of Law, University of Indonesia, Depok*, 2011.

¹⁸ Sudargo Gautama, *Pengantar Hukum Perdata Internasional Indonesia* (Bina Cipta, 1977).



objective interpretation which is the simplest interpretation or explanation to find out the meaning of legal provisions by describing them according to language, word arrangement, or sound listed in the Presidential Decree of the Republic of Indonesia No.6 of 1978, Insolvency Act 1967 and UNCITRAL Model Law as well as supporting regulations that will be discussed in this study. Data collection techniques used in this study are literature studies, legal documentation, and data tracing through Mayantarantara. The analytical techniques used are grammatical interpretation and systematic interpretation.

RESEARCH RESULT

A. Analysis of Cross Border Insolvency Dispute Resolution in Insolvency Practice in Indonesia Based on Central Jakarta Commercial Court Decision No: 26/Pailit/2010/Pn.Niaga.Jkt.Pst

Discussing the Analysis of *Cross Border Insolvency Dispute Resolution* in Bankruptcy Practice in Indonesia Based on the Central Jakarta Commercial Court Decision No: 26 / Bankruptcy / 2010 / Pn.Niaga.Jkt.Pst The related discussion so that this research is structured and structured to solve a problem. The things that the author will discuss include position cases, Analysis of Cross Border Insolvency Dispute Resolution Rules in Insolvency Practice in Indonesia, Cross Border Insolvency Dispute Resolution in Insolvency Practice in Indonesia Based on Central Jakarta Commercial Court Decision No: 26/Pailit/2010/Pn.Niaga.Jkt.Pst.

1. Position Case

The bankruptcy petition against Manwani Santosh Tekchand was registered at the Registrar of the Commercial Court at the Central Jakarta District Court on March 19, 2010, under case register Number: 26/Bankruptcy/2010/PN. TRADE. JKT. PST. The party filing for bankruptcy is OCBC Securities Private Limited (Singapore legal entity, hereinafter referred to as the "Insolvency Applicant" or "Applicant"). Meanwhile, the party who is made a bankruptcy respondent is Manwani Santosh Tekchand (Indonesian citizen, hereinafter referred to as "Bankruptcy Respondent" or "Respondent").

The reason why the Applicant filed for bankruptcy against the Respondent is because the Respondent, according to the Applicant, has overdue and collectible debts to the Applicant based on the Decision of the High Court of the Republic of Singapore No. : S870/2008/D, besides the Respondent has one other creditor besides the Applicant, namely CIMB-GK.Pte.Ltd which is also based on the Judgment issued by the High Court of Singapore through Decision No. S966/2008/F.



On 1 July 2009, The High Court of The Republic of Singapore issued a judgment in case No. : S870/2008/D between the Petitioner as Plaintiff and the Respondent as Defendant, which reads as follows (in translation of Indonesian by the Sworn Translator). In the absence of the Defendant today, it has been decided that the Defendant shall pay to the plaintiff, namely:

- (a) A total of S\$2,371,914 (Sing\$) dated 21 October 2008 as filed in paragraph 7 of the statement of claim;
- (b) An amount of Sing \$5,674.35 dated November 12, 2008 (as stated in paragraph (statement of claim);
- (c) Continued interest of Sing \$2,371,914.92 as of 21 October 2008 leveraged at the end of the month at a combined contractual interest rate of 1% per annum above the prevailing lending rate at Overseas Chinese Banking Corporation Limited (OCBC Limited) (which as of 31 October 2008 was 5% per annum) from 21 October 2008 until the date of full payment (as stated in the statement of claim paragraph);
- (d) Further interest of \$5,634.35 as of 12 November 2008, utilized at the end of the month at a combined contractual rate of 2% per annum above the prevailing prime lending rate at OCBC Limited which as of 31 October 2008 was 5% per annum and 24 September 2008 (without interest on the first 7 days) until 17 October 2008 (23 days) and after that with an interest rate level of 4% above the main lending rate valid at OCBC Limited until the date of full payment (as specifically submitted and requested and paragraph 10 of the statement of claim);
- (e) Cost amounts to \$7,300.80 on a full indemnity basis."

The Office of Abraham Law Firm has notified, warned, and strongly requested the Respondent to carry out the judgment of The High Court Of The Republic of Singapore in Case No. S870/2008/D dated 1 July 2009 to make payments to the Applicant. On 10 August 2009, for the second time the Petitioner through his attorneys Edward N.H Abraham Juris Doctor and David Abraham, the BSL informed, warned, and strongly requested that the Respondent implement the contents of the decision of The High Court Of The Republic Of Singapore in case No. S870/2008/D, namely to make payments to the Petitioner.

The Respondent again did not respond to the 2nd (two) summons from the Applicant, therefore the Applicant argued that the Respondent did not have good faith The collection had been done many times, but until the filing of the



bankruptcy application by the Applicant, the Respondent still did not make payments or pay off its obligations so that the Respondent was proven to have a debt that was due and unpaid to the Applicant amounting to 2,384,890.05 Singapore Dollars or equivalent to Rp. 15,423,083. 953.30 with an exchange rate of 1 Singapore Dollar of Rp.6,467.00 with details: (a) Principal and Interest Debt up to October 21, 2008, amounted to Sing \$2,371,914.90; (b). Interest up to October 12, 2008 amounted to Sing \$5,674.35; (c). Case costs of Sing \$7,300.80.

Based on the aforesaid facts, the Petitioner argues that the Respondent has been proved simply cannot be expected to enforce the decision of case No. S870/2008/D dated 1 July 2009 decided by The High Court of The Republic of Singapore. In addition to the Applicant, the Respondent also owes debts to Other Creditors, namely CIMB-GK SECURITIES Pte.Ltd (Other Creditors), a legal entity incorporated under the laws of Singapore and domiciled at 50 Raffles Place #19-00 Singapore Land Tower Singapore 048623. Both OCBC Securities Pte.Ltd and CIMB-GK Securities Pte.Ltd appointed a legal representative from the same office, namely Rajah & Tann law firm.

The Respondent argues that the basis for the petitioner's bankruptcy petition is the decision of The High Court Of The Republic Of Singapore in case No. S870/2008/D dated July 1 as contained in the Petitioner's bankruptcy petition, which asked the Commercial Court of the Central Jakarta District Court to declare the Respondent negligent in implementing the contents of the decision. Therefore, in accordance with the provisions of the applicable procedural law and for the sake of the legal sovereignty of the Unitary State of the Republic of Indonesia, the enactment of the decision must be rejected and cannot be executed in Indonesia. This refers to the provisions of Article 299 of the UUK-PKPU which state: "Unless otherwise stipulated in this Law, the applicable procedural law shall be the Civil Procedure Law".

Thus, according to the Respondent, the decision of the foreign judicial body has no binding force and the case is concerned once again. The principle of international law in Indonesia regarding the execution of the contents of the decision of a foreign judicial body states that the decision of a foreign court cannot be executed outside the territory of the country.

The panel of judges considered that from the translation of the judgment of The High Court of The Republic of Singapore No. S870/2008/D expressly or impliedly that the Defendant incas Manwani Santosh Tekchand had paid a sum of money to the plaintiff with the words "actually paid to the plaintiff" then the arguments of the Petitioner basing himself as a Creditor of the Respondent based



on the attachment of evidence in the form of decision No. S870/2008/D were unwarranted according to Law.

That because the Petitioner's argument is based on the existence of two decisions of The High Court of The Republic of Singapore, on the other hand, the Respondent denies the existence of legal relations with the Applicant, so that the Panel of Judges still requires verification of the following matters :

- a. Is there a summons to attend the trial for the Defendant in this case the Respondent?
- b. Whether the decision has been notified to the Defendant/Insolvent Respondent.

2. Analysis of Cross-Border Insolvency Dispute Resolution Rules in Insolvency Practice in Indonesia

- (a) Regarding the analysis of cross-border insolvency regulations in Indonesia, researchers will first describe how *cross-border insolvency* is regulated. The reason the researcher describes the cross-border bankruptcy regulation is as a rationale to discuss how the authorities possessed by the Indonesian government are concerned with the determination of cross-border bankruptcy regulations. In cross-border insolvency between countries, there are several provisions based on Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations.
- (b) When discussing cross-border bankruptcy, this sub-chapter will also analyze the concept of provisions governing cross-border bankruptcy regulations, but researchers will describe cross-border bankruptcy regulations first.
- (c) The Indonesian bankruptcy process is regulated in Law Number 37 of 2004, this Bankruptcy Law has not regulated cross-border bankruptcy mechanisms or procedures. There are only three articles governing this matter contained in Chapter II, the tenth Section on the provisions of international law, namely:
- (d) Article 212 of the Bankruptcy Law explains that: "A creditor who, after the judgment of the bankruptcy declaration is pronounced, takes repayment of all or part of the property belonging to the bankruptcy property located outside the territory of the Republic of Indonesia, which is granted to him with the right to precedence, must reimburse to the bankruptcy property all that he obtained."



The definition in Article 212 of the Bankruptcy Law is interpreted to mean that creditors have the right to make requests for property in any form included in the *bankruptcy model* located both in Indonesia and outside Indonesia.

- (a) Article 213 of the Bankruptcy Law explains that: "(1) A creditor who transfers all or part of his receivables against the Insolvent Debtor to a third party, with the intention that the third party takes repayment in precedence over others for all or part of his receivables from objects including bankruptcy assets located outside the territory of the Republic of Indonesia, must reimburse to the bankruptcy assets he obtained. (2) Unless proven otherwise, any transfer of receivables shall be deemed to have been made in accordance with the provisions referred to in sub-article (1), if such transfer is made by a Creditor and the Creditor knows that a declaration of bankruptcy has been or will be filed."
- (b) The definition in Article 213 of the Bankruptcy Law is interpreted to mean that creditors have an obligation to prove that their receivables against the bankrupt debtor are true and when there is a transfer either in whole or in part to a third party, the debtor is obliged to replace the bankrupt assets included in the *bankruptcy model* even though it has changed parties.
- (c) Article 214 of the Bankruptcy Law explains that: "(1) Every person who transfers all or part of his receivables or debts to a third party, who therefore has the opportunity to conduct a debt encounter outside the territory of the Republic of Indonesia which is not permitted by this Law, shall reimburse the bankrupt property. (2) The provisions of Article 213 paragraph (2) shall also apply to the matters referred to in paragraph (1)."
- (d) The definition in Article 214 of the Bankruptcy Law is interpreted to mean that creditors have the obligation to prove that in connection with the transfer of objects included in the bankrupt assets abroad and the transfer of part or all of the debt or receivables to third parties. This law does not regulate the execution mechanism and procedure if the asset is abroad when it conflicts with the laws of the country concerned, cross-border court cooperation, and the recognition and implementation of foreign court bankruptcy decisions.
- (e) Based on the description above, it can be concluded that in the civil procedural law in Indonesia, court judges' decisions can only be recognized and implemented in Indonesian territory, foreign court



decisions also have no execution power in Indonesian territory.¹⁹

Based on the provisions of Article 2 of the UUK-PKPU, it can be concluded that the juridical requirements for a company to be declared bankrupt are as follows:

- (a) The existence of debt;
- (b) At least one of the debts is due;
- (c) At least one of the debts can be collected;
- (d) The presence of debtors;
- (e) The presence of creditors;
- (f) More than one creditor;
- (g) The bankruptcy declaration is carried out by a special court called the Commercial Court.

The requirements for declaring a debtor in a state of bankruptcy are set out in Pasal 2 Ayat 1 UUK-PKPU which reads as follows: "A debtor who has two or more creditors and does not pay in full at least one debt that has fallen due and can be collected, is declared bankrupt by a court decision, either at the request of one or more of its creditors".

3. Cross Border Insolvency Dispute Resolution in Insolvency Practice in Indonesia Based on Central Jakarta Commercial Court Decision No: 26/Pailit/2010/Pn.Niaga.Jkt.Pst

- (a) Talking about cross-border bankruptcy in Indonesia, it is clear regarding the basic rules and implementing rules. Regarding the continuation of the discussion described above, researchers will describe how the application of regulations is still being applied. The final stage of the lack of clarity regarding the procedure for managing bankruptcy assets outside the territory of Indonesia and further provisions of Pasal 212, 213 dan 214 Undang-Undang 37 Tahun 2004 Making the problem of *cross-border insolvency* in Indonesia unanswered.
- (b) The question then arises regarding the principle held by most legal systems in many countries that a court decision on a case, especially in the case of bankruptcy, cannot be executed in a country. The refusal of execution against foreign convictions is closely related to the concept of state sovereignty. The legal basis is Pasal 264 ayat (1) UU Insolvency, the

¹⁹ Dinda Rizqiyatul Himmah, "Konvensi Putusan Pengadilan Asing Den Haag 2019: Perspektif Hukum Perdata Internasional Indonesia," *Mimbar Hukum* 34, no. 2 (2022): 618-48.



essence of which is to impose civil procedural law on commercial courts. Meanwhile, the civil procedural law that applies in Indonesia, namely Pasal 436 Regelement op de Burgerlijke van Justitie (hereinafter referred to as Rv), expressly determines that foreign court rulings cannot be recognized and cannot be executed by Indonesian courts.²⁰

- (c) According to the Indonesian HPI system, bankruptcy decisions use the principle of territoriality so that a bankruptcy decision pronounced abroad has no legal consequences in the country. Therefore, with the adoption of this principle, a person who has been declared bankrupt abroad, cannot be declared bankrupt again in Indonesia. This also means that the bankruptcy judgment that has been pronounced in Indonesia only has an effect on objects contained in the territory of the country itself.²¹

Manwani Santosh Tekchand is a party that, based on the decision of The High Court of The Republic of Singapore, is required to pay a sum of money to OCBC Securities.Pte.Ltd (based on decision No.870/2008/D) and CIMB-GK Securities.Pte.Ltd (based on decision No. 966/2008/F). The obligation to pay in these two judgments essentially arises from debts derived from the two Derivative Agreements :

- a. Margin Agreement between Manwani Santosh Tekchand and OCBC Securities.Pte.Ltd; and
- b. Margin Agreement between Manwani Santosh Tekchand and CIMBGK Securities.Pte. Ltd.

Bankruptcy Application against Manwani Santosh Tekchand is a bankruptcy application filed based on foreign court decisions, namely the High Court of The Republic of Singapore No.870/2008/D (OCBC Securities against Manwani) and No.966/2008/F (CIMB Securities against Manwani). In both judgments, Manwani Santosh Tekchand as a defendant was obliged to pay a sum of money to each plaintiff, both of which were based on debts arising from a derivative agreement. BI Director's Decree No. 28/119/KEP/DIR, dated December 29, 1995, provides a definition of derivatives: "A contract or payment agreement whose value is a derivative of the value of the underlying instrument such as interest rates, exchange rates, commodities, equity, and indices, whether

²⁰ Hikmahanto Juwana, "Transaksi Bisnis Internasional Dalam Kaitannya Dengan Peradilan Niaga," *Jurnal Hukum & Pembangunan* 31, no. 3 (2017): 224–27.

²¹ Loura Hardjaloka, "Kepailitan Lintas Batas Perspektif Hukum Internasional Dan Perbandingannya Dengan Instrumen Nasional Di Beberapa Negara," *Yuridika* 30, no. 3 (2015): 480–504.



followed by movements or without movements of funds/instruments”.

Regardless of the issue of whether the obligation stated in the foreign court decision can only be recognized by the Indonesian court as a respondent's debt or not, the issue is whether the obligation if recognized as a debt is due and collectible.

The Applicant has repeatedly charged the Respondent to immediately pay off its obligations, but the Respondent still does not make payments or pay off its obligations so the Respondent is proven to have overdue and unpaid debts to the Applicant. The Respondent also has debts to CIMB-GK SECURITIES Pte.Ltd which are Other Creditors arising based on the contents of the Judgment issued on March 5, 2008 by The High Court Of The Republic Of Singapore in case S966/2008/F between the Other Creditors. In this case, CIMB-GK SECURITIES Pte.Ltd as Plaintiff and Respondent as Defendant.

4. Legal Implications Related to the Settlement of Sengeketa Cross Border Insolvency in the Central Jakarta Commercial Court Decision No: 26/Pailit/2010/Pn.Niaga.Jkt.Pst

Relating to Legal Implications related to the Settlement of Sengeketa *Cross Border Insolvency* in the Central Jakarta Commercial Court Decision No: 26/Bankruptcy/2010/Pn.Niaga.Jkt.Pst Researchers will describe the supporting arguments so that there is a harmonizer of this study. The matter that will be discussed in this sub-chapter is about the Analysis of Bankruptcy and PKPU Cases and the Authority to Adjudicate, Problems in Cross Border Insolvency, *and ends with an Analysis of Legal Implications related to the Settlement of Sengeketa Cross Border Insolvency in the Central Jakarta Commercial Court Decision No: 26/Pailit/2010/Pn.Niaga.Jkt.Pst.*

(a) Analysis of Matters of Compassion and PKPU and Authority To Adjudicate

Conditions Pasal 1 Ayat 1 Undang-undang Nomor 37 Tahun 2004 on Bankruptcy and PKPU states that Bankruptcy is a general confiscation of all assets of the bankrupt debtor whose management and settlement is carried out by the receivership under the supervision of a supervisory judge as stipulated in this Law. The purpose of a bankruptcy declaration is actually to obtain a general forfeiture of the debtor's wealth (all property confiscated/frozen) for the benefit of all those who owe it (creditors). The debtor himself can also apply for bankruptcy if he has at least more than one creditor and is no longer able to carry out his obligations, namely

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continuing to pay his debt. In the event that the debtor files for bankruptcy on his own, the Commercial Court must grant if there are facts that are in accordance with the conditions for filing the bankruptcy application. In principle, bankruptcy is a joint effort to get payments for fellow debtors fairly.

Bankruptcy cases are also trivial cases or require simple proof because they have extraordinary legal consequences for debtors with bankruptcy status, which results in losing the authority to manage all their assets and does not harm creditors because debtors are no longer able to continue paying their debts. By using this simple evidence, it aims not to make a mistake in the bankruptcy statement for the debtor and not harm the creditor. Thus, a Special Court is needed, namely, the Commercial Court within the general judicial environment that has a fast procedural process whose period has been determined by law. If the settlement of the case will exceed the time prescribed by law, it must be with the approval of the Chief Justice of the Supreme Court.

(b) Problems in Cross Border Insolvency

Cross Border Insolvency is bankruptcy arising from international business transactions, which are found foreign elements in it, but do not originate from the country where the bankruptcy process is carried out. According to Roman Tomasic, cross-border insolvency can occur if the debtor who has been declared bankrupt has assets in more than one country or the creditor in the bankruptcy case does not come from the country where the bankruptcy process is ongoing.

Basically, the scope of cross-border insolvency is almost the same as bankruptcy in general, which consists of debtors, creditors, and debts, but cross-border insolvency also adds foreign elements. A foreign element is a link with another legal system outside of the "forum" specified in the treaty (the country where the court adjudicating the case) and that link is actually in the facts of the case. According to Sudargo Gautama, "a legal event that is said to contain foreign elements in it, that is, if in the legal event, there is one party to the legal event of foreign nationality or foreign legal standing, or there is property abroad."

Cross Border Insolvency is inseparable from the problems that arise in various bankruptcy cases that cross the jurisdiction of the country. The problem that is often faced in cross-border insolvency is about recognition and enforcement. Enforcement has a broader and deeper meaning than



recognition).

5. **Analysis of Legal Implications related to the Settlement of Sengeketa Cross Border Insolvency in the Central Jakarta Commercial Court Decision No: 26/Pailit/2010/Pn.Niaga.Jkt.Pst**

Related to Legal Implications related to the Settlement of Sengeketa *Cross Border Insolvency in the* Central Jakarta Commercial Court Decision No: 26 / Bankruptcy / 2010 / Pn.Niaga.Jkt.Pst which is the subject matter of the Foreign Court Decision which has ruled that a debtor is required to pay debts to creditors can be used as a basis for bankruptcy against the debtor in Indonesia. What this means is whether this Foreign Court Judgment can be formally and materially accepted as valid and conclusive evidence of the existence of debts and the relationship between debtors and creditors. Article 164 of Herziene Inlandsch Reglement (HIR) mentions several pieces of evidence, one of which is proof of letters (deeds).

The deed itself is divided into authentic deeds and underhand deeds. Article 1868 of the Civil Code provides for the definition of an authentic deed: "An authentic deed is a deed made in the form prescribed by law by or before a public officer authorized for it at the place where the deed is made." The decision of a foreign court already qualifies formally as an authentic deed because it meets the element "made in the form prescribed by law by or before a public officer authorized for it at the place where the deed was made.". Thus, if you only look at the formal requirements, then foreign court decisions can be used as valid and conclusive evidence in Indonesian courts.

In conclusion, the decision of a foreign court is materially an authentic deed that can be accepted as valid evidence in court but is materially non-binding so that it is only a legal fact that is freely assessed in accordance with the consideration of the panel of judges. So it can be concluded that if you look at the contents of the Commercial Court decision Number 26 / Bankruptcy / 2010 / PN. TRADE. JKT. PST that Cross Border Insolvency *Dispute Resolution* in Insolvency Practice in Indonesia cannot be applied due to the limitations of related regulations.

Based on everything that has been submitted, it can be concluded that the Legal Implications related to the Settlement of Sengeketa *Cross Border Insolvency in the* Central Jakarta Commercial Court Decision No: 26/Bankruptcy/2010/Pn.Niaga.Jkt.Pst become legally valid because of this arrangement that does not allow the execution of state bankruptcy decisions outside Indonesia. This is because decisions only create the rights and obligations of the person concerned in a particular relationship, and are

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therefore easily recognized by foreign judges because there is no need to carry out the exercise. In Indonesia itself as stipulated in the Reglement Op De Burgelijke Rechtsvordering in Article 436 Rv which states that except in matters prescribed by Article 724 of the Indonesian Civil Code and other laws, decisions pronounced by foreign judges or foreign courts within the territory of the Republic of Indonesia cannot be implemented.

CONCLUSION

That Cross Border Insolvency Dispute Resolution in Insolvency Practice in Indonesia cannot be applied due to the limitations of related regulations. On its formal terms, a foreign court decision is indeed an authentic deed. However, when viewed from the material requirements, foreign court decisions cannot necessarily be applied and used as valid and conclusive evidence in Indonesian courts because the provisions of Article 436 Rv specifically regulate that the principle of "Lex specialis derogat lex generali" or specifically applicable law overrides generally accepted law. In conclusion, the decision of a foreign court is materially an authentic deed that can be accepted as valid evidence in court but is materially non-binding so that it is only a legal fact that is freely assessed in accordance with the consideration of the panel of judges.

The Legal Implications related to the Settlement of Sengeketa Cross Border Insolvency in the Central Jakarta Commercial Court Decision No: 26/Bankruptcy/2010/Pn.Niaga.Jkt.Pst become valid according to law because of the existence of such arrangements that do not allow the execution of state bankruptcy decisions outside Indonesia. This is because decisions only create the rights and obligations of the person concerned in a particular relationship, and are therefore easily recognized by foreign judges because there is no need to carry out the exercise. In Indonesia itself as stipulated in the Reglement Op De Burgelijke Rechtsvordering in Article 436 Rv which states that except in matters prescribed by Article 724 of the Indonesian Civil Code and other laws, decisions pronounced by foreign judges or foreign courts within the territory of the Republic of Indonesia cannot be implemented.

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