

PARTY WHO HAS THE AUTHORITY TO FILE A BANKRUPT
PETITION OVER STATE OWNED ENTERPRISES

(Case Study Decision Number 73/PAILIT/2010/PN.Jkt.Pst)

LEGAL CASE STUDY



By :

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Student ID Number : 08410061

Department : International Business Law

INTERNATIONAL PROGRAM

FACULTY OF LAW

ISLAMIC UNIVERSITY OF INDONESIA

YOGYAKARTA

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Presented as Partial Fulfillment of the Requirements to Obtain a Bachelor Degree
of Law in the International Business Law Department, Faculty of Law,
International Program, Islamic University of Indonesia



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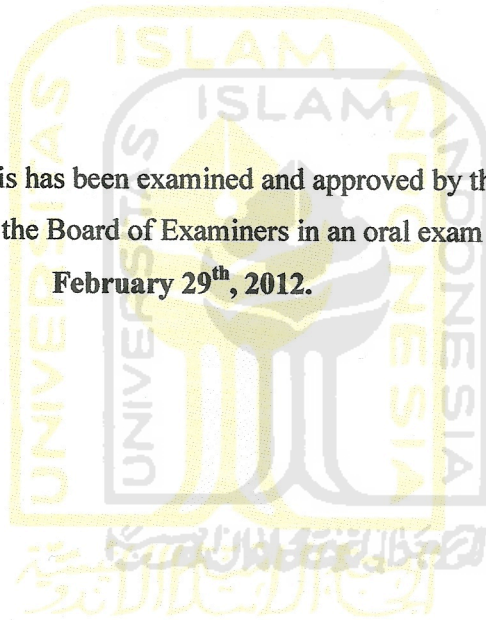
2012

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

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This bachelor degree thesis has been examined and approved by the advisor to be submitted in the front of the Board of Examiners in an oral exam on the date of **February 29th, 2012.**



Yogyakarta, January 31st, 2012
Content Advisor,

A handwritten signature in black ink, appearing to read 'Siti Anisah', is written over the text of the content advisor's name.

(Dr. Siti Anisah, SH., M.Hum.)

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February 29th, 2012.

Yogyakarta, January 31st, 2012
Language Advisor,



(Herman Felani, SS. MA.)



LEGAL CASE STUDY

**INTERNATIONAL LAW PROTECTION FOR REFUGEES IN
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Tim Penguji

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2. Anggota : Dr. Siti Anisah, SH., M.Hum.
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SURAT PERNYATAAN

ORISINALITAS KARYA TULIS ILMIAH BERUPA TUGAS AKHIR MAHASISWA
FAKULTAS HUKUM UNIVERSITAS ISLAM INDONESIA

Bismillahirrahman nirrohim

Yang bertanda tangan di bawah ini, saya:

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adalah benar-benar mahasiswa Fakultas Hukum Universitas Islam Indonesia Yogyakarta yang telah melakukan penulisan Karya Tulis Ilmiah (Tugas Akhir) berupa Skripsi/Legal Memorandum/Studi Kasus Hukum dengan judul :

PARTY WHO HAS THE AUTHORITY TO FILE A BANKRUPT PETITION OVER STATE

OWNED ENTERPRISES (Case Study Decision Number 73/PAILIT/2010/PN.Jkt.Pst)

Karya ilmiah ini akan saya ajukan kepada Tim Penguji dalam Ujian Pendadaran yang diselenggarakan oleh Fakultas Hukum UII.

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Selanjutnya berkaitan dengan hal di atas (terutama pernyataan pada butir no 1 dan 2), saya sanggup menerima sanksi baik sanksi administratif, akademik bahkan sanksi pidana, jika saya terbukti secara kuat dan meyakinkan telah melakukan perbuatan yang menyimpang dari pernyataan tersebut. Saya juga akan bersikap kooperatif untuk hadir, menjawab, membuktikan, melakukan pembelaan terhadap hak-hak saya serta menanda-tangani Berita Acara terkait yang menjadi hak dan kewajiban saya, di depan 'Majelis' atau 'Tim' Fakultas Hukum Universitas Islam Indonesia yang ditunjuk oleh pimpinan fakultas, apabila tanda-tanda plagiat disinyalir ada/terjadi pada karya ilmiah saya ini oleh pihak Fakultas Hukum UII.

Demikian, Surat Pernyataan ini saya buat dengan sebenar-benarnya, dalam kondisi sehat jasmani dan rohani, dengan sadar serta tidak ada tekanan dalam bentuk apapun dan oleh siapapun.

Dibuat di : Yogyakarta

Pada Tanggal : **27 MARET 2012**

Yang membuat Pernyataan



[Handwritten Signature]

ADAM WIJAYA M.

& Nama Terang Ybs.

MOTTO

Read! In the Name of Your Lord Who has created (all that exist). He has created man from a clot (a piece of thick coagulated blood). Read! And your Lord is the Most Generous. Who has taught (the writing) by the pen. He has taught man that which he knew not.

(Al-'Alaq 1-5)

Khoirunun Naasi Ahsanuhum khuluqan wa anfa'uhum linnaas

The greatest and the best human is the most beneficial human to others.

Do not be afraid to try! Do not be afraid to start!

If you have fought your best, whatever the result is

The fighting spirit itself, has the success value in it

NEVER REGRET



I Dedicated This Legal Case Study For:
My Beloved Mom Sri Sulistyani Endang Setyawati
My Grand Parents Tarobi Brojo Siswojo and Sri Oekendarijah
My Respectful Dads (Alm) Benny Wijanarka and Suharyanto
My friends who have changed my life
And for you who have touched my heart

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Sholawat wa salaam ought to be attributed to the last Prophet Muhammad *shallaallaahu 'alaihi wa salaam* who had successfully brought and led people from the darkness age to the age where muslim people are able to easily pray, gain knowledge, and develop the world.

This legal case study is made in order to obtaining the requirements in achieving the title of law scholar for bachelor degree in Universitas Islam Indonesia. Hopefully this legal study will be able to give contribution to the society and especially to the law scholars who have been devoting their time for the sake of law research and education.

The process of writing this legal case study will not able to be finished without any supports given from the people around me. The supports given to me are without doubt given by people in surroundings, either those given in the form of aiding me in systematic writing, sharing opinion, enlightening me for the analysis, reminding me every time, even praying to me. Therefore, as the expression of my gratitude, I would like to deliver my appreciations to:

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In the end, I personally realize that this legal case study is far from the so called as perfectness. This legal case study is only be made by me, person with less knowledge and sciences.

I do hope that this legal case analyze will give a positive contribution to the law students. I wish there will be any constructive critiques, suggestions and recommendations upon my legal case study since I believe that this legal case study still has some weaknesses. At last, *barakallaahu lanaa 'ala hayatinaa*.

Yogyakarta, January 31st 2012

Adam Wijaya Medantara

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A. Context of Study

Court decision is a product or a conclusion over an examination of the case based on the legal consideration of the judge.¹ Nevertheless, not all of judge's decisions are entirely appropriate to the regulations, some inappropriate even contradict to the regulation. Those conditions arisen because the judges have been mistaken in implementing the law. Referred to the bankruptcy case between PT JAIC Indonesia against PT Istaka Karya (Persero) in the Central Jakarta Commercial Court's decision Number 73/PAILIT/2010/PN.Jkt.Pst, the panel of judges has been mistaken in determining the decision in rejecting the bankrupt petition filed by PT JAIC Indonesia against PT Istaka Karya (Persero). They determined that PT JAIC Indonesia has no authority to file a bankrupt petition against PT Istaka Karya (Persero) in reason that PT Istaka Karya (Persero) is a State Owned Enterprises that due to the bankrupt petition, the Minister of Finance is the authorized party.

The Panel of judges of Central Jakarta Commercial Court rejected the bankrupt petition filed by PT JAIC Indonesia against PT Istaka Karya (Persero) through the decision Number 73/PAILIT/2010/PN.JKT.PST. In the legal consideration, the panel of judges argued that PT Istaka Karya (Persero) could be categorized as an enterprise as determined in the Article 2 paragraph 5 Act Number 37 of 2004 in which PT Istaka Karya (Persero) is a State

¹ Subekti and R. Tjitrosoedibio, *Kamus Hukum*, 7th edition, Pradnya Paramita, Jakarta, 1983, p. 95.

Owned Enterprises that can not be filed a bankrupt petition by any creditors but the Minister of Finance

The panel of judges got the evidences submitted by PT Istaka Karya (Persero) and the letter from the Ministry of State Owned Enterprises. It showed that PT Istaka Karya (Persero) was a State Owned Enterprises in which the state owned the entire capital, the capital came from the state finances, it ran in the field of public interest and its capital was not divided into shares. Thus, the panel of judges determined that PT Istaka Karya (Persero) could be categorized as a State Owned Enterprises as determined in the Article 2 paragraph 5 Act Number 37 of 2004.

Referred on the Act Number 37 of 2004 and the Act Number 19 of 2003 concerning State Owned Enterprises, Article 2 paragraph 5 Act Number 37 of 2004 and its explanation cannot be applied to the existence of PT Istaka Karya (Persero). Although PT Istaka Karya (Persero) is indeed a State Owned Enterprises, but PT Istaka Karya (Persero) is not a State Owned Enterprises (BUMN) as meant in the Article 2 paragraph 5 Act Number 37 of 2004 and its explanation. We can consider that State Owned Enterprises as meant by the Article 2 paragraph 5 Act Number 37 of 2004 is in the form of Perum (determined in the Article 1 paragraph 4 Act no 19 of 2003), and factually PT Istaka Karya (Persero) is a State Owned Enterprises in the form of Persero. Thus we can conclude that PT Istaka Karya (Persero) cannot be categorized as State Owned Enterprises determined in the Article 2 paragraph 5 Act

Number 37 of 2004 and PT Istaka Karya (Persero) can be filed a bankrupt petition by PT JAIC Indonesia.

If we take an analysis over the Commercial Court judges' consideration, the judges did not fully understand the concept of State Owned Enterprises as stated in the Article 2 paragraph 5 Act Number 37 of 2004 and its explanation. The judges also did not refer to the Article 1 paragraph 4 Act Number 19 of 2003 in which this article has the closest connection to the explanation of Article 2 paragraph 5 Act Number 37 of 2004. Because of the Panel of judges' legal consideration in settling the case of PT Istaka Karya (Persero) is not in accordance to the Act Number 37 of 2004, thus the writer would like to make a deep analysis over the panel of judges' legal consideration in this final assignment.

B. Parties Identity

1. The Dispute Parties

a. Applicant

PT JAIC Indonesia, a limited liability company established under the law of the Republic of Indonesia, domiciled in the registered office in Wisma Nugraha Santana, 10th floor, Jl. Jendral Sudirman Kav. 7-8, Jakarta 10220, however in this situation choosing the legal domicile in its legal attorney's officer that in the legal firm Budidjaja & Associates, domiciled in Jl. Tanah Abang II Number 38, Central

Jakarta, based on the special letter of power of attorney dated 2 September 2010.

b. Respondent

PT Istaka Karya (Persero), a limited liability company established under the law of the Republic of Indonesia, domiciled in Graha Iskandarsyah, Jl. Iskandarsyah Raya No 66, Kebayoran Baru, Jakarta.

2. The Panel of Judges

The panel of judges in the case between PT Istaka Karya (Persero) against PT JAIC Indonesia are consisted of Tjokoarda Rai Suamba, SH. MH. as the principal of panel, H. Syarifuddin, SH. MH. and Jupriyadi, SH. M.Hum. both of them as the member judges.

3. The Courts

The competence court in the case between PT Istaka Karya (Persero) against PT JAIC Indonesia is the Commercial Court on the Central Jakarta District Court. Addressed in Jl. Gajah Mada 17, Kelurahan North Petojo, Gambir, Central Jakarta 10130.

C. Statement of Facts

This case began when PT Istaka Karya (Persero) did not perform its obligation in paying the debt to PT JAIC Indonesia over six negotiable promissory notes bearer in amount US\$ 5.5 million on 9th December 1998, and the commercial paper in questioned would be due on 8th January 1999.

Notwithstanding that PT Istaka Karya's (Persero) obligation had been due since 8th January 1999, nevertheless there were no party claimed for the payment over the commercial paper issued by PT Istaka Karya (Persero).

At 2006, PT JAIC Indonesia suddenly claimed over the payment of PT Istaka Karya's (Persero) commercial paper. PT JAIC Indonesia acknowledged that it had the commercial paper, and also did acknowledge that it was the fourth hand bearer of those commercial papers in questioned. PT JAIC Indonesia calculated the total amount of those commercial papers included the interest arisen since January 1999 until 2006 in amount US \$ 7,645 million.

PT Istaka Karya (Persero) factually would like to pay off all of its commercial papers to PT JAIC Indonesia. Nevertheless, PT Istaka Karya (Persero) was afraid that PT JAIC Indonesia did not deserve over the payment of those commercial papers and it would like to convince itself that PT JAIC Indonesia deserved. Thus, PT Istaka Karya (Persero) did want to pay off the debt arisen from those commercial papers.

Toward PT Istaka Karya's (Persero) action, PT JAIC Indonesia that felt its right would not be performed by PT Istaka Karya (Persero), then filed a lawsuit against it before the South Jakarta District Court in the case of breach performance. In the first level, the panel of judges in their decision Number 1097/Pdt.G/2006/PN.Jkt.Sel. granted the lawsuit sued by the plaintiff and determined that the defendant PT Istaka Karya (Persero) had breached the performance due to those commercial papers.

Against the decision of South Jakarta District Court, PT Istaka Karya (Persero) appealed before the DKI Jakarta High Court in which the panel of judges invalidated the decision of South Jakarta District Court Number 1097/Pdt.G/2006/PN.Jkt.Sel with the decision of DKI Jakarta High Court Number 366/Pdt/2007/PT.DKI. So did by PT Istaka Karya (Persero), PT JAIC Indonesia filed a cassation request against PT Istaka Karya (Persero) before the Supreme Court. In the Supreme Court, the panel of judges determined their decisions through the decision Number 1799 K/PDT/ 2009 dated 9th February 2009 as follows:

1. Grant the cassation request from PT JAIC Indonesia, as follows:
 - a. Rejects the defendant's exception entirely (*in exception*);
 - b. Rejects the plaintiff's provision partially (*in provision*);
 - c. Grant the plaintiff's lawsuit (PT JAIC Indonesia) partially (*in main case*);
 - d. Declare the defendant (PT Istaka Karya (Persero)) had breached the performance to the plaintiff (*in main case*);
 - e. Punish the defendant (PT Istaka Karya (Persero)) to immediately pay off the total amount of the due debt all at once to the plaintiff (PT JAIC Indonesia) in amount US \$ 7.645.000 (Seven million six hundred and forty five thousand United States Dollar);
 - f. Rejects the plaintiff's lawsuit for the except and the rest;

- g. Punish the cassation defendant/defendant to pay all of disputing fees in all of court levels in which in the cassation level calculated in amount Rp. 500.000,-
- b. Annulled the decision of the DKI Jakarta High Court Number 366/Pdt/2007/PT.DKI dated 3rd January 2008 that annulled the decision of South Jakarta District Court Number 1097/Pdt.G/2006/PN.Jkt.Sel dated 6th February 2007.

The decision of Supreme Court has clearly stated that PT Istaka Karya (Persero) was obliged to immediately pay off all of its due and payable debt arisen from those commercial papers to PT JAIC Indonesia. PT JAIC Indonesia had been asked an execution request before the South Jakarta District Court, and the South Jakarta District Court had issued a decision concerning the execution under the decision Number 1097/Pdt/G/2006/PN.Jkt.Sel dated 29th July 2010.

In fact, although there was an execution decision, PT Istaka Karya (Persero) still did not perform its obligation. Due to PT Istaka Karya's (Persero) unwilling action, PT JAIC Indonesia reported it before the South Jakarta District Court, and the chief of South Jakarta District Court in the court session dated 18th August 2010 asked a cautionary (*aanmaning*) to PT Istaka Karya (Persero) to voluntarily conduct the decision of the Supreme Court.

Nevertheless, in fact PT Istaka Karya (Persero) still did not perform its obligation to PT JAIC Indonesia although there were a cautionary and the

decision of Supreme Court. Under these circumstances, PT JAIC Indonesia realized that PT Istaka Karya (Persero) was really unwilling to pay off all of its due and payable debts arisen from those commercial papers. Thus, PT JAIC Indonesia filed a bankrupt petition against PT Istaka Karya (Persero) under the fact of due and payable debt arisen from the decision of Supreme Court Number 1.799 K/PDT/2008 as appropriate to the explanation of the Article 2 paragraph 1 Act Number 37 of 2004.

D. Summary of Decisions

In the case between PT Istaka Karya (Persero) against PT JAIC Indonesia, the panel of judges has determined the decision through the decision Number 73/PAILIT/2010/PN.JKT.PST. In its decision, the panel of judges determined their decision as follows:

1. Reject the applicant's petition entirely;
2. Punish the applicant to pay all fees arisen from the case in amount Rp. 191.000,-

The decision determined in the panel of Commercial Court judges' meeting on the Central Jakarta District Court at Wednesday, 15th December 2010 by Tjokoarda Rai Suamba, SH., MH., as the principle of panel, H. Syarifuddin, SH., MH., and Jupriyadi, SH., M.Hum., both as the judge member, and openly read for public at Thursday, 16th December 2010 by the similar panel of judges.

E. Legal Issue

Referred to the description in the context of study, statement of facts, as well as summary of decisions, the legal issue arisen from the case of PT Istaka Karya (Persero) is to analyze the considerations of why the Central Jakarta Commercial Court rejects the bankrupt petition by reason that PT Istaka Karya (Persero) is the State Owned Enterprises (BUMN) that must be filed a bankrupt petition by the Minister of Finance?

F. Legal Consideration

Substances that contained in the legal consideration of the decision are the reasons of the panel of judges in which asserting that PT Istaka Karya (Persero) was categorized as the State Owned Enterprises as specified in the Article 2 paragraph 5 Act Number 37 of 2004, thus PT Istaka Karya (Persero) was not bankrupted by the panel of judges of the Central Jakarta Commercial Court. The legal considerations of the Judges in the decision of the Commercial Court constituted as follows:

1. Article 2 paragraph 5 Act Number 37 of 2004 asserts that in case of the debtor is a State Owned Enterprises running in the field of public interest, thus the petition of bankruptcy can only be filed by the Minister of Finance;
2. What was meant as “State Owned Enterprises running in the field of public interest” in accordance to the explanation of the Article 2

paragraph 5 Act Number 37 of 2004 is State Owned Enterprises which its capital entirely owned by the state and is not divided into shares;

3. The panel of judges will consider whether the debtor will be able to be classified as a State Owned Enterprises as specified in the Article 2 paragraph 5 and its explanation;
4. Based on the evidence TP-12 and the official statement from the State Minister of State Owned Enterprises Number S-357/MBU.3/2010 dated 24th November 2010, in main points asserting:
 - a) PT Istaka Karya (Persero) constitutes a State Owned Enterprises which its capital entirely (100%) owned by the State;
 - b) PT Istaka Karya (Persero) is a potential corporation that gives positive contributions to the Republic of Indonesia, either in the form of construction service providers in infrastructure projects in private and government projects, as such:
 - 1) Highways road project Semarang-Bawen, Central Java;
 - 2) Fly road non-highways project Kampung Melayu-Tanah Abang, Jakarta;
 - 3) Road project Cadas Mauk-Tangerang;
 - 4) Bypass road project, Lampung;
 - 5) Immigration Office building project, South Jakarta;
 - 6) Road project Cilegon-Banten, Banten;
 - c) Beside of it, PT Istaka Karya (Persero) have also been giving indirect contributions to the State of the Republic of Indonesia in pressing the

unemployment grades in the State of the Republic of Indonesia under its employees in total amount 700 people, and its project outsourcing workers in more than 1000 people, exclude from the sub contractor and supplier service;

d) Currently, the Minister of BUMN has asked the management of PT Istaka Karya (Persero) to conduct an entire restructuring;

5. Referred to the Statement Deed of the Shareholder's Decision outside General Meeting of Shareholder dated 4th December 2008, determined that the ownership of the entire PT Istaka Karya's (Persero) capital is Ministry of BUMN qq State of the Republic of Indonesia as mentioned in the page 5 of the deed in question, asserting that "Based on the Act Number 19 of 2003 concerning BUMN, Act Number 40 of 2007 concerning the Limited liability Company, Government Regulation Number 45 of 2005, along with Article of Association of PT Istaka Karya (Persero), State Ministry Secretary BUMN (Act Number 9 of 2008 concerning the State Ministry and the Presidential Degree Number 47 of 2009 concerning the establishment and the organization of state ministry and other service business field deputy in the authority as the attorney of the State minister of BUMN as the shareholder in the outside of general meeting shareholders of the company dated 4th December 2009 jo. The statement of meeting decision of the company PT Istaka Karya (Persero) Number 14 dated 12th December 2004 determined that 100% (one hundred percent) the capital taken from the state of the Republic of Indonesia";

6. In the statement letter from the State Minister of BUMN Number S357/mbu.3/2010 dated 24th November 2010, PT Istaka Karya is an existed and prospective State Owned Enterprises that still giving the contribution to the state and the job field provider;
7. The whole capital of PT Istaka Karya (Persero) is basically not divided into shares in reason that the whole capital owned by the state of the Republic of Indonesia, which specified represented by the State Minister of State Owned Enterprises as the shareholder of the entire company's share and capital as the State Owned Enterprises in which entire capital of PT Istaka Karya (Persero), sourced from the state finance as appropriate to the explanation of the Article 2 paragraph 5 Act Number 37 of 2004 concerning the bankruptcy and suspension of payment, thus PT Istaka Karya (Persero) can be able to be classified as the State Owned Enterprises that running in the field of public interest in which its capital entirely owned by the state and is not divided into shares;
8. PT Istaka Karya (Persero) as the State Owned Enterprises that owned by the state only can be filed a bankrupt petition by the Minister of Finance as specified and regulated in the Article 2 paragraph 5 Act Number 37 of 2004 concerning the bankruptcy and the suspension of payment;
9. Referred to the Article 50 Act Number 1 of 2004 concerning state treasury prohibits any parties to conduct a seizure over the money, commercial paper, moveable and immoveable goods owned by the state, thus according to the Article 1 paragraph 1 Act Number 37 of 2004 concerning

the bankruptcy and suspension of payment that constituted general seizure over all state's wealth is cannot be justified as seizure anymore, unless the bankrupt petition filed by the minister of finance as the government in the ownership of separated state's wealth and the general treasurer of the state (Article 6 paragraph 2 (a) *juncto* Article 8 Act Number 17 of 2003 concerning the Finance of State);

10. Referred to the considerations in questioned above, with unnecessarily need to consider other applicant's request, the panel of judges have been argued that there are quite enough reasons to refuse the petition filed by PT JAIC Indonesia;
11. In reason that the bankrupt petition is refused, thus the applicant must be burdened to pay the case fee in which the amount will be determined in the decision;
12. It should be taken attention to the statement of the Article 2 paragraph 5 Act Number 37 of 2004 concerning the bankruptcy and the suspension of payment, included the correlated legislations.

G. Legal Analysis

Bankruptcy is a general seizure of all bankrupt debtor's properties in which the settlement and the management handled by the receiver under the supervision of the supervisor judge as regulated in this act.² On simply words, bankruptcy is a condition where the bankrupt debtor is incapable of

² Article 1 paragraph 1 Act Number 37 of 2004 concerning Bankruptcy and Suspension of Payment.

conducting his private right (*volkomen handelingsbevoegheid*) in managing and controlling his properties.³ Thus, the debtor's properties will be seized and moved over its management to the receiver.⁴

There are some parties that able to file a bankrupt petition, and are specified in the Article 2 Act Number 37 of 2004.⁵ The one who able in filing a bankrupt petition are consisted as follows:⁶

1. Debtor himself as his request asking a bankrupt petition before the commercial court;⁷
2. A creditor or more file a bankrupt petition against the debtor before the commercial court;⁸
3. State attorney files a bankrupt petition against the debtor in the matter of public interest;⁹
4. Bank Indonesia files a bankrupt petition in case the debtor is a bank;¹⁰
5. Bapepam-LK files a bankrupt petition in case the debtors are securities company, stock exchange, **clearing and guarantee effect, and custodian central effect**;¹¹

³ Siti Anisah, *Perlindungan Kepentingan Kreditor dan Debitor dalam Hukum Kepailitan di Indonesia (Studi Putusan-Putusan Pengadilan)*. Total Media, Yogyakarta, 2008, p. 111.

⁴ Gunawan Widjaja, *Tanggung Jawab Direksi Atas Kepailitan Perseroan*, PT. RajaGrafindo Persada, Jakarta, 2004, p. 83.

⁵ Jono, *Hukum Kepailitan*, Sinar Grafika, Jakarta, 2008, p. 12.

⁶ Sutan Remy Sjahdeini, *Hukum Kepailitan-Memahami Undang-Undang Nomor 37 Tahun 2004 Tentang Kepailitan*, Grafiti, Jakarta, 3rd Edition, 2009, p. 103.

⁷ Article 2 paragraph 1 Act Number 37 of 2004.

⁸ *Ibid.*

⁹ Article 2 paragraph 2 Act Number 37 of 2004.

¹⁰ Article 2 paragraph 3 Act Number 37 of 2004.

¹¹ Article 2 paragraph 4 Act Number 37 of 2004.

6. Minister of Finance files a bankrupt petition in case the debtors are Insurance Company, Reinsurance Company, Pension Fund, or State Owned Enterprises running in the field of public sector.¹²

In the case between PT Istaka Karya (Persero) and PT JAIC Indonesia, since PT Istaka Karya (Persero) is a State Owned Enterprises, thus the writer will only limit the analysis on the Article 2 paragraph 5 Act Number 37 of 2004. The writer will analyze whether PT Istaka Karya (Persero) can be categorized as the State Owned Enterprises that running in the field of public interest as regulated in the Article 2 paragraph 5 Act Number 37 of 2004.

Entirely, Article 2 paragraph 5 Act Number 37 of 2004 and its explanation stated that:

“In case the debtors are the Insurance Company, Re-Insurance Company, Pension Fund, or Stater Owned Enterprises running in public interest, the bankrupt petition can only be filed by the Minister of Finance. (Article 2 paragraph 5)”

“...what meant by “State Owned Enterprises running in the field of public interest” is State Owned Enterprises in which its entire capitals owned by the state and are not divided into shares”

The existence of State Owned Enterprises based on the Act Number 37 of 2004, consisted of three elements as follows:

1. State Owned Enterprises;
2. State Owned Enterprises runs in the field of public interest;
3. State Owned Enterprises that its capital entirely owned by the state and is not divided into shares.

¹² Article 2 paragraph 5 Act Number 37 of 2004.

1. State Owned Enterprises

Before the writer analyzes the State Owned Enterprises, the writer would like to provide an understanding among the existence of corporation, company, and enterprises. Although those three terminologies have quite similar understanding, actually they are difference among them.

Corporation can be defined to as a kind of business form that regularly and continuously running each kind of business activities in which established, work, and domiciled in the region of the state of the Republic of Indonesia and having the goals in gaining profits and benefits.¹³ It is a legal person or legal entity regarding as law subject that is capable of doing legal action or legal relation contact with various party as human beings.¹⁴ Meanwhile, corporation is supposed to be as an entity (usually a business) having authority under law to act as a single person distinct from the shareholders who own it and having rights to issue stock and exist indefinitely.¹⁵ In short understanding, corporation is an incorporated entity that is a separate legal entity from its owners and operators.¹⁶ For the explanation of company and enterprises, it will be further explained on the page 17-18.

¹³ Eddi Sopandi, *Beberapa Hal dan Catatan Berupa Tanya Jawab Hukum Bisnis*, Refika Aditama, Bandung, 2003, p. 11, see also Article 1 paragraph b Act Number 3 of 1982 concerning The Corporation Registration Obligation.

¹⁴ Ridwan Khairandy, *Perseroan Terbatas Sebagai Badan Hukum*, Jurnal Hukum Bisnis, Volume 26 Number 3, 2007, p. 5.

¹⁵ Bryan A. Garner, *Black's Law Dictionary*, West, United States of America, 9th Edition, 2009, p. 391.

¹⁶ *English to Indonesian Legal Language/Bahasa Hukum A Guidebook for Interpreters and Translators/Buku Panduan untuk Penterjemah*, p. 83.

Moving to the understanding of State Owned Enterprises, State Owned Enterprises is an enterprise in which its capitals entirely owned by the state through the direct enclosing deriving from the separated state's wealth.¹⁷ State Owned Enterprises can also be defined as a business unit that having a relationship to the state in the context of ownership.¹⁸ In another terminology, State Owned Enterprises can be called as governmental enterprise. Governmental enterprise is an enterprise undertaken by a governmental body.¹⁹ Indirectly, State Owned Enterprises could be defined as a legal entity in which the state can control it through the majority shareholder ownership.²⁰

There are some elements that making a company can be categorized as State Owned Enterprises.²¹

a. Enterprise or Company²²

Company is an association of people formed for the purpose of making a profit.²³ It is a corporation that carries on a commercial or industrial enterprise.²⁴ It can also be defined as a distinct legal entity,

¹⁷ Article 1 Act Number 19 of 2003 concerning State Owned Enterprises.

¹⁸ Hendra, Sejarah Terminologi BUMN, Majalah *BUMN TRACK*, Desember 2007, p. 19.

¹⁹ Bryan A. Garner, *op.cit.*, p. 611.

²⁰ Hendra, *Loc.cit.*

²¹ Ridwan Khairandy, *Konsepsi Kekayaan Negara yang Dipisahkan Dalam Perusahaan Perseroan*, Jurnal Hukum Bisnis, volume 26, Number 1, tahun 2007, p. 33.

²² In reason State Owned Enterprises constitutes a company enterprise, thus as appropriate to the understanding of company or entity; it should have the goal to gain profit. See Ridwan Khairandy, *Konsepsi Kekayaan Negara yang Dipisahkan Dalam Perusahaan Perseroan*, *op. cit.*, p. 33 and 39.

²³ *English to Indonesian Legal Language/Bahasa Hukum A Guidebook for Interpreters and Translators/Buku Panduan untuk Penterjemah*, p. 64.

²⁴ Bryan A. Garner, *op. cit.*, p. 318.

with all of the legal rights and powers of an individual.²⁵ In the economic view, it is a production and commercial organization that uses and combine production factors efficiently in order to satisfy the consumer society's need (directly or indirectly, at least the business actor will gain the reasonable profit.²⁶

Enterprise is an organization or venture established for business purposes.²⁷ Enterprise can also be defined as a venture or undertaking, especially one involving financial commitment.²⁸

PT Istaka Karya (Persero) is a State Owned Enterprises established under the law of the Republic of Indonesia. Based on the classification of State Owned Enterprises as specified and regulated in the Act Number 19 of 2003, PT Istaka Karya (Persero) can be classified as State Owned Enterprises established in the form of Limited Liability Company in which its capital is divided into shares in which entirely or partially (at least 51%) owned by the State of the Republic of Indonesia that having the goals in gaining profit. In reason that PT Istaka Karya (Persero) is a State Owned Enterprises established in the form of Limited Liability Company, thus the Act Number 40 of 2007 concerning the Limited Liability Company is applicable to PT Istaka Karya (Persero).

²⁵ Simon Fisher, et.al, *Corporations Law*, Butterworths, Australia, 2nd edition, 2001, p. 4.

²⁶ Habib Nazir, Muhammad Hasanuddin, *Ensiklopedi Ekonomi dan Perbankan Syariah*, Kafa Publishing, Bandung, 2008, p. 523.

²⁷ Bryan A. Garner, *op.cit.*, p. 611.

²⁸ W.S. Weerasooria, *Business and Law Dictionary*, Butterworths, Australia, 1997, p. 173.

In the Act Number 40 of 2007, Article 1 paragraph 1 defines Limited Liability Company as a legal entity that constituting a capital partnership, established due to the agreement, conducting a business activity with the authorized capital that entirely divided into shares and has fulfilled the requirements as stated in this Act included its implementation regulation.

PT Istaka Karya (Persero) was established by the notarial deed made by the public notary Adlan Yulizar Number 8 of 1980 under the previous name PT Indonesia Consortium of Construction Industries (PT ICCI), in which at that time one of the shareholders is Public Operation Department. Afterwards, PT Indonesia Consortium of Construction Industries (PT ICCI) has been changed for its status to a State Owned Enterprises after the government of the Republic of Indonesia has conducted a direct capital enclosing in the entire PT Indonesia Consortium of Construction Industries' shares (PT ICCI). The government of the Republic of Indonesia conducted a direct capital enclosing through the government regulation Number 19 of 1983 concerning the capital enclosing of the state of the Republic of Indonesia in the share of PT Indonesia Consortium of Construction Industries (PT ICCI).

There are changes and remake in the entire Article of Association of PT Indonesia Consortium of Construction Industries (PT ICCI), the result of extra ordinary general meeting shareholders

determined the changing of the name of the corporation, from PT Indonesia Consortium of Construction Industries (PT ICCI) to PT Istaka Karya (Persero). Currently, the State Minister of BUMN qq. State of the Republic of Indonesia owns the entire share of PT Istaka Karya (Persero). Referred to the legal consideration of the panel of judges, they argued that PT Istaka Karya (Persero) constituted a State Owned Enterprises that categorized by the Article 2 paragraph 5 Act Number 37 of 2004 in reason that the state of the Republic of Indonesia owns the entire share of PT Istaka Karya (Persero).

b. The state owns the share either entirely or partially

Any corporation intended in becoming a State Owned Enterprises, its capital should be owned by the state entirely or at least the state owns minimum 51% in that capital.²⁹ Article 1 paragraph 1 Act Number 19 of 2003 specifically stated that a State Owned Enterprises is an enterprise in which the state owns the share of the company either entirely or partially. For further explanations regarding this matter, it will be explained from the page 35-43 (thirty five until forty three).

c. The State Conducts a Direct Enclosing

General definition of direct enclosing is an effort to own a new corporation or a run corporation by conducting a capital payment to

²⁹ Ridwan Khairandy, *Konsepsi Kekayaan Negara yang Dipisahkan Dalam Perusahaan Perseroan*, *Loc.cit.*

the corporation in questioned.³⁰ Direct enclosing is separated from the state income and expenditure estimation or the reserve corporation decree or other sources in order to be made as the capital of State Owned Enterprises and/ or other Limited Liability Companies, and managed as a corporation.³¹ In the Article 1 paragraph 4 Government Regulation Number 1 of 2008 concerning the government investment constituting a direct enclosing as a government investment form over the legal entity by gaining the ownership right, included the establishment of the Limited Liability Company and/ or the acquisition of the Limited Liability Company.

Article 4 paragraph 2 and 3 Act Number 19 of 2003 stated that:

“State capital enclosing in case of the establishment or enclosing of the State Owned Enterprises coming from the: State income and expenditure estimation; reserve capitalization; and other sources. Each state capital enclosing in case of the establishment of State Owned Enterprises or Limited Liability Company in which the fund coming from the State income and expenditure estimation should be regulated by the government regulation.”

In the case of PT Istaka Karya (Persero), it has been proven that there was a direct enclosing conducted by the state. Based on the government regulation Number 19 of 1983 concerning the direct enclosing of the State of the Republic of Indonesia in the capital share of PT Indonesia Consortium of Construction Industries, the

³⁰ Penyertaan Modal Negara, , last accessed January, 9th 2012 <http://www.jdih.bpk.go.id/informasihukum/Penyertaan%20modal.pdf> .

³¹ *Ibid*, see also Pasal 1 angka 7 PP Number 44 Tahun 2005 tentang Tata Cara Penyertaan dan Penatausahaan Modal Negara pada Badan Usaha Milik Negara dan Perseroan Terbatas.

government has been conducted a direct enclosing by buying the entire share of PT Indonesia Consortium of Construction Industries in which the shares are previously owned by the private companies. Afterward, the government changed the entire Article of association and changed the name of the corporation PT Indonesia Consortium of Construction Industries to become PT Istaka Karya (Persero).

d. The Capital Enclosing Coming from the Separated Wealth of State

The Supreme Court has been issued a fatwa constituting.³²

1) Article 1 paragraph 1 Act Number 19 of 2003 concerning State Owned Enterprises stated that State Owned Enterprises is an enterprise in which its capitals entirely owned by the state through the direct enclosing deriving from the separated state's wealth. In the Article 4 paragraph 1 stated that State Owned Enterprises comes from the separated state's wealth. In its explanation, stated that what meant by separated is a separation of state's wealth from the state income and expenditure estimation to be made as a capital enclosing over State Owned Enterprises. It is conducted in purpose that the management will be no longer referred to the to the system

³² Erman Rajagukguk, *Peranan Hukum Dalam Mendorong BUMN Meningkatkan Pendapatan Negara dan Kesejahteraan Rakyat*, Disampaikan pada pertemuan "Peranan BUMN Dalam Meningkatkan Pertumbuhan Ekonomi Negara", diselenggarakan oleh Direktorat Jenderal Peraturan Perundang-Undangan Departemen Hukum dan HAM R.I., Jakarta 28 Juli 2008. <http://ermanhukum.com/Makalah%20ER%20pdf/PERANAN%20HUKUM%20DALAM%20MENDORONG%20BUMN.pdf>, last downloaded and accessed at January, 9th 2012.

of state income and expenditure estimation, but it will be referred on the principles of healthy companies;

2) Referred to the Articles mentioned above, that constituting a special Act concerning State Owned Enterprises, it was clearly stated that the capital of State Owned Enterprises is coming from the separated state's wealth, and it has been separated from the state income and expenditure estimation. Nevertheless, the following management in the future is not referred and based on the state income and expenditure estimation but the principles of healthy companies.

Under the provisions of Article 4 paragraph 1, 3, and 5 and Article 1 Number 10 of Act Number 19 of 2003, it is clear that the establishment of State Owned Enterprises in the form of Persero and Perum is coming from the state budget through capital enclosing, but it has to be separated from the state wealth, and the issuance of the capital enclosing must be provided by a government regulation. The separation of wealth from the state wealth is directly conducted when the state issued a capital enclosing, and the capital that has been enclosed is the wealth of State Owned Enterprises.³³ We can conclude that the capital of the State Owned Enterprises in the form of Persero, is separated from the state budget and divided into shares.³⁴

In the legal consideration, the judges stated that referred to the

³³ Rahayu Hartini, *Kepailitan BUMN Persero*, downloaded and viewed at January, 9th 2012 <http://gagasanhukum.wordpress.com/2010/09/06/kepailitan-bumn-persero-bagian-x/>.

³⁴ Erman Rajagukguk, *Butir-Butir Hukum Ekonomi*, Pusri, Jakarta, 2011, p.191.

Article 50 Act Number 1 of 2004 concerning State Treasury, it prohibits to any parties conducting a seizure over the money, commercial paper, moveable and immoveable goods owned by the state. They argued that since PT Istaka Karya (Persero) is a State Owned Enterprises in which its entire wealth is owned by the state, thus it cannot be declared as bankrupt. They argued that the Minister of Finance is the one who has the authority to file a bankrupt petition against PT Istaka Karya (Persero) in reason that the Minister of Finance represents the government in the ownership of separated state wealth and the general treasurer of the state (determined in the Article 6 paragraph 2 (a) *juncto* Article 8 Act Number 17 of 2003 concerning the Finance of State).

The writer analyzes that the judges did not fully understand the concept of separated state wealth. It is clear that when the State conducted direct enclosing to the State Owned Enterprises, the wealth of State Owned Enterprises is not owned by the state, the state has no longer ownership of the capital that already enclosed, and it directly indeed becomes the wealth of the State Owned Enterprises itself. Thus, the writer argues that the panel of judges is incorrect in applying the Article 50 Act Number 1 of 2004.

Referred to the Act Number 19 of 2003 concerning State Owned Enterprises, State Owned Enterprises can be divided into two kinds,³⁵ first is State Owned Enterprises in the form of Persero, and the second of all is State Owned Enterprises in the form of Perum. Persero established to gain profit, otherwise Perum established to conduct the public benefits.³⁶

Referred to the Article 1 paragraph 2 Act Number 19 of 2003, what meant by State Owned Enterprises in the form of Persero is

“State Owned Enterprises formed as limited liability Company in which its capital is divided into shares in which either entirely nor partially at least 51 % (fifty one percent) in minimum amount of the shares that owned by the State of the Republic of Indonesia, in which its main purpose and goal are gaining the benefits”.

Toward State Owned Enterprises in the form of Persero, applied all of the stipulations and the principles of the limited liability company as regulated in the Limited Liability Company Act. The purpose and the goal of the establishment of State Owned Enterprises in the form of Persero is to provide goods and/ or high quality service and has the strong competition quality, included also to gain the profits in order to increase the value of the company.

Meanwhile, referred to the Article 1 paragraph 4 Act Number 19 of 2003, what meant by State Owned Enterprises in the form of Perum is:

“State Owned Enterprises in which its capitals are entirely owned by the state and are not divided into shares, in which its purpose and goal are for the public interest and public advantages in the form of goods providing and/ or high quality services and also

³⁵ H.R. Daeng Naja, *Pengantar Hukum Bisnis Indonesia*, Pustaka Yustisia, Yogyakarta, 2009, p. 34.

³⁶ *Ibid.*

gaining profits all at once based on the principle of company management”.

State Owned Enterprises in the form of Perum in running its business reflected and referred to the purpose and the goal of its establishment as regulated in the Article 36 (1) Act Number 19 of 2003, it is stated that:

“Running business in the purpose to the public benefits in the form of providing goods and/ or reachable high quality service by the societies based on the good company management;”

From those explanations concerning the State Owned Enterprises in the form of Persero and Perum, the writer took a conclusion that in usual, State Owned Enterprises in the form of Persero is established to gain the profit only, and State Owned Enterprises in the form of Perum is established to run in the field of public interest. Nevertheless, there will be still any possibilities that State Owned Enterprises established in the form of Persero also runs in the field of public interest instead to gain profit.

2. State Owned Enterprises Runs in the Field of Public Interest

We can take analysis on the understanding of the public interest. Sudargo Gautama argued that public interest is similar to the public welfare.³⁷ Public interest covers national interest in meaning of nation interest, society, and the state in which covering the individual, groups, and regions interest.³⁸ Liang Gie argued that public interest is all matters

³⁷ Sudargo Gautama, *Pengertian Tentang Negara Hukum*, Alumni, Bandung, 1983, p.15.

³⁸ Kuntjoro Purbopranoto, *Beberapa Catatan Hukum Tata Pemerintahan dan Peradilan Administrasi Negara*, Alumni, Bandung, 1985, p. 37.

pushing the gaining of welfare, economic stability, and the development either in the society life besides any business regarding the state and the citizens as a unity.³⁹ Referred to the Black's Law Dictionary, public interest can be taken an understanding as the general welfare of the public that warrants recognition and protection, and also something in which the public as a whole has a stake, especially an interest that justifies governmental regulation.⁴⁰ We can take a conclusion that public interest always refers to the government interest, citizen interest, and nation interest.⁴¹

Referred to the facts of the case between PT Istaka Karya (Persero) and PT JAIC Indonesia, PT Istaka Karya (Persero) constitutes a potential company that has been giving the positive contributions to the Republic of Indonesia, either in the form of construction service providers in infrastructure projects in government and private projects. Meanwhile, PT Istaka Karya (Persero) constitutes a prospective State Owned Enterprises Company that has been giving the contributions to the state as the State Owned Enterprises and jobs provider. Beside of it, PT Istaka Karya (Persero) has also been giving indirect contributions to the State of the Republic of Indonesia by pressing the unemployment grades in the State of the Republic of Indonesia under the total amount of the employees are 700 people and outsourcing project workers more than 1.000 people

³⁹ Ibrahim R, *Prospek BUMN dan Kepentingan Umum*, Citra Aditya Bakti, Bandung, 1997, p. 37, *read also* The Liang Gie, *Pertumbuhan Pemerintah Daerah di Negara Republik Indonesia*, Gunung Agung, Jakarta, 3rd edition, 1968, p. 159.

⁴⁰ Bryan A. Garner, *op.cit.*, p. 1350.

⁴¹ *Ibid*, p. 43.

included sub contractor workers and suppliers. Until now, PT Istaka Karya (Persero) is still accepting and conducting the projects referred to the public interest, either local client or foreign clients.

PT Istaka Karya (Persero) as the bankrupt defendant argued that by the existence of bankruptcy process, thus the development of the project would be ruined, and either even would be failed and suffered losses, with the result that the project that factually supposed to be finished in the due time will be failed, and the result is that its creditors will ask for the completion of the project under huge cost in reason of the happening of the increasing of the cost in the completion of the project. Even they will ask for the huge enough compensations in reason that the development of the project in the construction was failed or breached the due time, and beside of it, the State would loss the trust from the foreign states that have been working collectively until now, and it is definitely clear that it will take losses to the state and state's financial. It can be taken a conclusion that any matters that causing losses to the state and state's financial will make a huge losses to the public interest and they will suffer it. Thus, if PT Istaka Karya (Persero) was stated as bankrupt, it is definitely clear that the bankrupt petition will make huge losses to the public interest.

Following to the facts and evidences submitted by the bankrupt defendant in proving the existence of the defendant as the State Owned Enterprises that running in the field of public interest, the panel of judges in their legal considerations argued and asserted that the facts from the

evidences submitted by the defendant, thus the panel of judges determined and decided that the bankrupt defendant constituted a State Owned Enterprises that running in the field of public interest, in which for the bankrupt petition is supposed and ought to be filed by the minister of finance as appropriated as what regulated in the Article 2 paragraph 5 Act Number 37 of 2004. The facts in questioned have been determined as one of the reasons determined by the panel of judges in making the legal considerations to refuse the bankrupt petition filed by PT JAIC Indonesia against PT Istaka Karya (Persero).

There are similarities between the case of PT Istaka Karya (Persero) and the case of PT Dirgantara Indonesia (Persero). In the case of PT Dirgantara Indonesia (Persero), the panel of judges in cassation level granted the cassation request from the cassation supplicant PT Dirgantara Indonesia (Persero) and PT Perusahaan Pengelola Aset (Persero) and annulled the decision of Central Jakarta Commercial Court at the Central Jakarta District Court Number 41/Pailit/2007/PN.Niaga/Jkt.Pst. dated 4th September 2007. The panel of judges in the cassation level annulled the statement of bankrupt toward PT Dirgantara Indonesia (Persero), and PT Dirgantara Indonesia (Persero) was no longer debtor that stated as the bankrupt debtor.

One of the reasons in the legal considerations of the panel of judges in the cassation level in granting the cassation request submitted by the cassation defendant PT Dirgantara Indonesia (Persero) is because the

panel of judges have been argued that PT Dirgantara Indonesia (Persero) constituted a vital industrial object, and what meant by vital industrial object is the location area, building/ installation and/ or industrial business running in the field of public interest, state interest and/ or the sources of the most strategic state's incomes.

At last, the panel of judges concluded that PT Dirgantara Indonesia (Persero) concluded and determined that PT Dirgantara Indonesia (Persero) constituted a State Owned Enterprises that running in the field of public interest, and indeed for the bankrupt petition against PT Dirgantara Indonesia (Persero), it was supposed to be filed by the minister of Finance only.

Following to the legal considerations of the panel of judges in the case PT Istaka Karya (Persero), the writer has analyzed and concluded that the panel of judges in the case PT Istaka Karya (Persero) have been correct in determining that PT Istaka Karya (Persero) is a State Owned Enterprises that running in public interest. The writer analyzed that the existence of PT Istaka Karya (Persero) as the prospective company that has been continuously giving contributions to the state, either state's financial and its role in pressing the unemployment grades, and also its role in establishing the development of the state through the valuable projects conducted for the social interest, state interest, and even social welfare.

Legal considerations as mentioned above are correct if we would like to determine whether PT Istaka Karya (Persero) is a State Owned

Enterprises that running in the field of public interest or not. Meanwhile, the writer also necessarily need to analyze that regarding to the bankruptcy of State Owned Enterprises, referred to the Article 1 paragraph 2 Act Number 19 of 2003 concerning State Owned Enterprises in the form of Persero is “State Owned Enterprises formed as limited liability Company in which its capital is divided into shares in which either entirely nor partially at least 51 % (fifty one percent) in minimum amount of the shares that owned by the State of the Republic of Indonesia, in which its main purpose and goal are gaining the benefits”.

The goal of Persero in gaining the profits is also determined in the Article 12 Act Number 19 of 2003, instead State Owned Enterprises in the form of Persero is a Limited Liability Company, thus the establishment and the management must be applied to the Act Number 40 of 2007 concerning the Limited Liability Company. It determined that Persero is a subject in the form of Private Corporation, formed as limited liability Company, and has the main goal in gaining the profits. The goal in gaining profits is more explained that the purpose and the goals in establishing Persero is to provide goods and/ or high quality service and has the strong competitive ability, and also gaining the profits in order to increase the value of the company.

Nevertheless, the writer analyzes that although PT Istaka Karya (Persero) in running its business reflecting that it runs in the field of public interest, nevertheless because PT Istaka Karya (Persero) is a State Owned

Enterprises established in the form of persero and basically its goal is gaining profits, thus the writer concludes that PT Istaka Karya (Persero) is a State Owned Enterprises established in the form of persero having goals in gaining profits by running in the field of public interest.

3. State Owned Enterprises that its capital entirely owned by the state and is not divided into shares

Capital is an invested money or assets or available to be invested, in a business.⁴² Capital is divided into authorized capital, issued capital, and paid-up capital.⁴³

Authorized capital is an entire nominal value of the shares that mentioned in the Article of Association.⁴⁴ Principally, a company's authorized capital constitutes total amount of the shares issued by the company.⁴⁵ An authorized capital is determined to be at least in amount Rp. 50.000.000,00.⁴⁶

Issued capital is one of the company capital structures.⁴⁷ Issued capital can be defined as the total shares that have been taken by the former or the shareholder, and there are paid shares and unpaid shares yet

⁴² Bryan A. Garner, *op.cit.*, p. 236.

⁴³ M. Yahya Harahap, *Hukum Perseroan Terbatas*, Sinar Grafika, Jakarta, 2009, p. 232.

⁴⁴ *Ibid*, p. 233.

⁴⁵ *Ibid*.

⁴⁶ Article 33 paragraph 1 Act Number 40 of 2007 concerning Limited Liability Company.

See also M. Yahya Harahap, *op.cit.* p. 234.

⁴⁷ M. Yahya Harahap, *op.cit.* p. 235.

over the shares taken.⁴⁸ Issued capital determines that the authorized capital should be issued at least 25% (twenty five percent) from the authorized capital.⁴⁹

Paid-up capital is capital that has been paid by the shareholder as a repayment of the share payment in which the shareholder takes it as the issued capital from the authorized capital.⁵⁰ The paid-up capital is supposed to be paid directly when the authorized capital is issued.⁵¹ In simply understanding, paid-up capital is a share that has fully been paid by the holder or the owner.⁵² And theoretically, paid-up capital is a capital entered as the last payment of the capital taken as the issued capital from the authorized capital of the corporation.⁵³

After explaining the capital, the writer will explain the share. Share represents the amount of money invested by the investor in a corporation.⁵⁴ Shares are also a personal wealth of shareholders who are moving objects that cannot be touched.⁵⁵ Black's Law Dictionary⁵⁶ defines share as an allotted portion owned by, contributed by, or due to someone (each partner's share of the profits).

In the Act Number 19 of 2003 concerning State Owned Enterprises, stated that the capital of Perum is not divided into shares, however, State

⁴⁸ Achmad Ichsan, *Hukum Dagang, Lembaga Perserikatan Surat-Surat Berharga, Aturan-Aturan Angkutan*, Pradnya Paramita, Jakarta, 1987, p. 167.

⁴⁹ Article 33 paragraph 1 Act Number 40 of 2007 concerning Limited Liability Company.

⁵⁰ M. Yahya Harahap, *op.cit.*, p. 236.

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ *Ibid.*, p. 257.

⁵⁵ *Ibid.*

⁵⁶ Bryan A. Garner, *op.cit.*, p. 1.500.

Owned Enterprise that whose capital is divided into shares, it would be categorized as the State Owned Enterprises in the form of Persero. Although the existence of State Owned Enterprises in the form of Persero is governed by Act Number 19 of 2003, but ownership of shares of Persero still must comply with the provisions of Law Number 40 of 2007 concerning the Limited Liability Company. In the Act Number 40 of 2007, one party should not own the entire share. Minimum shareholding must be owned by at least two parties, it is stipulated in Article 7 paragraph 1 and 2 of Law Number 40 of 2007, which states that:

“Company was founded by 2 (two) persons or more with a notarial deed made in the Indonesian language; every founder of the company shall take the shares when the company was founded. ”

Two paragraphs in the Article shows that it is not allowed a shareholder own the entire shares or 100% (hundred percent). However, Act Number 40 of 2007 provides an exception to state that allows a company whose entire capital is divided into shares wholly owned by the State, it is stipulated in Article 7 paragraph 7 (a) Law Number 40 of 2007. Article 7 paragraph 7 (a) states that:

"Provisions that require the company founded by 2 (two) or more persons referred to in paragraph 1 (one), and the provisions in paragraph 5 (five), and paragraph 6 (six) does not apply to:
a. Limited Liability Company in which the entire shares owned by the state.”

Article 2 paragraph 5 mentions that the State Owned Enterprises run in the field of public interest could only be filed a bankruptcy petition by the Minister of Finance. Nevertheless, the explanation of the provision

determines that the understanding of State Owned Enterprises run in the field of public interest is a State Owned Enterprises in which the entire capital is owned by the state and not divided into shares. In case that the explanation of the article 2 paragraph 5 Act Number 37 of 2007 is a cumulative nature, thus it is not only the State Owned Enterprises that owns the entire capital, but also it should not be divided into shares.

In the case of PT Istaka Karya (Persero), the government of the Republic of Indonesia has bought the entire share of PT Indonesia Consortium of Construction Industries (PT ICCI) based on the Government Regulation Number 19 of 1983 concerning The Capital Enclosing of the State of the Republic of Indonesia in the Capital Share of PT Indonesia Consortium of Construction industries (PT ICCI). Previously, private corporations owned the shares of PT Indonesia Consortium of Construction Industries (PT ICCI). Then, the government changed the entire Article of Association and changed the name of PT Indonesia Consortium of Construction Industries (PT ICCI) to become PT Istaka Karya (Persero).

In establishing State Owned Enterprises, it requires that the state has to own the capital of the State Owned Enterprises entirely or at least 51% (fifty one percent).⁵⁷ In the case of PT Istaka Karya (Persero), there is statement deed of the decision of the shareholders in the outside of the

⁵⁷ Ridwan Khairandy, *Konsepsi Kekayaan Negara yang Dipisahkan Dalam Perusahaan Perseroan, loc.cit.*

general meeting shareholders of the corporations dated 4th December 2008, it stated that:

- a. Based on the Act Number 19 of 2003 concerning State Owned Enterprises, Act Number 40 of 2007 concerning the Limited Liability Company, government regulation Number 46 of 2005, and the statement of the Article of association of the corporation PT Istaka Karya (Persero), secretary of the state minister of State Owned Enterprises (Act Number 39 of 2008 concerning the State Ministry and the Presidential Degree Number 47 of 2008 concerning the Establishment and Organization of the State Ministry);
- b. In the time this decision determined, the structure of the corporation shareholders as follows “the State of the Republic of Indonesia owns the entire share of the corporation” in amount of 50.000 (fifty thousand) shares or entirely in amount of Rp. 50.000.000.000,- (fifty billion rupiah);
- c. The authorized capital is owned 100% by the state of the Republic of indonesia.

In the bankruptcy case of PT Istaka Karya (Persero), PT Istaka Karya (Persero) as the bankrupt defendant argued that PT Istaka Karya (Persero) cannot be filed a bankrupt petition by PT JAIC Indonesia in reason that the share of PT Istaka Karya (Persero) is entirely owned by the State of the Republic of Indonesia, in this matter, the State Minister of State Owned Enterprises owns the shares entirely. Thus, PT Istaka Karya

(Persero) is included as the State Owned Enterprises that categorized by the Article 2 paragraph 5 Act Number 37 of 2004 in which State Owned Enterprises in which its capital entirely owned by the state cannot be filed a bankrupt petition by other ordinary creditors but the minister of finance.

In this case, after the panel of judges considered the evidences submitted by the bankrupt defendant, the panel of judges give the legal consideration that PT Istaka Karya (Persero) constitutes a State Owned Enterprises that its entire capital owned by the state and that PT Istaka Karya (Persero) constituted as a State Owned Enterprises as mentioned in the Article 2 paragraph 5 Act Number 37 of 2004 and specified in its explanations that State Owned Enterprises running in the field of public interest is a State Owned Enterprises in which its one of the characteristic is the entire capital is owned by the state. Referred to this explanation, the panel of judges in the legal consideration argued and determined that PT Istaka Karya (Persero) cannot be filed a bankrupt petition by PT JAIC Indonesia, in reason that PT JAIC Indonesia did not have the authority at all, and as regulated in the Article 2 paragraph 5 Act Number 37 of 2004, the authority is owned by the minister of finance.

In the writer's view, after analyzing the legal consideration of the panel of judges in the decision of PT Istaka Karya (Persero), the writer argues that in one of the element asserting that State Owned Enterprises running in the field of public interest is a State Owned Enterprises, the writer agrees to the legal consideration of the panel of judges that

determined the share ownership of PT Istaka Karya (Persero) is entirely owned by the state, in this matter represented by the State Minister of State Owned Enterprises as the shareholder.

The legal consideration of the panel judges in the case of PT Istaka Karya (Persero) is similar to the legal consideration of the panel of judges in cassation level in the bankruptcy case of PT Dirgantara Indonesia (Persero). In the legal consideration, the panel of judges in the cassation level determined that the entire capital of PT Dirgantara Indonesia (Persero) is owned by the state, thus PT Dirgantara Indonesia (Persero) can be categorized as the State Owned Enterprises as regulated in the Article 2 paragraph 5 Act Number 37 of 2004.

In the case of PT Istaka Karya (Persero), as the bankrupt defendant, it provided some evidences showing that the state owns the entire capital of it. PT Istaka Karya (Persero) provided some evidences such as the decision outside shareholders general meeting of shareholders of the Company dated 4 December 2008 in which stating that:

- a. Under the Act Number 19 year 2003 concerning the State Owned Enterprises, the Act Number 40 of 2007 on Limited Liability Companies, government regulation Number 46 of 2005, as well as the company's Articles of association (limited company) PT Istaka Karya (Persero), secretary of the Ministry of State Owned Enterprises (Act Act Number 39 year 2008 on the Ministry of State and presidential decree Number 47 of 2008 concerning the establishment and

organization of the Ministry of State) and other service businesses deputy in the position of power as Minister of State Enterprises as Shareholders;

- b. With reiterated that at the time this decision is set, the company's shareholding structure as follows "The State of the Republic of Indonesia has the entire stock company" as many as 50,000 (fifty thousand) shares or total amount of Rp. 50.000.000.000,- (fifty billion);
- c. That 100% of paid-up capital came from the Republic of Indonesia.

Based on the evidence, PT Istaka Karya (Persero) as the insolvent respondent stated that PT Istaka Karya (Persero) can not be made bankrupt by PT JAIC Indonesia because according to Article 2 paragraph 5 and its explanation in the Act Number 37 of 2004, PT Karya Istaka (Persero) is State Owned Enterprises running in the field of public interest in which its entire capital is owned by the state and is not divided into shares. Nevertheless, it has been proven that the shareholder of PT Istaka Karya (Persero) is only the Minister of State Owned Enterprises.

Following to the argument of PT Istaka Karya (Persero) as the bankrupt debtor, in the legal consideration, the panel of judges determined that whereas the entire capital of PT Istaka Karya (Persero) is basically not divided into shares in reason that the whole capital owned by the state of the Republic of Indonesia, which specified represented by the State Minister of State Owned Enterprises as the shareholder of the entire

company's share and capital as the State Owned Enterprises in which entire capital of PT Istaka Karya (Persero), sourced from the state finance as appropriate to the explanation of the Article 2 paragraph 5 Act Number 37 of 2004 concerning the bankruptcy and suspension of payment, thus PT Istaka Karya (Persero) can be able to be classified as the State Owned Enterprises that running in the field of public interest in which its capital entirely owned by the state and is not divided into shares.

Compared to the case of PT Dirgantara Indonesia (Persero), in which it has been clearly proven that there is a distribution of shares. However, the panel of appeal judges in that case argued that the division of capital PT Dirgantara Indonesia (Persero) on the shares that the holder of State Enterprises Minister and Minister of Finance is solely to meet the prerequisite conditions set forth in Article 7 paragraph 1 and 3 Act Number 40 of 2007 in which requiring that the shareholders of a corporation at least two people. The division shares are entirely owned by the State and the division of the shares distributed to the Minister of State Owned Enterprises and Minister of as a representation of the Republic of Indonesia due to the establishment of Limited Liability Company requires the cooperation of at least two parties. Thus, it is why the shares of PT Dirgantara Indonesia (Persero) is divided into two.

In the case of PT Dirgantara Indonesia (Persero), the panel of judges in cassation level said that the division of the shares of PT Dirgantara Indonesia (Persero) in which the shareholder are Minister of

State Owned Enterprises and Minister of Finance is solely to comply the provisions of Article 7 paragraph 1 and paragraph 3 of Act Number 40 of 2007 concerning Limited Liability Companies that require shareholder of a corporation at least two people. Since the shareholders of PT Dirgantara Indonesia (Persero) represented the state, thus the judges determined that the state actually owns the entire capital of PT Dirgantara Indonesia (Persero).

In the case of PT IGLAS (Persero),⁵⁸ the panel of judges in the PK level has been clearly incorrect in determining the legal considerations. It has been clearly that PT IGLAS (Persero) has divided the capital into shares, and the shareholders are not the state only, the shareholders are the state, represented by the state ministry of BUMN and another one is PT Bank BNI (Persero). Nevertheless, the panel of judges in the PK level determined that the distribution of the shares was just to fulfill the requirement of the establishment of Limited Liability Company, the panel of judges also determined that PT Bank BNI (Persero) was a state's property. Thus, the ownership of the shares of PT IGLAS (Persero) belonged to the state.

In this element, the writer analyzes and concludes that there are errors made by the presiding judge in the case of PT Istaka Karya (Persero). The judges have misapplied the Article 2 paragraph 5 Act

⁵⁸ Bankruptcy case between PT IGLAS (Persero) against PT. INTERCHEM PLASAGRO JAYA and PT. AKR CORPORINDO, Tbk, decision of Supreme Court in the PK Level Number 111 PK/Pdt.Sus/2009.

Number 37 of 2004. We have to understand that the explanation of Article 2 paragraph 5 Law Number 37 of 2004 is cumulative. Beside the State Owned Enterprises should run in the field of public interest, it also obliged that its capital is ought to be owned by the state entirely and is not divided into shares. The judges argued that the capital of PT Istaka Karya (Persero) is not divided into shares under reason that the state owns the entire capital. In the legal consideration, the judges did not notice that PT Istaka Karya (Persero) is a State Owned Enterprises in the form of Persero in which Article 1 paragraph 2 Act Number 19 of 2003 determines that State Owned Enterprises in the form of Persero is an enterprises in the form of Limited Liability Company in which the capital should be divided into shares where the state should own the shares entirely or minimum 51% (fifty one percent) and its goal of establishment is gaining the profit.

The judges also do not carefully understand that the explanation of Article 2 paragraph 5 Law Number 37 of 2004 is referred to Article 1 paragraph 4 Act Number 19 of 2003. Explanation of Article 2 paragraph 5 stated that the State Owned Enterprises runs in the public interest is a State Owned Enterprises in which its capital entirely owned by the state and is not divided into shares. This explanation is clearly referring to the State Owned Enterprises in the form of Perum (regulated in the Article 1 paragraph 4 Act Number 19 of 2003).

In legal consideration, the judges also do not understand that the ownership of all shares of PT Istaka Karya (Persero) owned by the State

does not indicate that the PT Istaka Karya (Persero) is a State Owned Enterprises in which its capital is not divided into shares. The judges did not consider that PT Istaka Karya (Persero) is a State Owned Enterprises in the form Persero and it is a Limited Liability Company in which the Act Number 40 of 2007 is supposed to be applied. Ownership of all shares of PT Istaka Karya (Persero) does not indicate the absence of the division of shares, because there are exceptions regulated in the Article 7 paragraph 7 (a) Act Number 40 of 2007 which allows the entire shares solely owned by the State.

H. Conclusion

In the case of PT Istaka Karya (Persero), the panel of judges refused the bankrupt petition filed by PT JAIC Indonesia under reason that PT Istaka Karya (Persero) is a State Owned Enterprises that running in the field of public interest in which its capital derived from the state and is not divided into shares. Thus, the panel of judges determined that PT JAIC Indonesia did not have the authority to file a bankrupt petition against PT Istaka Karya Indonesia (Persero).

In the decision of PT Istaka Karya (Persero), the panel of judges have been misapplied the Article 2 paragraph 5 Act Number 37 of 2004. The panel of judges has been incorrect in determining that PT Istaka Karya (Persero) is a State Owned Enterprises that running in the field of public interest. It is clearly stated that the main goal of the establishment limited liability

company is for gaining and pursuing profit. And it can be clearly analyzed that PT Istaka Karya (Persero) is a State Owned Enterprises in the form of Persero. Thus, PT Istaka Karya (Persero) is not a State Owned Enterprises that running in the field of public interest, but it is a State Owned Enterprises that established to gain profit by running in the field of public interest.

The panel of judges has also been misapplied the understanding of the explanation of State Owned Enterprises running in the field of public interest. The judges argued that the capital of PT Istaka Karya (Persero) is derived from the state, thus Article 2 paragraph 5 Act Number 37 of 2004 is applied to PT Istaka Karya (Persero).

The panel of judges has also been misapplied the understanding of the explanation that State Owned Enterprises should not be divided into shares for its capital. The judges determined that since the capital is entirely owned by the state, thus there is no dividing of the shares. Although PT Istaka Karya (Persero) did not divide its capital into shares in which its capital entirely owned by the state. PT Istaka cannot be categorized to as State Owned Enterprises as regulated in the Article 2 paragraph 5 Act Number 37 of 2004 and its explanation. In reason that PT Istaka Karya (Persero) is a State Owned Enterprises established in the form of Persero in which Act Number 40 of 2007 is applicable to it. Referred to the Act Number 40 of 2007 that limited liability company is established by dividing into shares, and based on the Article 7 paragraph 7 (a) Act Number 40 of 2007, there is any exception for the permissible clause in which State Owned Enterprises in the form of

Persero is possible to not divide its capital into shares, in which all of the shares owned by the state. Thus, the panel of judges is clearly incorrect in determining the legal consideration.

At last, the panel of judges has been clearly misapplied the Article 2 paragraph 5 Act Number 37 of 2004 and its explanation. The panel of judges should understand that what meant by State Owned Enterprises running in the field of public interest in which its capital is owned by the state and is not divided into shares is referred to the State Owned Enterprises in the form of Perum, not Persero.



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