

## CHAPTER I INTRODUCTION

### 1.1 Background

The process of declaring for Bankruptcy relatively evolved from its classification of insolvency for traders and non-traders in the Indonesian Commerce Code (*Kitab Undang-Undang Hukum Dagang* or “**KUHD**”) into *faillissementsverordening* (only applicable to the European class) in 1905.<sup>1</sup> *Faillissementsverordening* applied as no other law on the determination of Bankruptcy’s were made although this western based-law was rarely practiced nor understood by native Indonesians.<sup>2</sup> Bankruptcy only became pertinent once again during the 1997 monetary crisis, compelling Indonesia to establish Government Regulation in Lieu of Law No. 1 of 1998 regarding the Amendment to the Law on Bankruptcy (“**GR1/1998**”) as Law.<sup>3</sup> Absent any explicit definition of Bankruptcy under said law, merely the circumstances arising out of it, Bankruptcy proceedings were both ineffective and inefficient.

Bankruptcy occurs when there is a Debtor with two or more Creditors whom fails to pay at least one due and matured debt, reasonably defining Bankruptcy as the current circumstance of the Debtor.<sup>4</sup> It was only explicitly defined in Article 1(1)

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<sup>1</sup> Book 3, Article 749-915, Indonesian Commercial Code (**KUHD**).

<sup>2</sup> Article 2, Transitory Provisions of the 1945 Constitution.

<sup>3</sup> Elucidation of Bankruptcy Law; Article 1, Law No.4 of 1998 on the Establishment of Government Regulation in Lieu of Law No. 1 of 1998 on the Amendment to the Law on Bankruptcy (**UU4/1998**); Government Regulation in Lieu of Law No. 1 of 1998 on the Amendment to the Law on Bankruptcy (**GR1/1998**).

<sup>4</sup> Sudikno Mertokusumo. *Penemuan Hukum, Sebuah Pengantar*, (Yogyakarta: Liberty, 2006) (**Sudikno**), p.80.

Law No. 37 of 2004 regarding Bankruptcy and Suspension of Obligation for Payment of Debts (or which hereinafter will be referred to as “**Bankruptcy Law**”), as a general confiscation of the bankrupt Debtor’s assets then managed and liquidated by a Curator under the supervision of a Judge.<sup>5</sup> This portrayed the consequential circumstances of said Debtor’s inability to pay whereas the previous definition became Bankruptcy’s legal standard or *das sollen* of in Article 2(1) Bankruptcy Law that must be proven based on *simple substantiation*.<sup>6</sup>

Corroborated with the acknowledgment of the Ministry of Law and Human Rights (“**MOLHR**”), and preceding rules and regulations, *i.e.*, Article 6(3) GR 1/1998, the scope of the *simple substantiation* element in Article 8(4) Bankruptcy Law is narrow.<sup>7</sup> That Bankruptcy shall be automatically granted when ‘*there are facts summarily proving that the facts or conditions of Article 2(1) have been met*.<sup>8</sup> Such is regardless of any differences in the value of the debt itself and relies on what is *prevalent and can be shown in short*.<sup>9</sup> Implying a *prima facie* standard of evidence that evades the opportunity for the presiding judge to decide for Bankruptcy based on the determining factors.<sup>10</sup> These factors includes nature of the debt, priority rights, contractual obligations equitable to money, if the petition is merely a debt collector

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<sup>5</sup> Art.1(1), Government Regulation in Lieu of Law No. 1 of 1998 regarding the Amendment to the Law on Bankruptcy.

<sup>6</sup> Article 2(1), 8(4), Bankruptcy Law.

<sup>7</sup> Article 31(3)(c),32, *Vienna Convention on the Law of Treaties*, 1155 UNTS 331 (1969) (**VCLT**); Badan Pembinaan Hukum Nasional, “Naskah Akademik Rancangan Undang-Undang Tentang Perubahan Atas Undang-Undang Nomor 37 tahun 2004 tentang Kepailitan dan Penundaan Kewajiban Pembayaran Utang, Kementerian Hukum dan Hak Asasi Manusia, Pengayoman, 2017, (**Naskah Akademik BPHN**), p.85.

<sup>8</sup> Article 2(1), 8(4), Bankruptcy Law.

<sup>9</sup> Art.8(4), Elucidation of Bankruptcy Law; Art.6(3), Elucidation to GR1/1998.

<sup>10</sup>Naskah Akademik BPHN, pp.90, 113; Sudikno, p.80.

call and the financial capabilities of the Debtor to repay the loan.<sup>11</sup> Rather, the *prima facie* standard of proof relies on the same forms of evidence as Article 1866 of the Indonesian Civil Code (“**KUHPer**”), *i.e.*, written evidence, evidence presented by witnesses, inferences, confessions and through oath.<sup>12</sup> Applied in the 5 authorized Commercial Courts of Jakarta, Medan, Semarang, Surabaya and Makassar pursuant to Presidential Decree No. 97 of 1999 (“**PD97/1999**”), the assessment of simple substantiation and declaration for Bankruptcy varies from the respective courts.<sup>13</sup>

The practice of simple proof test requires evidence to be proven without complication or further calculations *e.g.*, *PT. ESA Kertas Nusantara and Bank Danamon*.<sup>14</sup> The Court determined an examination of how should the loan be converted from US Dollar into IDR, *i.e.*, based on the currency rate of when the loan was first made or at the proceedings, would complicate the dispute and avoid a swift proceeding. Hence the Court’s decision to deny the petition for Bankruptcy.<sup>15</sup>

This abstract test also means that the debt must not be subject to contract defences requiring complicated legal proceedings to resolve, including agreements pertaining to the nature of the loan and the rule of law.<sup>16</sup> In Commercial Court Decision No. 125 PK/PDT.SUS.PAILIT/2015 (**PT HI Case**),<sup>17</sup> the dispute was on a

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<sup>11</sup> Nelson Kapoyos, “Konsep Pembuktian Sederhana Dalam Perkara Kepailitan, Kajian Putusan Nomor 125 PK/PDT.SUS.PAILIT/2015”, *Naskah*, Indonesia Lembaga Studi Universitas Indonesia, 2017, pp.332-333 (**Kapoyos**), p. 331.

<sup>12</sup> Art.199, Bankruptcy Law; Art.1865, Indonesian Civil Code (**KUHPer**).

<sup>13</sup> Presidential Decree No. 97 of 1999 on the Formation of Commercial Courts to the District Court of (PN) Ujung Padang, PN Medan, PN Surabaya, PN Semarang, dated 18 August 1999.

<sup>14</sup> *Teddy Thohir, Heru Sajito, Setiadhi Lukman, Joey H. Wihardja v. PT. Karabha Digdaya*, Supreme Court Decision No.14 K/N/2001.

<sup>15</sup> *PT. Bank Danamo Indonesia and PT. ESA Kertas Nusantara*, Commercial Court Decision No. 28/PAILIT/2009/PN.NIAGA.JKT.PST; Yunita Kadir, “*Pembuktian Sederhana Dalam Kepailitan*”, *Jurnal Ilmiah Mahasiswa Universitas Surabaya* Vol. 3 No. 1, 2014, p.21.

<sup>16</sup> Kapoyos, pp.346-347.

<sup>17</sup> *Ibid.*, p.337.

credit facility agreement between PT HI and Bank PI who then sold the rights over the cessie to BPPN and subsequently GPF, with the guarantee that the credit due could be claimed from the heir to the shareholders of PT HI.<sup>18</sup> The guarantees were subsequently relinquished [prior to] GPF with VIH Ltd., petitioned for PT HI's Bankruptcy after numerous notice of defaults and summons were made against them.<sup>19</sup> While the inheritors argued they were never notified of the cessie taking place, the Judicial Review adjudged that such determination and its compliance with Article 613 KUHPer would warrant a complicated assessment.<sup>20</sup> Such lack of assurance for a Creditor's ability to retrieve their owed and matured loans contradicts the intention of Bankruptcy law, i.e., simple proof test, to support national economic development. Hence, the rule on the simple proof assessment must be clearly drawn out.

Moreover, the simple test proof holds a blurry line when one considers its other functions as to prevent Creditor's abuse to use Bankruptcy proceedings as a form of debt collection when the company is properly operating and able to repay the debt.<sup>21</sup> In the 2012 landmark PT Telkomsel case, a petition was made against Telkomsel for unilaterally terminating its cooperation agreement with PT Prima Jaya Informatika ("PT PJI") for their failure to meet the number of minimum Premium Cards to be sold in a year.<sup>22</sup> PT Telkomsel is recognized for its contribution as

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<sup>18</sup> Art.1820, KUHPer.

<sup>19</sup> Kapoyos, pp.34-341.

<sup>20</sup> *Ibid.*, p.346.

<sup>21</sup> Elucidation to Bankruptcy Law; BPHN, p.85.

<sup>22</sup> *PT Telkomsel Selula v. PT Prima Jaya Informatika*, Supreme Court Decision No. 704/Pdt.Sus/2012 (**Telkomsel MA**), p.30; *PT Prima Jaya Informatika v. PT Telkomsel Selular*, Central Jakarta Commercial Court Decision No. 48/PAILIT/2012/PN.Niaga.Jkt. Pst (**Telkomsel District Case**).

Indonesia's finest asset with 35% of foreign investment that would reasonably infer their financial capability to repay the 5 billion rupiah loan. Acknowledging the matter of Bankruptcy proceedings to be automatically declared once the facts are proven, the determining factor of declaring a decision that would substantially loose the development of security and certainty of investments in Indonesia should have been considered since the case was first examined in the Commercial Court. As such, the Supreme Court voided PT Telkomsel's Bankruptcy decision.<sup>23</sup>

The ineffectiveness of the simple proof standard also stems from the inability for a Debtor's petition to pass when it is voluntary and done in good faith. In Supreme Court Decision No. 515K/Pdt.Sus.Pailit/2013, PT J and J Garment's petition was denied in spite of its inability to operate and repay the loans because the value of the loans needed further calculations by an auditor in line with employment wages and prevailing labour rights under law.<sup>24</sup> Thus revision on the simple substantiation test is needed.

Indonesia's standard of proof is different from practices of the United States despite both defining Bankruptcy as reorganizations of a business arising from their assets.<sup>25</sup> As evinced through the (1) forms of Bankruptcy, (2) prerequisites to petition for Bankruptcy, and (3) presumption of guilt shouldered, Indonesia holds a lower Bankruptcy standard than the US.<sup>26</sup>

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<sup>23</sup> *Telkomsel MA*, pp.40-41.

<sup>24</sup> *PT J and J Garment*, Supreme Court Decision No. 515K/Pdt.Sus.Pailit/2013, dated 30 December 2013 (**MA 515**), p.14.

<sup>25</sup> Article 1(1), Bankruptcy Law; Chapter 11 United States Code (**USC**) (**Ch. 11**).

<sup>26</sup> 707(b), Ch. 11.



*First*, the two states distinguish the types of Bankruptcy. The United States differentiates Bankruptcy into 6 forms, with 4 forms of business reorganizations for government agencies, businesses actively operating, specific for family farmers/fisherman, and individuals.<sup>27</sup> The most frequent form of Bankruptcy petitioned is Chapter 11 for business actively operating because the law is meant to protect financially troubled businesses to being financially stable after they are able to repay the loan owed following a repayment plan.<sup>28</sup> The continued existence can be guaranteed within the Reorganization Plan as practiced in the California Electric Utility PG&E Corp as a form of reconciling the dispute with the victims.<sup>29</sup>

Contrastingly, Indonesian Bankruptcy Law integrates all forms of bankruptcies of companies or individuals as one term that assumes the companies' inability to pay.<sup>30</sup> Only the curator assigned to allocate the assets of the Debtor post-Bankruptcy declaration can propose for the Debtor's business to continue.<sup>31</sup> Debtor's intending to actively operate while settling a debt can resort to requesting a suspension of their payment obligations ("PKPU") by way of a composition plan before the Commercial Court rather than filing for bankruptcy.<sup>32</sup>

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<sup>27</sup> §2075, Title 28, USC; Baker McKenzie, "Global Restructuring & Insolvency Guide", <[https://www.bakermckenzie.com/-/media/files/expertise/banking-finance/bk\\_globalrestructuringinsolvencyguide\\_20170307.pdf?la=en](https://www.bakermckenzie.com/-/media/files/expertise/banking-finance/bk_globalrestructuringinsolvencyguide_20170307.pdf?la=en)> accessed April 2020, p.451.

<sup>28</sup> United States Courts, "About Bankruptcy", <<https://www.uscourts.gov/services-forms/Bankruptcy>> accessed April 2020; Jones Day, "The Year in Bankruptcy 2019", Newsletter <<https://www.jonesday.com/en/insights/2020/02/the-year-in-Bankruptcy-2019>> accessed February 2020.

<sup>29</sup> Article 6.3, *PG&E Corporation & Pacific Gas and Electronic Company*, United States Bankruptcy Court Northern District of California San Francisco Division, Bankruptcy Case No. 19-30088 (DM), pp.46-47.

<sup>30</sup> §1, *Elucidation to Bankruptcy Law*, p.103.

<sup>31</sup> Article 104(1), *Bankruptcy Law*.

<sup>32</sup> Article 222-223, *Bankruptcy Law*.

*Second*, regulated in Chapter 11 of the United States Code (“**Chapter 11**”), the prerequisites to petition for Bankruptcy differs based on who is filing the petition, the Creditor or Debtor. In the 2019 opioid case, the Debtor, Insys Therapeutics Inc. and Purdue Pharma L.P jointly submitted a Reorganization Plan to compensate all victims.<sup>33</sup> This would require the Debtor to gain prior approval of credit counselling based on their (1) assets and liabilities; (2) current income and expenditure; (3) executory contracts and unexpired leases; and (4) financial affairs.<sup>34</sup> However, this thorough assessment to ensure an accurate bankruptcy decision is not likewise emulated within Indonesia’s Bankruptcy Law but rather declares bankruptcy automatically based on a prima facie assessment. To sufficiently prove (1) there are two or more Creditors, in which the Debtor (2) fails to pay at least one debt that have matured and remains outstanding.<sup>35</sup> The Debtor holds no authority over the formulation of the plan as such is vested on the Curator together with the Creditors per Article 102 Bankruptcy Law.<sup>36</sup> Any means for reconciliation is not offered as a form of Bankruptcy declaration, but merely a right that only the Debtor may exhaust after the declaration and before the Creditors committee conducts the verification of claims with the Curator.<sup>37</sup> Hence, the simple standard can be deemed as an accept-first, think later mode of operation.

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<sup>33</sup> Chapter XII, *Purdue Pharma L.P., et al.*, United States Bankruptcy Court Southern District of New York, Bankruptcy Case No. 19-23649 (RDD), p.49; National Banker. Rev. Commission, Report of the National Bankruptcy Review Commission, 1997, pp. 318-19.

<sup>34</sup> §§301,303, Chapter 11.

<sup>35</sup> Article 2(1), 8(4), Bankruptcy Law.

<sup>36</sup> Article 98-100,113, Bankruptcy Law.

<sup>37</sup> Article 144-145, Bankruptcy Law.

*Third*, since its promulgation, United States Courts have already placed a presumption of abuse or guilt onto the Debtor as to protect Creditors from Debtor's avoiding payment. This is different from Indonesia's simple substantiation test where Debtors are given the presumption of innocence and in fact acknowledged to be protected from any Creditor meaning to get their loans back.<sup>38</sup>

For instance in the *Alm. Andi Sutanto Heirs, Alm. Gunawan Sutanto Heir (Njoo Jun Tjauw) ("Shareholders to PT HI") v. Greenfinch Premier Fund ("GPF")*, GPF attempted to retrieve its matured loan from PT HI. This was based on a investment credit facility agreement via a cessie from the initial Creditor, Bank PI. The inherited shareholders to PT HI argued that since they relinquished their rights to guarantee any credits and were only informed of the cessie taking place when their debt was summoned, they are not personally obliged to pay back the loan given.<sup>39</sup> The Court seconded this argument and denied the petition for Bankruptcy as it would require them to assess the rule of law on when a cessie should be properly notified. The Debtor knew of the *cessie* taking place regardless of the period to notify despite the deeds and agreements proving the nominal and the structure of the *cessie*. Indirectly, the inherited Debtors were able to avoid paying the loan due to the Creditor due to the simple standard proof.

With the current development of society, it becomes more challenging to simply prove the fulfilments of the elements of Bankruptcy where any association with fees, cessies and discussions on the procedural legalities of law would outrightly

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<sup>38</sup> Elucidation to Bankruptcy Law, p.104.

<sup>39</sup> *GPF v. PT HI*, Commercial Court Case No. 125 PK/PDT.SUS.PAILIT/2015.



reject the petition.<sup>40</sup> Further comparisons to the United States makes it clear the differences of assessing bankruptcies and the repayment of the loan or liabilities owed to Creditors with Indonesia. Thus this empirical analysis becomes necessary as guidance for Creditors that their loans can be secured in the event of Bankruptcy proceedings in Indonesia.

## **1.2 Research Questions**

In line with the aforementioned, the following research questions are formulated to guide the analysis of this research to reach an objective conclusion.

1. How can it be simply proven that the elements for Bankruptcy under Bankruptcy Law are sufficiently met?
2. How does Indonesia's Bankruptcy declaration compare to that of the United States?

## **1.3 Purpose of Research**

The formulation of the research questions is done to fulfill the purpose of conducting this research, mainly that:

1. To understand factors that can fulfill the simple proof standard for Bankruptcy declarations.
2. To understand whether Indonesia's Bankruptcy law is effective in comparison to practices of other developed countries

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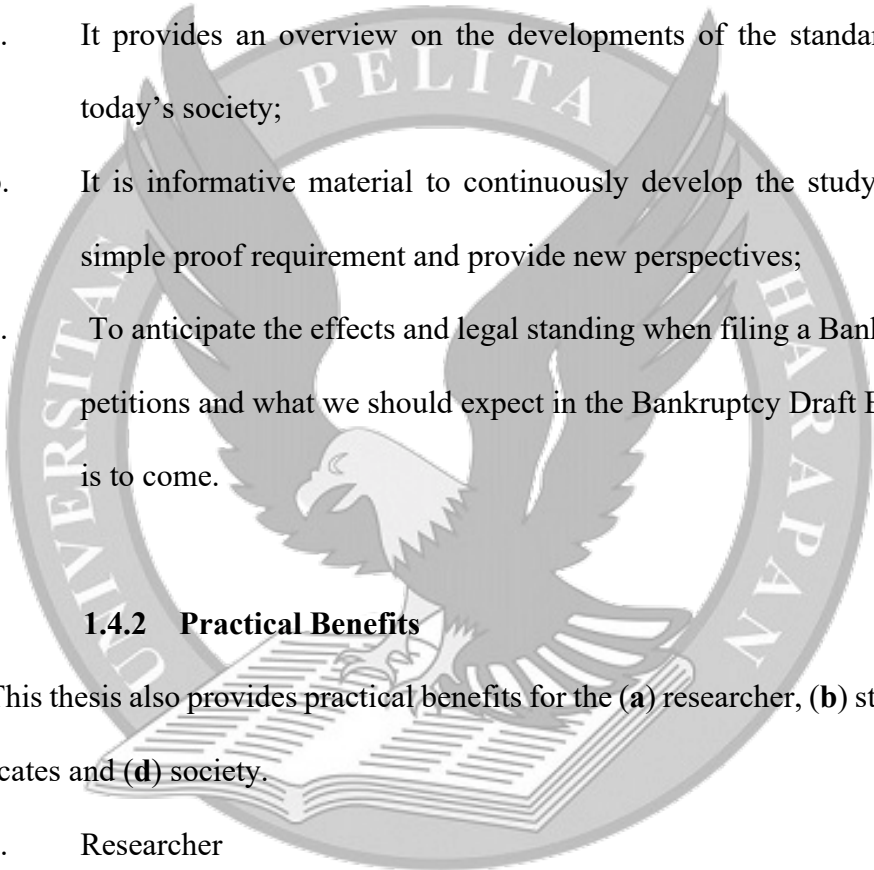
<sup>40</sup> Setiawan R., & Satrio J., *Legal explanations of cessie*, (Jakarta: PT Gramedia, 2010) (**Setiawan**).

## 1.4 Benefits of Research

This research is conducted for its (1) theoretical and (2) practical benefits.

### 1.4.1 Theoretical Benefits

This research is useful and beneficial for the understanding of the theory of simple proof requirement because:

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- a. It provides an overview on the developments of the standard with today's society;
  - b. It is informative material to continuously develop the study of the simple proof requirement and provide new perspectives;
  - c. To anticipate the effects and legal standing when filing a Bankruptcy petitions and what we should expect in the Bankruptcy Draft Bill that is to come.

### 1.4.2 Practical Benefits

This thesis also provides practical benefits for the (a) researcher, (b) students, (c) advocates and (d) society.

- a. Researcher

As a prerequisite to achieve her Bachelor of Law degree from Universitas Pelita Harapan Law School and to create an analytical review.

- b. Students

To increase knowledge for the development of the simple proof assessment and its effectiveness in practice.

c. Advocates

To provide general picture on the development of the simple proof assessment that can be used to strengthen legal arguments when filing for or arguing against Bankruptcy petitions in commercial courts.

d. Society

Providing additional insight and as a reference for other researchers in conducting their respective studies of developing the simple proof requirement under Bankruptcy Law. It can also be used as a proposed guarantee for Creditors when providing loans and investments to companies in Indonesia.

### **1.5 Systematic Writing**

The Author divides this Thesis into five main chapters along with a brief summary, as follows:

#### **CHAPTER I. INTRODUCTION**

The first chapter of this Thesis to elucidate the background of the analysis-to-be-made, the research questions, research purpose, research benefits and the systematic writing.

#### **CHAPTER II. LITERATURE REVIEW**

The second chapter is a literature review containing the theoretical and conceptual framework with regard to the research questions made in Chapter I.

### **CHAPTER III. RESEARCH METHODOLOGY**

Chapter three contains the type and approach of research, the procedure of material research needed, how the analysis will be characterized and what obstacles the Author faced in conducting research and how they were able to overcome it.

### **CHAPTER IV. DISCUSSION AND ANALYSIS**

The fourth chapter will contain the analysis of the two research questions made. *first*, how the elements for Bankruptcy under Bankruptcy Law are sufficiently met, and *second*, a comparison of Indonesia's Bankruptcy declaration with the US standard for declaration.

### **CHAPTER V. CONCLUSION AND RECOMMENDATION**

The final chapter will contain the conclusions of the foregoing analysis and the Author's recommendations in such regard to solve the problems that lead to the purpose of this Thesis.