

CHAPTER I

INTRODUCTION

1.1 Background

According to Aristotle in his book of politics:

“... man is by nature a political animal. He who is without a city through nature rather than chance is either a mean sort or superior to man;”

From the Latin word "societas", which means "friendly association with others,"¹ and "socius" meaning "fellow, associate, comrade, or business partner"², comes the word society in English. Societal significance is therefore strongly linked to what is deemed social.

With reference to the quote from Aristotle and the concept of society in the preceding paragraph, we can conclude that humans are social animals who must exist in a community. As a result, we need to govern our behavior and interactions with one another, ultimately leading to the establishment of law. Another point that can be taken from the famous quote is the need for humans to work with each other and trade for their needs.

¹ societas. (n.d.). In Merriam-Webster.com dictionary. Retrieved December 1, 2022, from <https://www.merriam-webster.com/dictionary/societas>

² socius. (n.d.). In Oxford English Dictionary Online. Retrieved December 1, 2022, from <https://www.oed.com/view/Entry/179238>

In a society, we use currency as a tool to trade for goods or services and vice versa to receive currency we give service or trade of goods or in other words working. As in accordance with the constitution, article 28 (a) about Human Rights states that everyone has the right to defend his right to live and the right to defend his life and existence.³ Article 28 (a) also includes the right to earn money by working.

Your rights as a worker are further protected in law number 13 year 2003 about Labor.⁴ To increase the profits employers like to lower their costs which resulted in exploiting the employees. Such as having employees working for over 40 hours all week long to increase the efficiency of the company. Which is against the labor law article 77 part 2 where the maximum work hour in a week is 40 hours with 1 or 2 rest days depending on the work hour per day.⁵

The labor law is further amended on 2nd November 2020, the law is called Omnibus law and their goal is to further protect the national interest but at the same time attract investors to invest in the country as America just released a ban of trade between the American companies and China.⁶ Some

³ Constitution of the Republic of Indonesia. (1945). Article 28A.

⁴ Law Number 13 Year 2003. (2003). concerning manpower.

⁵ Law Number 13 Year 2003. (2003). concerning Manpower. Article 77, Part 2.

⁶ Omnibus Law. (2023). Law Number 06 Year 2023 concerning Job Creation.

of the notable changes between the labor law and Omnibus law are about foreign employees, full time workers, overtime hours and minimum wage.

On the other side of the mirror, owning a business is a path for one to earn money. Especially after the changes in the omnibus law that attracts overseas investors and the introduction of Online Single Submission (OSS)⁷, the birth of new companies has never been this easy and convenient. With the growth of new companies, others will fall. As a result filing for bankruptcy have been more abundant.

For a business to go bankrupt, according to Law number 37 year 2004 about bankruptcy and deferment of debt payment obligations article 2 states that there must be two or more creditors and that the business must be unable to pay off a matured credit before the court can declare the business bankrupt.⁸

Article 2 subsection 1 about Bankruptcy and Deferment of Debt Payment Obligation is further developed in article 8 sub section 4 where it states:⁹

⁷ Ministry of Communication and Information Technology. (n.d.). Online Single Submission. Retrieved from <https://oss.go.id/> accessed on October 3 2021

⁸ Law No. 37 of 2004 about Bankruptcy and Deferment of Debt Payment Obligations, art. 2. (2004). Indonesia.

⁹ Law No. 37 of 2004 about Bankruptcy and Deferment of Debt Payment Obligations, art. 2, Sub 1. (2004). Indonesia.

Requests for bankrupt statements must be granted if there is a fact or state that is proven simply that the requirement to declare the bankruptcy as referred to in Article 2 paragraph (1) has been fulfilled.

The law above explains that the arguments for bankruptcy is whether the evidence given is proof of credit owed which has matured but the debtor is unable to pay it off. Furthermore the judges job is to discern whether the evidence given is valid or not. If the evidence is found valid, the judges must declare the business bankrupt.

After explaining the requirements and elements for bankruptcy, there is an important key word that needs to be further explained to reduce confusion. As such the difference between creditor and credit. Creditor is a person who gives credit to the debtor, according to law 10 year 1998 about banking law, the definition of credit is¹⁰

“Credit is provision of money or bills that can be equalized with it, based on the approval or agreement to borrow ... require the borrower to pay off the debt after a certain period of time by giving interest.”

¹⁰ Law No. 10 of 1998 about Banking Law. (1998). Indonesia.

Although this is more specific towards loans from a bank, the requirements of a credit are the money being borrowed and must be returned at a later date with interest.

Whilst according to Law number 37 year 2004¹¹, credit or debt is an obligation that is stated or can be stated in the amount of money both in Indonesian currencies and foreign currencies, both directly and those will arise in the future or continuity, arising because of the agreement or law and which must be filled with the debtor and if not fulfilled, the creditor have the rights to claim their fulfillment from the assets of the debtor.

There are 3 types of classification for creditors. They are Secured, Preferent, and Unsecured creditors. The classifications are a way to know who has priorities on getting their demandable debt back. Originally, the highest priority according to the Civil Code article 1139 to 1149, Creditors who hold credit with a guarantee hold the second highest priority of getting their demandable debt back. Preferent creditor holds the highest priority, but it consists mostly of tax and government money that are demandable debts.¹² After being amended in the constitution court, the priorities have changed and to give certainty towards the people, the Constitutional Court

¹¹ Law No. 37 of 2004 about Bankruptcy and Restructuring of debt, art. 1. (2004). Indonesia.

¹² Indonesian Civil Code (1948). Article 1139 -1149

Decision Number 67 / PUU-XI / 2013 amended the hierarchy and put employees as a preference creditor second priority after tax.¹³

When explaining what a creditor is, there are 3 key roles during and after filing for bankruptcy. The roles are Creditor, Debtor, and Curator which is clearly defined in Law number 37 year 2004 article 1 as stated:

1. Creditors are people who have accounts receivable because of agreements or laws that can be billed in front of the court.
2. Debtor is a person who has a debt because of an agreement or laws that are repayment which can be billed in the face of the court.
3. Curator can be from insolvency and public trustee's office or an individual appointed by the court to take care of, and encourage bankrupt debtor assets under the supervision of the supervisory judge according to law.

The Netherlands has a civil law legal system, which is based on the French civil law system. The Dutch legal system is founded on written laws and regulations, which are codified in statutes and legal codes. The Dutch Constitution (Grondwet) is the highest legal document in the country and establishes the basic principles of the legal system. In addition to the

¹³ Constitutional Court Decision No. 67/PUU-XI/2013. (2013). Indonesia.

Constitution, there are various laws and codes that govern different areas of law, such as criminal law, civil law, and administrative law.¹⁴

Dutch bankruptcy law is a branch of Dutch civil law that governs the process by which individuals and companies can declare bankruptcy. The legal basis for Dutch bankruptcy law is primarily contained in the Dutch Bankruptcy Act (Faillissementswet), which was first introduced in 1893 and has been amended several times since then.¹⁵

The main purpose of Dutch bankruptcy law is to provide a legal framework for the efficient and fair distribution of assets among creditors in the event of insolvency. When an individual or company declares bankruptcy in the Netherlands, a trustee is appointed to oversee the liquidation of assets and the distribution of funds to creditors.¹⁶

The legal basis for Dutch bankruptcy law is primarily contained in the Dutch Bankruptcy Act (Faillissementswet). The Act sets out the procedures and rules for the declaration of bankruptcy, the appointment of a trustee, the liquidation of assets, and the distribution of funds to creditors. In addition to the Bankruptcy Act, other relevant legal sources for

Dutch bankruptcy law include:

¹⁴ Mak, C. *Introduction to Dutch Law* (The Netherlands: Kluwer Law International, 2019).

¹⁵ Netherlands Ministry of Foreign Affairs. (2021). "Dutch Law." Government.nl. Retrieved on November 1, 2022, from <https://www.government.nl/topics/dutch-law>.

¹⁶ Dutch Bankruptcy Act, 1893 (Faillissementswet).

1. Dutch Civil Code (Burgerlijk Wetboek)
2. Dutch Commercial Code (Wetboek van Koophandel)
3. Dutch Insolvency Regulation (Insolventieverordening)
4. EU Regulation on Insolvency Proceedings¹⁷

The term “two creditors” from article 2 sub 1 in Law number 37 year 2004, is what this thesis will be focused on. The thesis will do a comparison of law between the Indonesian bankruptcy and Netherland bankruptcy laws, additionally the thesis will break down the bankruptcy law into elements such as what is counted as a creditor, what is counted as a matured debt, and who are the parties able to file for bankruptcy.

In comparison to the Indonesian bankruptcy law from the Netherland bankruptcy act according to their bankruptcy act, there are lots of similarities due to the fact that we adopted the law from the Netherlands, therefore that there will be no vacuum of law. There is a single difference between the Indonesian Bankruptcy and Deferment of Debt Payment Obligation. Due to these facts, the writer has raised the question “What are the required elements to file for bankruptcy and comparison to the Netherland Bankruptcy law?” for the first issue.

¹⁷ European Union. (2015). Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings. Official Journal of the European Union, L 141/19-76.

Would two employees who have not been paid by the company be considered bankrupt in the situation of two creditors? If this is true, does this suggest that if the company has a cash flow problem and has failed to pay their employees, the employees have the right to file for bankruptcy? Theoretically, the essence of *Privaat rechtspersoon*¹⁸ in civil law has the nature of individual interests, hence if there are two persons it counts as two legal entities. Following the theory before, multiple employees count as multiple creditors. The employees have an employment contract which promises them being paid at a certain date for how much they have done. Although this is a gray area, the work of an employee is a promise to be paid but failure to pay counts it as a credit as explained above, as the company will have to borrow the money that was supposed to be paid and paid at a later date.

Additionally, according to Presidential Decree article 54 about Wages No. 78 Year 2015 after a certain date, there will be interest which will increase as it takes longer to pay the wages. But in practice the Author has discovered two instances of this. Cases No.08/Pailit/2011/PN.Niaga.Medan and No.501K/PDT.sus/2010 are involved which supports and contradicts with the theory of bankruptcy. In one case, the court decided to deny two or more employees the status of

¹⁸ van der Velden, M “Legal forms of business enterprises in the Netherlands”. Kluwer Law International.2020

creditors, whereas in the other case, the court decided to grant two or more employees the status of creditors.

In this thesis, the author will explain why, in one of the cases, the court opted to issue bankruptcy while, in the other, the judge decided not to grant bankruptcy. The creditors in the first lawsuit (No.501K/PDT.sus/2010) are five individuals who are suing PT. Griya Permata Lestari (A.K.A. PT. Universal Grand Hotel)/Hotel Grand Aquila Bandung (From now on will be called Pt. GPL). All five employees have not been paid for one year and two months (14 months), totaling RP. 67.370.240,00. (all 5 employees). The case has been reviewed by the Supreme Court. The court decided that they are unable to sue the company to file for bankruptcy.

The second case (No.08/Pailit/2011/PN.Niaga.Medan) was led by salmiyati and co. a total of 30 employees. They are suing PT. Gimmill Industrial Bintan (From now on will be called Pt. GIB) who have failed to pay the salary of their employee for 6 months, totaling RP. 198.990.000. The court decided that PT. GIB to be bankrupt.

After an introduction of the cases, there is an irregularity in the case that is from 2010 which the supreme court deemed employees unable to bankrupt the business but the case from 2011 in the district court deemed the company to be bankrupt when similar facts were being brought up. Due

to these facts, the writer has raised the question “Whether the decision of judges on No.08/Pailit/2011/PN.Niaga.Medan and Decision No.501K/PDT.sus/2010 are contradictory with the law” for the second issue.

Based on the background that has been stated above, the author is interested in raising the proposal entitled “Judicial Analysis Whether Two or More Employees Wages That Have Been Paid Late Counted As One or Two Creditors and the comparison with the Netherlands (No.08/Pailit/2011/PN.Niaga.Medan and Decision No.501K/PDT.sus/2010).”

1.2 Formulation of Issues

In regards to the topic of this thesis, the Author will discuss the following formulation of issues:

1. What are the required elements to file for bankruptcy and comparison to the Netherlands Bankruptcy law?
2. Whether the decision of judges on No.08/Pailit/2011/PN.Niaga.Medan and Decision No.501K/PDT.sus/2010 are contradictory with the law?

1.3 Research Purposes

The Author's purpose of writing this thesis is to answer the formulation of issues stipulated above, namely:

1. This research seeks to determine if two or more employees which the company has failed to pay their salaries complete the prerequisites to file for bankruptcy. It is critical to understand whether failure to pay employees could close down companies. Furthermore, it is critical to understand whether employees who have not been paid by the company are considered creditors or not.
2. This research will help the reader to understand for future references if two employees could be counted as a single creditor or not. Allowing bankruptcy lawyers to use 2 employees as multiple creditors or not.

1.4 Research Benefits

1.4.1 Theoretical Benefits

In theory, the Author hopes that this will explain the requirement of the two creditors. Because it will be used in court, it must have a clear

definition and interpretation, allowing lawyers and clients to use it as a foundation to determine if the conditions for the case to continue to be filed for bankruptcy have been met. The research would also describe what it takes for a person or entity to be a creditor.

1.4.2 Practical Benefits

Practically, the Author hopes that this research can provide an input for the government in defining the wordings of Article 2 of Law number 37 Year 2004. The Author realizes that a clearer wording in the form of a law or regulation is needed as an act of prevention of future practical problems that could arise from the multi-interpretation of the said provision, particularly regarding the requirements of 2 creditors for there to be a bankruptcy lawsuit.

Additionally, the Author would like the requirement of many employees as various creditors to be used as a foundation for a lawsuit or, if not, to be used as a defense against a bankruptcy litigation. The outcomes of this study could make or break a case, which is crucial because the law is vague and people will take advantage of it if it is not well defined.

1.5 Framework of Writing

This thesis is arranged into five main chapters that will ease the readers to understand the discussion of this thesis.

CHAPTER I: INTRODUCTION

These chapters consist of the introduction, which is further divided into five parts, which are background, research question, research purpose and research benefits.

CHAPTER II: LITERATURE REVIEW

In the literature review and case review chapter will be split into seven sections. To begin, the Author will examine the laws, regulations, and practices that govern bankruptcy law in Indonesia and Netherlands. Second, the Author will go through the meaning of bankruptcy as well as the legal prerequisites and compare it to the Netherland Bankruptcy law. Following that, the definition and regulation of bankruptcy will be based on Law number. 37 of 2004.

Third, the Author will outline the prerequisites for a business to declare bankrupt. Using laws, regulations and expert interpretations, each part is explained in detail. Fourth, the Author wishes to explain how the laws interact with one another. Next, the

Author will explain the process for Bankruptcy. Finally, the author will explain each case based on the facts, the judge's judgment, and the judge's opinion based on the judge's decision.

CHAPTER III: RESEARCH METHODS

Research methods are crucial in ensuring that a study is conducted with accuracy and validity. Legal research involves an inquiry into legal issues and the search for answers to those issues. There are two major types of legal research, which are empirical and normative legal research. Empirical research relies on the collection and analysis of data derived from observation or experimentation. In contrast, normative legal research is based on moral, ethical, and legal principles. This essay discusses research methods, including empirical research and normative legal research, and how they can be used to conduct a study.

CHAPTER IV: ANALYSIS AND RESEARCH RESULT

The fourth chapter will discuss the research problems along with its solution. This chapter will be divided into two further sub-chapters and each sub-chapter will answer the respective research

question as stipulated in chapter two of this thesis. The first sub-chapter will answer what are the required elements to file for bankruptcy and comparison to the Netherlands Bankruptcy law and the second sub-chapter will answer Whether the decision of judges on No.08/Pailit/2011/PN.Niaga.Medan and Decision No.501K/PDT.sus/2010 which result in different court decisions and weather they are contradictory towards the law.

CHAPTER V: CONCLUSION

In this last chapter, the Author will explain the conclusion as an answer to the issues that have been analyzed in chapter four. Aside from giving a conclusion, the Author will also give a suggested law interpretation and will also discuss some things the author has failed to do.