

CHAPTER I

INTRODUCTION

1.1 Background

Due to the rapid economic and trade development that happen in today's life, it leads to increasing number of businesses conducted by both individuals and business entities to establish companies. As a developing country, Indonesia has a strong desire to carry out the development, especially in the economic sector, however, this desire is often not supported by the adequacy of domestic sources of financing so that the inability to provide sources of financing must be found from sources outside the country. In pursuing these sources of funds, Indonesian government has issued many policies in the economic and business sectors in an effort to reduce and remove various types of regulations that limit and minimize excessive government interference in the economic and business fields in order to create a business climate that is conducive and efficient.¹

In order to achieve the goals of a Limited Liability Company (“LLC”), lending and borrowing activities are very common. The existing trend shows that the proportion of companies that use loans is getting bigger. In fact, it can be seen that there are fewer companies that do not use capital from third parties or capital from outside the company. One of the main motives for a business entity to borrow or use capital from third parties

¹ Amrizal, *Hukum Bisnis, Risalah Teori dan Praktek*, (Jakarta: Djambatan, 1999), p. 1.

is the desire to increase the profits and expand the business that can be obtained, both in terms of quantity and time. On the other hand, one of the main motives of Creditors or lenders willing to provide loans is the desire to obtain remuneration by providing the loan, such as interest. From the start, both borrowers and lenders are fully aware that the activities they carry out will have risks. In fact, the amount of risk that may arise is the main consideration in determining the amount of remuneration for a loan. The thing is, the greater the risk of loss that may occur, the greater the rate of remuneration for a loan. In order to calculate the risk, usually the borrower reviews the performance of the company before it arrives until after the loan is disbursed. In many cases, Creditors do not make the size of the collateral the only consideration before making a loan, but rather the prospects for the development of the company concerned. In business practice, considerations based on the prospect of a company are increasingly prominent and this can be shown by the increasing number of companies operating today that have loan capital that is far greater than the amount of their own capital.²

Nowadays, it is difficult to find an entrepreneur who does not use debt facilities which can be loans or credit to increase their business capital in the form of short-term, medium-term debt and long-term debt. Debt is an inseparable factor in the world of economy, business and trade. Capital or debt lending can be obtained through individuals or financial institutions.

² Sri Rejeki Hartono, *Kapita Selektu Hukum Perusahaan*, (Bandung: Mandar Maju, 2002), p. 1-2.

The monetary crisis in 1997 that occurred in Indonesia which originated in the problem the exchange rate of the rupiah has seriously weakened and even killed the financing capacity of the business world. The need for imported raw materials, especially for business activities that are substitutive in nature, is seriously disrupted. What is experienced by debtors at that time is a condition that cannot be predicted when the credit agreement is signed or the debt securities are issued, namely the unexpected weakening of the rupiah exchange rate. As a result of the unforeseen or unpredictable situation, the Debtor also cannot bear it. Fulfillment of payment obligations is disrupted because the required foreign currency must be purchased in rupiah, whose exchange rate has depreciated greatly in sequence, the continuity of production is threatened and even the activities of supplying complementary materials from domestic sub-contract sources are also disrupted. For businesses that are import substitution, what can then be seen is the scarcity of production in the market. Meanwhile, for export-oriented businesses there are no more products that can be exported, which in turn weakens reserves and the ability to pay for imported goods or materials.³

The series of conditions above illustrates how the monetary crisis has triggered economic difficulties and in turn has penetrated into the social sphere. The loss of jobs, the decline in people's purchasing power, which is worsened by the increase in the price of goods, have further impaired social

³ Rudhy A. Lontoh, Deny Kailimang, Benny Ponto, *Penyelesaian Utang Piutang melalui Kepailitan atau Penundaan Kewajiban Pembayaran Hutang*, (Bandung: Alumni, 2001), p. 98.

conditions.⁴ It absolutely has an unfavorable impact to the business world that causing huge difficulties in settling debts to continue its activities.

Bankruptcy issue settlement serves as a tool to filter out the business world from inefficient companies. In turn, the policy of solving the debt and credit problems is expected to provide confidence and security to investors, both national and foreign, to invest or develop businesses in Indonesia. On the other hand, it is also expected that the settlement of the debt problem could be carried out quickly, fairly, openly, efficiently, and effectively and professionally, so that the national business world could immediately operate normally, and in turn economic activities would resume. Thus, the social pressure caused by the loss of many jobs will be reduced.⁵ Theoretically, as in general accounts payable, debtors who have problems with the ability to meet their obligations to pay debts, take various alternative solutions. They can negotiate a debt write-off request, either partially or completely. They can also sell part of their assets or even their business, they can also convert the loan into equity participation, in addition to the possibility that the debtor can also negotiate a request for postponement of debt payment obligations as a final way, then a solution will be taken through the bankruptcy process if the peace process is not achieved.⁶

⁴ Ibid, p. 99.

⁵ Ibid, p. 181.

⁶ Ibid, p. 101.

The party who owns and provides loan funds to those who need funds or lenders is called a Creditor. Whereas those who lack funds so that they borrow funds from creditors to develop their business or are in debt are called Debtors.⁷ The debtor must fulfill the agreement or repay the loan funds provided by the creditor at the time specified and agreed upon by the parties in the agreement. If at the specified time the debtor cannot repay the loan provided by the creditor, the debtor can submit a request to postpone the debt payment obligation. The situation of being unable to pay is usually caused by a financial distress condition from the debtor's business that has been in decline.⁸ However, if the debtor continues to experience difficulties and cannot repay his debts or known as bankruptcy, the debtor may submit a request for bankruptcy to the creditor, or other parties to provide the bankruptcy status to the debtor.

Regarding bankruptcy dispute settlement, the arrangement can be found in *Faillissements Verordening Stb.* 1905 No. 217 *jo Stb.* 1906 No. 348 which has been amended by Government Regulation in Lieu of Law No. 1 of 1998 concerning Amendments to the Law on Bankruptcy (***Faillissements Verordening***) which was later stipulated into law by Law No. 4 of 1998 (**“Bankruptcy Law”**). With the enactment of the Bankruptcy Law, undesirable practices are likely to occur. Certain parties can request a company to be declared bankrupt with the main objective not only to protect

⁷ Abdulkadir Muhammad, *Hukum Perdata Indonesia Cet-4*, (Bandung: Citra Aditya Bakti, 2010), p. 230.

⁸ M. Hadi Shubhan, *Hukum Kepailitan (Prinsip, Norma, dan Praktik di Peradilan)*, (Jakarta: Kencana Prenada Media Group, 2008), p. 1.

the receivables it provides, but furthermore, to eliminate its competitors from the market. In general, the revised Bankruptcy Law still identifies individual bankruptcy as a private legal subject with the bankruptcy of a legal entity.⁹

In terms of the various shortcomings and weaknesses of the regulation regarding material aspect, it was no longer in accordance with the needs and legal developments in society, the Government made an amendment from Law No. 1 of 1998 concerning Bankruptcy to Law No. 37 of 2004 concerning Bankruptcy and Suspension of Obligation for Payment of Debts (“UUK-PKPU”). UUK-PKPU has been created with a purpose to resolve bankruptcy disputes that can arise in Indonesia’s business world with quick, fair, open, effective, and professional way.

There are several factors needed for regulation regarding bankruptcy and suspension of debt payments, namely:

1. To avoid the seizure of property the debtor, if in the same time there are some creditors who collect receivables from debtors;
2. To avoid any collateral material creditor rights holders who are claiming rights by selling the debtor’s property without regard to the interest of the debtor or other creditors;
3. To avoid any fraud committed by one of the creditors or the debtor itself. For example, the debtor seeks to provide benefits to one of

⁹ Maya S. Karundeng, *Akibat Hukum Terhadap Penjatuhan Pailit Pada Perseroan Terbatas*, *Lex et Societatis*, Vol 3, Number 4, May 2015, p. 185

several specific creditors so that the other creditors are impaired, or any fraudulent act of the debtor to get all of their wealth with the intentions to relinquish its responsibility towards the creditors.¹⁰

A process in which a debtor is declared bankrupt by the Commercial Court because it cannot pay its debts is called bankruptcy. The authorized of Commercial Court will declare the debtor is bankrupt if it is proven to meet the requirements to be declared bankrupt as referred to in Article 2 Paragraph (1) of UUK-PKPU, which are:¹¹

1. There are two or more creditors. Creditors are people who have receivables due to agreements or laws that can be collected in court. "Creditors" here include concurrent creditors, separatist creditors and preferred creditors.
2. There are debts that are past due and are collectible. This means the obligation to pay debts that have matured, either because they have been agreed upon, because of the accelerated collection time as agreed, due to the imposition of sanctions or fines by the competent authority, or because of a court, arbitrator, or arbitral tribunal decision.

Bankruptcy statements by the Commercial Court Judge Panel have resulted in debtors losing their civil rights to control and manage assets that have been placed in public seizure status, under the control of the curator

¹⁰ Arrisman, *Bankruptcy Law and Company's Responsibility Towards Debt Payment In Indonesia*, Scientific Research Journal (SCIRJ), Vol V, Issue II, February 2017, p. 39.

¹¹ Article 2 paragraph (1) of UUK-PKPU.

appointed by the Commercial Court Judges and under the supervision of the supervising judge.¹² Thus, the assets owned by the Debtor are confiscated and will be used to pay off debts the Debtor has against the creditors. This shows that if a Debtor is declared bankrupt by the court, he will carry out the obligations and legal consequences of a bankrupt Debtor who obviously does not have the ability to pay off his debts even though in fact the debtor is still in a state of being able to pay off his debts if the requirements of Bankruptcy only implies the need for 2 debts that are due and can be billed and simply proven as the main condition for Bankruptcy without providing further requirements that are used to determine the ability to pay debts owned by the debtor.

After the bankruptcy decision, they will conduct a verification meeting (matching debts) which will determine the consideration and order of rights of each creditor. With the court's decision on bankruptcy statements, the creditors can apply for a group consisting of bills on their receivables from the curator.¹³ The curator determines bankruptcy assets, which will be used as money to pay all debts of bankrupt debtors. Then the curator determines the level of creditor that can be paid by the bankruptcy assets and make the distribution in accordance with the Planned List of Creditors who will receive payments from bankrupt assets. The Bankruptcy Law determines the priority order of the right to obtain credit settlement of

¹² Imran Nating, *Peranan dan Tanggung Jawab Kurator dalam Pengurusan dan Pemberesan Harta Pailit*, (Jakarta: Raja Grafindo Persada, 2005), p. 44.

¹³ Gatot Supramono, *Perjanjian Utang Piutang*, (Jakarta: Kencana Prenada Media Group, 2013), p. 180.

creditors. The position of the creditors is determined based on the type and nature of the accounts of each creditor which is divided into two groups of creditors, namely the Preferred Creditor (*Kreditor Preferen*), the Secured Creditor, and the Privilege Right Creditor and the other group is Unsecured Creditor (*Kreditor Konkuren*).¹⁴

Bankruptcy decisions by the court do not result in the debtor losing ability to carry out legal actions (*volkomen handelingsbevoegh*) in general, but only losing power or authority to administer and transfer the debtor's assets. Thus, the debtor can still carry out legal actions, such as getting married, making a marriage agreement, receiving a grant, acting as a proxy, and representing other parties. However, bankruptcy results in Debtors declared bankrupt losing all "civil rights" to control and manage assets that have been entered into bankrupt assets.¹⁵ Since the declaration of bankruptcy statement was announced, the management and transfer of debtor's assets became the authority of the curator. Lawsuit relating to the rights and obligations regarding the assets of the bankrupt debtor must be filed against or by the curator. In other words, a lawsuit regarding debtor's assets is no longer submitted to the debtor but must be submitted to the curator. Likewise, the claim against another party is no longer filed by the debtor but by the curator.¹⁶

¹⁴ Sutan Remy Sjahdeni, *Sejarah, Asas, dan Teori Hukum Kepailitan*, cet-1, (Jakarta: Prenadamedia Group, 2016), p. 13.

¹⁵ Ahmad Yani and Gunawan Wijaya, *Kepailitan*, (Jakarta: PT. Raja Grafindo Persada, 1999), p. 30.

¹⁶ Erlina, *Akibat Hukum Kepailitan Perseroan Terbatas*, *Jurisprudentie*, Vol 4, Number 2, 2017, p. 110.

Article 13 paragraph (1) of the UUK-PKPU stipulates that the decision to declare bankruptcy must be appointed:¹⁷

- (1) A Supervisory Judge appointed by the Court Judge, and;
- (2) Curator.

Before the enactment of the Perpu No. 1 of 1998, only the Curator of the Heritage Center (*Balai Harta Peninggalan*) was only the one who became the Curator. It has become different since the enactment of Law No. 4 of 1998, which can act as a curator besides the Heritage Center is also another party (Article 67 A paragraph (1) of the UUK-PKPU). Then based on Article 69 paragraph (1) of the UUK-PKPU states that: "The task of the curator is to carry out the management and / or settlement of bankruptcy assets". Thus it can be seen that the curator is one of the parties who plays a role in a bankruptcy case process.

The Curator assumes the trust of the Court, Debtors, Creditors and Shareholders to carry out their duties as best as possible in the interests of these parties. In other words, the Curator is responsible to the court. In relation to Creditors, in the opinion of Andrew Key, the Curator is not responsible to the Creditors individually, but to the Creditors as a whole.¹⁸

In the bankruptcy of a LLC, whether the company operates or not after the bankruptcy decision is pronounced depends on the curator's perspective on the company's business prospects in the future. This is

¹⁷ Article 13 Paragraph (1) of UUK-PKPU.

¹⁸ Sutan Remy Sjahdeini, *Hukum Kepailitan; Memahami Faillissementverordening Juncto Undang-Undang No.4 Tahun 1998*, (Jakarta: Pustaka Utama Grafiti, 2002), p. 225.

possible because based on the provisions in Article 104 of UUK-PKPU which states:¹⁹

(1) On the basis of the approval of the temporary Creditors Committee, the Curator may continue the business of the Debtor who has been declared as bankrupt even if a cassation or judicial review to the Supreme Court is filed from the decision of the declaration of bankruptcy.

(2) If Creditors Committee is not appointed in the decision of the declaration of bankruptcy, the approval for the continuation of the business as referred to in paragraph (1) shall be obtained from the Supervisory Judge.

Based on the article above, it can be concluded that the bankruptcy of the legal entity of LLC in Indonesia does not automatically make the company lose its right to manage and control the company's assets because the bankruptcy of a limited liability company according to Indonesian law does not cause the company's operations to stop. Nevertheless, in the event that the company that is being continued does not have good prospects, the supervisory judge will decide to stop the operation of the limited liability company at the request of a creditor. After the company was terminated, the Curator began selling assets without requiring the assistance or approval of the bankrupt debtor. However, this article does not apply if at the accounts

¹⁹ Article 104 of UUK-PKPU.

receivable matching meeting no settlement is offered or if the proposed reconciliation plan is not accepted or the ratification of the reconciliation is rejected, thus, the LLC that declared bankrupt is in a state of insolvency.²⁰

Even though the conditions as above have been fulfilled, whether a LLC continues to operate or not, it still has to obtain approval from the Supervisory Judge in a meeting attended by Curators, Debtors and Creditors, specially held to discuss the creditor's proposal as referred to in Article 179 paragraph (1) and paragraph (2), Article 180 paragraph (1), Article 183 of UUK & PKPU.

With the issuance of the recent UUK-PKPU, the regulation regarding the existence of a legal subject that is declared bankrupt, especially the existence of a LLC that has been declared bankrupt need to be added in more detail and specific. In the process of management of bankruptcy estates, it is possible that there will be obstacles that cause losses to certain parties due to legal uncertainty. In the event of negligence and errors in the management of the bankruptcy estate, it can cause problems such as the submission of an application for the re-opening of the bankruptcy which has long been completed through other lawsuits based on other related issues as stipulated in Article 3 paragraph (1) of UUK-PKPU. In addition, the limited nature of its legal entity, in the sense that the company's assets are separate from the assets of the management parties, in practice shows that the company is often used as a tool to cover broader

²⁰ Maya S. Karundeng, *Op. Cit.*, p. 188.

liability, which should be subject to, and be borne by the parties that have issued it. Under the guise of the limited nature of responsibility, we often find situations where the company is used as a shield against the company's Directors who do not have good intentions. Through the implementation of limited liability company activities, with limited liability, the assets of the Board of Directors with bad intentions seem untouched.²¹

In the bankruptcy case of PT. Jaya Nur Sukses (“JNS”) Jakarta Commercial Court Decision No. 18/PDT.SUS-GUGATAN LAIN-LAIN/2019/PN NIAGA.JKT.PST., judges decided to re-open the case. This case began when JNS was declared bankrupt in December 26th, 2012 based on the Decision of the Jakarta Commercial Court No. 44/PKPU/2012/PN.NIAGA.JKT.PST. After the bankruptcy decision, JNS filed an appeal, however, the application was rejected based on Supreme Court Decision No. 484/K/PDT.SUS-PAILIT/2013 in October 22nd, 2013. After the appeal was rejected, JNS submitted a Judicial Review and it was still rejected based on Supreme Court Decision No. 51/PK/PDT.SUS-PAILIT/2014 in August 14th, 2014. Furthermore, the Council of Judges appointed the Curators. After the curators made proportional payments to 85 concurrent creditors, there were still other insufficient claims of other concurrent creditors for the sale of JNS assets, namely, PT. Hutama Karya (“HK”) PT. Bina Mandiri Ksatria Sakti (“BMKS”).

²¹ *Ibid.*

Afterward, the curators announced the end of bankruptcy of JNS which was announced in two newspapers, namely *Republika* and *Rakyat Merdeka* edition dated September 4th 2013. On the same day, the termination of the bankruptcy has also been recorded in the State Gazette of the Republic of Indonesia as proof of payment of State Gazette No. 251/BN/9:007776/BN/2013. Then, the curators only notified JNS as the bankruptcy debtor related to the termination of the bankruptcy of JNS, the curators should have carried out the act of dissolving the JNS's legal entity, but then, the curators filed the dissolution of JNS to the Ministry of Law and Human Rights (“KEMENKUMHAM”) as stated in the Letter of Dissolution No. AHU-AH.01.10-0003116 in May 9th, 2017. Since there was an absence that should be carried out by the curators regarding the announcement of dissolution of JNS's legal entity, JNS (in bankrupt) held a general meeting of shareholders (“GMS”) in April 11th, 2017 by making amendments to Deed No. 250. At the GMS, JNS re-appointed the organization and amended the Articles of Association by depositing the authorized capital, issued capital and paid-up capital that had been received and registered by KEMENKUMHAM in the Letter of Acceptance of Notification of Changes to Company Data from the Director General of AHU, KEMENKUMHAM RI No. AHU-AH.01.03-0127253 dated 13 April 2017. Furthermore, based on the acts that carried out by JNS, in April 24th, 2019, HK then filed a lawsuit against JNS and the Curators and requested to re-open the case which has been granted based on Jakarta Commercial

Court Decision No. 18/PDT.SUS-GUGATAN LAIN-LAIN/ 2019/PN NIAGA.JKT.PST.²²

From the explanation of the bankruptcy case between JNS and HK, in the effort of resolving bankruptcy disputes in Indonesia, based on "UUK-PKPU", there are processes and procedures that must be carried out by debtors who have been declared bankrupt by the commercial court. However, based on the facts in bankruptcy dispute settlement, there are many negligence or loopholes that occur in the process and procedure for resolving bankruptcy disputes that can cause the bankruptcy cases to be re-opened. Therefore, based on the background above, the existence of gap between *das sollen* (what is expected or *ius constituendum*) and *das sein* (fact / reality or *ius consitutum*), the Author is interested to analyze one of bankruptcy cases regarding the re-opening bankruptcy case between HK and JNS.

1.2 Formulation of Issues

In regard to the background of this thesis, the Author will be discussing and analyzing about a bankruptcy case decision with several issues that lead the case to be re-opened. The Author comes up with two formulation of issues, namely:

1. How is the legal actions of PT. JNS (in bankruptcy) in conflict with its legal standing being regulated during the bankruptcy

²² Jakarta Commercial Court Decision No. 18/PDT.SUS-GUGATAN LAIN-LAIN/ 2019/PN NIAGA.JKT.PST.

dispute settlement process in accordance with Law No. 37 Year 2004 Concerning Bankruptcy and Suspension of Obligation for Payment of Debts (“UUK-PKPU”) and Law No. 40 Year 2007 Concerning Limited Liability Company (“UUPT”)?

2. Whether the judge’s conviction to decide to re-open the Bankruptcy Case of PT. Jaya Nur Sukses has been in accordance with Law No. 37 Year 2004 Concerning Bankruptcy and Suspension of Obligation for Payment of Debts (“UUK-PKPU”)?

1.3 Research Objectives

The objectives of the Author writing this research are to answer the formulation of issues, namely:

1. To analyze the chance of re-opening bankruptcy cases in Indonesia.
2. To examine the obstacles in the settlement of bankruptcy disputes.
3. To find out the possibility of civil law violations that can occur in the settlement of bankruptcy disputes.

1.4 Benefits of the Research

The benefits of this research include the following:

1.4.1 Theoretical Benefits

Theoretical benefit will deliver the benefits of a legal research to the development of science in the field of law. The Author is hoping that the results of this research can contribute ideas in the field of law in terms of the loopholes in the process of re-opening bankruptcy dispute in Indonesia.

1.4.2 Practical Benefits

The practical benefits include the benefits of a legal research to the problem solving in the field of law or the implementation of certain efforts. The Author is hoping that this research will be an input, especially for businessmen to understand legal issues related to bankruptcy. Also, the Author believes that this thesis will provide a better understanding how Bankruptcy Law works in Indonesia.

1.5 Systematics of Writing

To ease the reader of this paper, the Author will describe the chapters briefly in order to provide a clearer picture of the discussion:

CHAPTER I : INTRODUCTION

Chapter I contains the background of the topic, the formulation of issues that will be discussed in Chapter IV, research objectives, benefits of the research, and systematics of writing.

CHAPTER II : LITERATURE REVIEW

Chapter II contains relevant laws, regulations, and theories that become the basis or reference in

conducting this research, and as a reference for the Author in conducting this research.

CHAPTER III : RESEARCH METHODS

Chapter III contains the relevant research methods that will be used by the Author in conducting this research. It consists of, types of research methods, types of research, procedures of obtaining the research materials and legal materials, along with the research technique.

CHAPTER IV : DISCUSSION AND ANALYSIS

In Chapter IV, the Author will analyze and discuss the answer of three formulation of issues that are stated in Chapter I. This will be carried out in accordance with the relevant theories elaborated in Chapter II, research methods defined in Chapter III as well as fundamental laws and regulations.

CHAPTER V : CONCLUSION AND RECOMMENDATIONS

Chapter V is the last chapter of this thesis. The Author will conclude all the discussion in Chapter IV to answer the problem formulations. Further, the Author will provide suggestions or recommendations based on the relevant issues and the analysis conducted in this research.