UNSIMPLE EVIDENTIARY TOWARD THE DEBT SUBMITTED BY CREDITOR IN STATEMENT OF BANKRUPT

(Case Study Decision Number 04/PAILIT/2011/PN.Niaga.Smg)

LEGAL CASE STUDY

Presented as Partial Fulfillment of the Requirements of Obtaining Bachelor Degree

Written By:

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Department: International Business Law

INTERNATIONAL PROGRAM

FACULTY OF LAW

ISLAMIC UNIVERSITY OF INDONESIA

YOGYAKARTA

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Content Advisor,

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MOTTO

Indeed, with hardship [will be] ease, so when you have finished [your duties], then stand up [for worship].

(QS. Asy Syarh: 6-7)

I Dedicated This Legal Case Study For:

My Dads Hery Krisyanto S.E.

My Mom Sunarsih

My Younger Brother Doni Laksita

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Assalamualaikum Wr. Wb

Innalhamdalillah, asta'iinuhu wa astaghfiruhu. I ought to express my deepest gratitude to Allah *subhanahu wa ta'alaa* upon His mercy and blessing in form of logic, health, time, and any conveniences which He has been always giving to me. His love and guidance have led me in finishing this writing of my legal case study under tittle **"Unsimple Evidentiary toward the Debt Submitted by Creditor in Statement of Bankrupt"**

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 Islamic University of 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.*

Wassalamualaikum Wr. Wb

Yogyakarta, March 18th 2012

Lucky Suryo Wicaksono

TABLE OF CONTENT

A. Context of Study

The aim of enactment of the Bankruptcy Act is to achieve settlement of debts speedy, fair, open and effective.[1] Therefore, the simple evidentiary is a method of proof performed in a bankruptcy case investigation.

Definition of a simple evidentiary is not described in the Act, but the directions on the application of simple evidentiary in the case of bankruptcy contained in provisions article 8 paragraph (4) of the Bankruptcy Act which states that "The petition for declaration of bankruptcy shall be granted if there are facts or circumstances which proved in simple that the conditions for a declaration of bankruptcy as referred to in Article 2 paragraph (1) have been met".[2]

The provision does not provide an understanding about simple evidentiary, and the explanation only explains what is meant by the facts or circumstances which proved in simple, namely the fact two or more creditors and the fact that debt has been due and payable.[3] From the description, implicitly can be seen that the main principle of simple evidentiary is the application of the terms of bankruptcy as defined in article 2 paragraph (1) which done in a simple.

In the cases examined, PT Mitra Kayu Sejati has filed a petition of bankruptcy by PT Bank Negara Indonesia (Persero) Tbk. It is occurred because PT Mitra Kayu Sejati has made 9 Loan Agreements and 3 Approval

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[1] Widjanarko, *Dampak Implementasi Undang-Undang Kepailitan Terhadap Sektor Perbankan, Jurnal Hukum Bisnis*, Volume 8, Yayasan Pengambangan Hukum Bisnis, Jakarta, 1999, Page 73.

[2] Putriyanti dan Wijayanta, *Kajian Hukum Tentang Penerapan Pembuktian Sederhana*, Page 485.

[3] Sutan remy Sjahdeini, *Hukum Kepailitan Memahami Undang-Undang Nomor 37 Tahun 2004 Tentang Kepailitan*, Pustaka Utama Grafiti, Jakarta,2009, page 148.

of Loan Agreement Amendments (PPPK) to PT Bank Negara Indonesia (Persero) Tbk. As collateral for the agreement of PT Mitra Kayu Sejati has been guarantee in the form of immovable things consisting of 7 SHM and 3 certificates of immovable things (Fiducia). And also PT Mitra Kayu Sejati has debt toward PT Samudra Pasific Maju in amout of 11.747,93 USD. However until the agreed time and maturity date, PT Mitra Kayu Sejati could not meet its obligations to pay off debts to PT Bank Negara Indonesia (Persero) Tbk.

Another fact revealed in court session, that one of the certificate of land guaranteed by PT Mitra Kayu Sejati in the form of SHM number 558/Semaki have had disputes in the District Court of Yogyakarta. On eventually, the result is decision Number 81/Pdt.G/2007/PN.Yk. The decision happened because one of collateral namely SHM 558/Semaki that has been secured by PT Mitra kayu Sejati toward PT Bank Negara Indonesia (Persero) Tbk also secured to the third party (Bambang Wahyudi). Therefore, same object of land as collateral has been used to secure two different loans.

The Decision is in form of amicable settlement (*acte vandading*), which principally requires that PT Bank Negara Indonesia Tbk to submit SHM number 558/Semaki toward Thoriq Hussein (PT Mitra Kayu Sejati) and witnessed by the plaintiff in this case is Bambang Wahyudi after receiving full payment of certificate. The results of the payment which paid by Thoriq Hussein (PT Mitra Kayu Sejati) toward PT Bank Negara Indonesia (Persero) Tbk is used to reduce the amount of the obligation in the matter of load agreement of PT Mitra Kayu Sejati toward PT Bank Negara Indonesia.

However, after receiving full payment, PT Bank Negara Indonesia Tbk not fulfills its obligation to submit SHM Number 558/Semaki in line with the amicable settlement (*acte vandading*).

Article 2 paragraph (1) of Bankruptcy Act and Suspension of Payment explains that ”a debtor having two or more creditors and failing to pay at least one debt which has matured and became payable, shall be declared bankrupt through a court decision, either at his own petition or at the request of one or more of his creditors”. Based on the article, PT Bank Negara Indonesia (Persero) Tbk filed bankruptcy petition against PT Mitra Kayu Sejati and generate decision Nomor 04/Pailit/2011/PN. Niaga.Smg which essentially grant the petition of bankrupt PT Bank Negara Indonesia and declared PT Mitra Kayu Sejati bankrupt with its legal consequences.

After examining the decision, the existence of the debt that arise between PT Bank Negara Indonesia Tbk and PT Mitra Kayu Sejati can still be questioned because of the amicable settlement *(acte vandading)* which has legal force is not executed by PT Bank Negara Indonesia (Persero) Tbk. Therefore, the simple evidentiary of the existence of the debt that has matured and payable still be questioned.

B. Parties Identity

The parties involved in the statement bankruptcy of PT Mitra Kayu Sejati consist of:

1. Disputing Parties

a. Applicant

The party who submit the petition of bankruptcy is PT Bank Negara Indonesia (persero) Tbk having domiciled in MT. Haryono Street Number 16 Semarang, Indonesia. In this case, the applicant represented by lawyer based on Special Power of Attorney number W05/4.3/002 dated February 11th 2011, namely:

1) M. Ali Purnomo, S.H, M.H
2) Ari Widiyanto, S.H

They are lawyers and legal consultant at legal office "dS & Partners" having domiciled at Wahyu Asri Utara Street II/BB 198 Semarang, Indonesia.

b. Respondent

Party who become respondent is PT Mitra Kayu Sejati, having domiciled at Namnaman Street Blok G-7, Housing Pertamina Purwomartani, Sleman, Yogyakarta, and Ds. Babadan Purwomartani Kalasan, Sleman, Yogyakarta, Indonesia. In this case, the respondent represented by lawyer namely Musyafah Achmad from Legal office "Musyafah Ahmad & Partner" having domiciled at Mendung Warih Street Number 146, Giwangan, Umbulharjo, Yogyakarta, based Special Power of Attorney dated on July 3rd 2011.

2. Panel of Judges

Panel of judges who adjudicate and prosecute this case, as follows:

a. Agus Subroto, S.H, M.Hum, as Chief Judge.
b. Winarno, S.H as Member Judge.

c. Ira Satiawati, S.H as Member Judge.

3. Court

Hearing regarding the petition for declaration of bankruptcy examined and adjudicate by Semarang Commercial Court dated on July 8th 2011.

C. Statement of Fact

On February 17th 2000, PT Bank Negara Indonesia (Persero) Tbk and PT Mitra Kayu Sejati have mutually agreed and decided to make a loan approval number: 2000.006. The type of loan is a Working Capital Loan with a maximum credit of Rp.1.250.000.000. Over the Loan Agreement, PT Bank Negara Indonesia (Persero) Tbk and PT Mitra Kayu Sejati have also mutually agreed to do the Loan Agreement Amendment Approval (PPPK) dated December 7th 2000 and March 21th 2001 which essentially regulate provisions concerning about loan period, namely until the date of February 17th 2008.

On May 29th 2000, between PT Mitra Kayu Sejati with PT Bank Negara Indonesia (Persero) Tbk, have been made and signed the loan agreement Number: 2000.023, which contain provisions on granting loans with a maximum credit limit of Rp. 2.500.000.000. Over that of loan agreement, between the PT Bank Negara Indonesia (Persero) Tbk and PT Mitra Kayu Sejati also agreed to perform Loan Agreement Amendment Approval (PPPK), dated May 23th 2001 and December 14th 2001 that substantially amend the purpose of Loan, namely become the additional

working capital in wood processing industry and also change the loan period until the date of December 6th 2002.

On December 7th 2000, between PT Mitra Kayu Sejati and PT Bank Negara Indonesia (Persero) Tbk have been agreed and signed a Loan Agreement Number: 2000.076 and Amendment Loan Agreement Amendment Approval (PPPK) dated on March 21th 2001 which essentially contains a provision on granting loans amounting to Rp. 200.000.000 and regulate the provision about period of loan agreement until June 7th 2006

On March 21th 2001, between PT Mitra Kayu Sejati and PT Bank Negara Indonesia (Persero) Tbk have been agreed to and signed the Loan Agreement Number: 2001.013 along with the Loan Agreement Amendment Approval (PPPK) dated May 23th 2001 which essentially contains a provision on granting loans with a maximum credit limit of Rp. 650.000.000 and regulate the provision about period of loan agreement until September 20th 2003.

On December 14th 2001, between PT Mitra Kayu Sejati and PT Bank Negara Indonesia (Persero) Tbk have been agreed to and signed the Loan Agreement Number: 2001.062, which essentially contain a provision on granting loans with a maximum credit limit of Rp. 1.000.000.000 and regulate provisions regarding the period of Loan Agreement until December 6th 2002.

Similarly, On December 14, 2001, PT Mitra Kayu Sejati and PT Bank Negara Indonesia (Persero) Tbk have agreed to and sign the Loan Agreement Number: 2001.062, which essentially contain a provision on granting loans

with a maximum credit limit of Rp. 5.900.000.000 and regulate the provisions of Loan Agreement period of up to December 13th 2007.

On August 2th 2002, PT Mitra Kayu Sejati and PT Bank Negara Indonesia (Persero) Tbk have agreed to make and sign the Loan Agreement Number: 2002.058, which essentially contains provisions concerning the maximum loan amount of Rp. 900.000.000 as well as provisions governing the period of Loan Agreement until November 1th 2002.

On October 30th 2002, PT Mitra Kayu Sejati and PT Bank Negara Indonesia (Persero) Tbk have agreed to make and sign the Loan Agreement Number: 2002.078, which essentially contains a provision on granting loans with a maximum credit of Rp.1.100.000.000, as well as regulating the period of Loan Agreement until April 29th 2008.

On November 13th 2002, PT Mitra Kayu Sejati and PT Bank Negara Indonesia (Persero) Tbk have agreed to make and sign the Loan Agreement Number: 2002.084, which essentially contains a provision on granting loans with maximum loans of Rp. 600,000,000, along with regulating the period of Loan Agreement until March 12th 2003.

That for the purposes realization of the Loan Agreement as mentioned above, PT Mitra Kayu Sejati has pledged to the PT Bank Negara Indonesia (Persero) Tbk immovable things in the form of 7 land certificates that have been burdened mortgage, as follows:

1. Land Certificate Number 70/Tridadi with an area 160 m^2 on behalf of Thoriq Hussein.

2. Land Certificate Number 71/Tridadi with an area 261 m^2 on behalf of Thoriq Hussein.
3. Land Certificate Number 618/Purwomartani with an area 3.425 m^2 on behalf of Thoriq Hussein.
4. Land Certificate Number 1327/Purwomartani with an area 2265 m^2, on behalf of Thoriq Hussein.
5. Land Certificate Number 558/Semaki with an area 897 m^2 on behalf of Thoriq Hussein.
6. Letter Right of Building Number 657/Purwomartani with an area 211 m^2 on behalf of Thoriq Hussein.
7. Land CertificateNumber 5216 with an area 1096 m^2 on behalf of Thoriq Hussein.

For the realization purposes of the loan agreement as mentioned above, PT Mitra Kayu Sejati has made the pledge to the PT Bank Negara Indonesia (Persero) Tbk in the form of 3 movable things as described in the Fiducia agreement.

Due to the PT Mitra Kayu Sejati who has not implemented the obligation to pay off its debts, the PT Bank Negara Indonesia (Persero) Tbk has submitted notice of default (*somasi*) to PT Mitra Kayu Sejati as follows;

1. Letter Number KAK/V/9.5/233 dated on September 22th 2006.
2. Letter Number KAK/V/9.5/249 dated on September 25th 2006.
3. Letter Number KAK/V/9.5/249 dated on November 8th 2006.

In fact the PT Mitra Kayu Sejati could not meet its obligations as agreed in loan agreement and its amendments. And according to the PT Bank

Negara Indonesia (Persero) Tbk, PT Mitra Kayu Sejati calculated until the date of January 5th, 2011 had a debt in amount of Rp.9.362.662.600.

On July 23th, 2008 based on the verdict number 81/Pdt.G/2007/PN.Yk has occurred the amicable settlement (*acte vandading*) between parties as follows:

1. Drs. H. Bambang Wahyudi as Plaintiff,
2. H.Toriq Husein as Defendant I,
3. Rini Ekowati (Representatives from PT Bank Negara Indonesia) as Defendant II,
4. Sri Wahyuni (Representative Office of State Assets and Auction Yogyakarta) as Defendant III,
5. Drs Winarno (Representative Auction Hall PT Triagung Lumintu) as Defendant IV.

In essentially the parties agreed to end the dispute in Yogyakarta District Court by amicable settlement. The subjects of the agreement are:

1. Toriq Husein performs redemption over SHM Number 558/Semaki toward PT Bank Negara Indonesia (Persero) Tbk in amount of Rp. 1.100.000.000.
2. The result of redemption over SHM Number 558/Semaki paid up by Thoriq Hussein to PT Bank Negara Indonesia (Persero) Tbk will be used to reduce the obligation in the matter of debt PT Mitra Kayu Sejati toward PT Bank Negara Indonesia (Persero) Tbk.
3. After the payment of Rp.1.100.000.000 has been received, PT. BNI as a receiver / mortgage holders has to submit SHM Number 558/Semaki toward Thoriq Hussein (PT Mitra Kayu Sejati) as the Mortgage Giver.

Based on the information from those parties, there are a legal fact that in 2007 the collateral PT Mitra Kayu Sejati is currently in the process of auction through auction house PT Triagung Luminto, which means that after the last Notice of default (*somasi*) in November 2006, the PT Bank Negara Indonesia (Persero) Tbk follow the auction process over collateral of goods. In addition, other legal facts revealed that SHM Number 558/Semaki actually on behalf of Thoriq Hussein that has been pledged by PT. Mitra Kayu Sejati toward PT. Bank Negara Indonesia (Persero) Tbk materially is the land of Drs. H. Bambang Wahyudi although formally still under the ownership of Thoriq Husein.

Based on letter of acceptance of deposits from PT Bank Negara Indonesia (Persero) Tbk toward PT Mitra Kayu Sejati on February 26, 2009, PT Mitra Kayu Sejati has been pay Rp. 1.950.000.000 to PT Bank Negara Indonesia (Persero) Tbk to fulfill its obligations.

Besides having debts to PT Bank Negara Indonesia (Persero) Tbk, PT Mitra Kayu Sejati also has debts to PT. Samudra Pasific Maju that domiciled and having office at Imam Bonjol street Number 54, Semarang in amount of 11.747,93 USD.

Under these circumstances, PT Bank Negara Indonesia Tbk has fulfill the requirements to file the petition of for bankruptcy of PT Mitra Kayu Sejati because the element of having two or more creditors and did not pay in full at least one debt that has matured already fulfilled.[4]

[4]Article 2 Paragraph (1) Act Number 37 of 2004 concerning Bankruptcy and Suspension of Payment.

D. Summary of Decision

Case between PT Bank Negara Indonesia (Persero) Tbk and PT Mitra Kayu Sejati creates decision of Commercial Court Number 04/Pailit 2011/PN.Niaga.Smg.

In its decision, the judges decided to grant the Petition Bankrupt, as follows:

1. Stated PT Mitra Kayu Sejati that domiciled and having office in Ds. Babadan Purwomartani Kalasan, Sleman, Yogyakarta, Indonesia bankrupt with its legal consequences;
2. Appoint Djoko Sujono, BBA, SH., in Wahyu Asri Utara II/BB Number 196, Ngaliyan, Semarang and Ir.H Ady Ngaliyan Setiawan, S.H, Domiciled in Rejosari street VII Number 8, Semarang as the Receiver in bankruptcy of PT. Mitra Kayu Sejati;
3. Appoint Noor Ediyono, S.H., M.H judge of Semarang Commercial Court; as Supervisory Judge;
4. Decide handling case expense and fee for receivers later;
5. Punish PT. Mitra Kayu Sejati pay court fees in amount of Rp. 1.410.000.

The verdict was read on Monday, July 11th 2011 in trial which open to the public by Agus Subroto S.H, MH as well as Chief Justice was accompanied Winarto S.H and the Ira Satriawati as Member Judge and assisted by Meilyna Dwijanti as Substitute Clerk and was attended by Attorney PT Bank Negara Indonesia (Persero) Tbk and PT Mitra Kayu Sejati.

E. Statement Question

Based on the description of the context of study, statement of fact, as well as summary decision, the main issue of this decision namely is it rights that debt who submitted as the condition of bankruptcy included in simple evidentiary?

F. Legal Consideration

Before granting a decision in this case, the judges of Commercial Court of Semarang have some consideration, as follows:

1. The requirement that the debtor can be declared bankrupt is when has fulfilled the elements explained in Article 2 paragraph (1) of Law Number 37 of 2004 on Bankruptcy and Suspension of Payments.
2. PT Bank Negara Indonesia (Persero) Tbk filed a declaration of bankruptcy against PT Mitra Kayu Sejati because PT Mitra Kayu Sejati has debt to PT Bank Negara Indonesia (Persero) Tbk.
3. Based on the bankruptcy petition, PT Mitra Kayu Sejati respond that essentially refused the petition with argued rebuttal as follows:
    a. Respondent argues that the legal issue between the Applicant and Respondent is not really a loan legal problem but technically legal dispute concerning the handover of the collateral that has been paid off.
    b. That the handover of the collateral is also related to the interest of third party namely Bambang Wahyudi and fourth parties namely Lili. As for the legal interests of third parties (Bambang Wahyudi) is related to amicable settlement (*acte vandading*) signed by the applicant, respondent and Attorney of Bambang Wahyudi that the

contents including the obligation to submit the SHM Number 558/Semaki to the respondent and witnessed by Bambang Wahyudi. And fourth party interests (Lili) is associated with the purchase of the collateral of land and factory building permission and known by the respondent and the applicant has made full payment in amount of Rp.5.400.000.000 performed gradually from August 2008 until December 2009.

c. Proof of the case is unsimple because it involves legal issues the existence of *acte vandading* as well as respondent's debt in amount of Rp.9.362.662.600 is not made the details of each loan agreements.

4. PT Mitra Kayu Sejati denied the existence of debt to the Indarto Dwipayana.
5. The evidence in the trial process can show the existence of legal relationship between the applicants with respondent in the form of Loan Agreements with collateral objects of immovable and movable assets.
6. At the appointed time PT Mitra Kayu Sejati could not pay off his debts incurred as the result of the implementation of the Loan Agreements with the amount of Rp. 9.362.662.600 consisting of Debt Principal, Interest Arrears and Arrears Cost. Applicant has also sent notice of defaults (*somasi*) three times in order to respondent settle its debts, but the Respondent did not respond to the existence of notice of default from the applicant. So, the Commercial Court argued that the respondent does not have the goodfaith to settle its debts.

7. Regarding the evidence of *acte vandading* that the content concerning applicant's obligation to submit SHM Number 558/Semaki to the respondent witnessed by Bambang Wahyudi. And about the evidence involving Mrs Lili that related purchases respondent's collateral of land and factory buildings with the permission from the applicant and make full payment of Rp. 5.400.00.000 are carried out gradually and already received by the applicant, it is a separate issue and had no relevance to the applicant's bankruptcy petition.
8. Respondent has paid his debt to the applicant in amount Rp. 1.950.000.000. Actually the debt in the loan agreement that guaranted by SHM Number 558/Semaki is in amout of Rp. 1.100.000.000. Threfore according to respondent, the debt that guanteed by SHM Number 558/Semaki has been settled. In fact, the certificate that has been pledge as collateral in a loan agreement between the applicant and the respondent has not been received by the respondent (in line with *acte vandading*). According to the judges because of amount of debt of the respondent to the applicant is Rp. 9.362.662.600 although the respondent paid Rp. 1.950.000.000 the amount is insufficient compared to the amount of debt that should be fulfilled by respondent.
9. Based on the evidence of the Notice of defaults (*somasi*) concerning settlement of the debt that has been sent 3 times but no respond, it is shown that the respondent did not have good faith to settle its debts.

10. The respondent has debt and obligated to pay a debt to the applicant based on the loan agreement between the applicant and the respondent, regarding the how much amount of debt it is different issue.
11. In the applicant's statement of fact stated that amount of respondent's debt has been due in accordance with the agreed time limit and to obtain notice of default and the respondent did not carry out its obligations, then the Commercial Court argued that respondent has a debt to the applicant that has due and payable.
12. Based on the evidence at court session, the respondent has other creditors namely PT Samudra Pasific Maju. In addition, Respondent has unpaid debt to PT Samudra Pacific Maju in amount of 11.747,93 USD.
13. Commercial Court has obtained facts or circumstances which proved in simple that the requirement to declared bankrupt as referred to Article 2 paragraph (1) of Act Number 37 of 2004 has been fulfilled.
14. The panel of judges stated that PT Mitra Kayu Sejati is bankrupt with all legal consequences.

G. Legal Analysis

In civil cases, one of the judge's duties is to investigate whether the legal relationship that becomes basis of lawsuit proves true or not.[5] In other words, the civil law procedure just needs the formal truth.[6]

According to Sudikno, "proving" in juridical meaning is to give sufficient basics for the judges who investigate the case in order to give legal certainty about the truth of events that submitted.[7] From the definition, appears that proving is convincing the judge about truthfulness of the arguments presented in certain case.[8] Evidence is an absolute element in the filing of a bankruptcy petition where there is a proposition that was rejected by the judge at the Commercial Court because it is not supported by strong evidence.

According to R. Soekardono, that the issue of proving an event concerning the existence of a legal relationship, is a way to convince the judge the truth of the arguments put forward the opposite side.[9] One requirement of proving the existence of debt is the court must decide the evidence that submitted truly a debt. Erman Rajagukguk stated, that in essence the parties want a fair decision, therefore judges need to make use of all available and relevant sources, including expert witnesses.[10]

Article 1 paragraph 1 of Act Number 37 of 2004 states that "bankruptcy shall mean general confiscation of all assets of a Bankrupt Debtor that will be

[5] Retnowulan Sutanto dan Iskandar Oripkartawinata, *Hukum Acara Perdata Dalam Teori dan Praktek*, Alumni, Bandung, 1985, page 41.

[6] *Ibid*

[7] Victorious M.H Randa Puang, *Penerapan Asas Pembuktian Sederhana dalam Penjatuhan Putusan Palit*, Cet 1, Satu Nusa, Bandung,2011 page 41.

[8] Subekti, *Hukum Pembuktian*, Pradnya Paramitha, Jakarta,1975, page 7.

[9] Victoria, *op. cit.*, page .42.

[10] Beny Ponto, et. al., eds., *Penyelesaian Utang Piutang melalui Pailit atau Penundaan Kewajiban Pembayaran Utang*, Ctk. Pertama, Alumni, Jakarta, 2001, page 201.

managed and liquidated by a Receiver under the supervision of Supervisory Judge as provided for herein". The result affected to the debtor who stated bankrupt is debtor legally loses its right to control and manage the property included in the bankruptcy estate, since the date of bankruptcy declaration was pronounced.[11]

Bankruptcy is one method for creditors to obtain settlement of debt, namely by general confiscation and sell the assets of debtor who has been declared bankrupt and the proceeds used to pay the debtor's debts. According to Munir Fuady, each debtor whether legal entity or persons can be stated bankrupted as long as it meets the requirements in the legislation.[12]

Simple Evidentiary is a requirement set forth in Article 8 paragraph (4) of Act Number 37 of 2004 stated, as follows;

> "The petition for declaration of bankruptcy shall be granted if there are facts or circumstances summarily proving that the conditions for a declaration of bankruptcy as referred to in Article 2 paragraph (1) have been met".[13]

Whereas the meaning of "*facts or circumstances summarily proving"* shall mean the fact that there are two or more creditors and there is one debt that has become due and payable but remain outstanding. The differences in the value of the debt as argued by the bankruptcy petitioner and bankruptcy petitionee shall not prevent the issuance of bankruptcy declaration decision.[14]

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[11] Munir Fuady, *Hukum Pailit dalam Teori dan Praktek*, Ctk. Ketiga, Edisi Revisi, Citra Aditya Bakti, Bandung, 2005, page 6.

[12] *Ibid*

[13] Article 2 paragraph (1) Act Number 37 of 2004: "*A debtor having two or more creditors and failing to pay at least one debt which has matured and became payable, shall be declared bankrupt through a Court decision, either at his own petition or at the request of one or more of his creditors".*

[14] Explanation Article 8 paragraph (4) Act Number 37 of 2004.

From the explanation of Article 8 paragraph (4) Act Number 37 of 2004 that mentioned above, can be known that simple evidentiary refers to the article 2 paragraph (1) that have some elements, as follows:

1. Existence of debt

2. At least one debt that has due and payable

3. Existence of debitor

4. Two or more creditor

This research is focused to explain the existence of debt as mentioned in requirement of statement of bankruptcy stated in Article 2 paragraph (1) of Act Number 37 of 2004 on Bankruptcy and Suspension of Payment.

1. Existence of Debt

According to provison Article 1 number 6 Act Number 37 of 2004 what meant by debt, as follows:

> "Debt shall mean an obligation that is expressed or may be expressed in monetary unit under Indonesian or foreign currency that exist now or thereafter or is contingent that is incurred from an agreement or pursuant to the prevailing law and must be fulfilled by the Debtor, failing which the Creditor becomes entitled to recover its loan from the assets of the Debtor"

From definition of debt, it can be known that the debt has some elements, as follows:

a. Obligation

Obligation is a burden, which is given by law to the legal subject. The raise of right and obligation needs a "legal event", which is known as engagement or *verbitten*. In private law, the form of obligation is performance.

Performance is an obligation that must be fullfiiled by debtor. The

others term of performance is debt. The debt also means as an obligation that must be fulfilled by the debtor.[15] In this case the debt is defined as engagement in terms of relationship or obligation of certain performance.[16]Performance also can be interpreted as something given, promised or conducted reciprocally.[17]

Debtor has an obligation deliver performance to the creditor. Because of the debtor has an obligation to pay of the debt (*schuld*).[18] For debtor, the obligation is debt that gives the right to collect (*vorderingrecht*) to the debtor.[19] In addition, the debtor also has another obligation to allow his property be taken by creditors as much as debtor's debts use to settlement its debt, if the debtor does not meets its obligation pay off the debt (*haftung*).[20]

In Indonesian Indonesian Civil Code Article 1234, differentiate performace into 3 forms, as follows;

1) Give something

The form of the performance is an obligation to give something toward creditor. The obligation to give something does not have to be in certain amout of money.[21]

The forms of give something, for example in the loan agreement is

[15]Ridwan Khairandy, *Bahan Kuliah Hukum Perikatan, Fakultas Hukum, UII, Yogyakarta, 2008.* Page 1.

[16]Siti Anisah, *Perlindungan Kepentingan Kreditor dan Debitor Dalam Hukum Kepailitan di Indonesia, Studi Putusan-Putusan Pengadilan*, Ctk. Kesatu, Total Media, Yogyakarta, 2008, page 62.

[17] Abdul Kadir Muhammad, *Hukum Perjanjian*, Alumni, Bandung, 1980.page.93

[18] Mariam Darus Badrul Zaman, *Kitab Undang-Undang Hukum Perdata Buku III Tentang Hukum Perikatan dan Penjelasannya*, Alumni, Bandung,1983, Page 9.

[19]Siti Anisah, loc. cit.

[20]*Ibid.*

[21] J. Satrio, *Hukum Perikatan, Perikatan pada Umumnya*, Alumni, Bandung, 1993, page 25.

the obligation of the seller to give goods, which become the object of sale and purchase agreement. According to Indonesian Civil Code Article 1235, "in every engagement to give something consist the obligation of the debtor to deliver his property and take care of it like a good host (*goed aan huis Vader*) until the moment of delivering".

Regarding the engagement to give something, the Indonesian Civil Code does not give a complete overview. However, from the above provision, it can be formulated that engagement is an engagement to give something is engagement to give (*leveren*) and take care of things until the moment of delivering.

2) Do something

Actually to give something is similar with to do or doing something. The determination of the constraint between giving something and doing something is not clear. Eventhough according to grammatical aspect, giving is doing, but generally is defined by giving the deliver of property or to give enjoyment right to an object.[22]

3) Not to do something

[22] R. Setiawan, *Pokok-Pokok Hukum Perikatan*, Binacipta, Bandung, 1986, page 16.

Regarding the engagement to not do something does not cause problems, because the performance of the debtor just does not do something or let someone else do something.[23]

Then performance as an object of engagement must fulfill certain conditions, namely:

1) Performance must be certain or at least can be determined[24]

Performance in agreement must be certain. A particular object is the kind of things can be determined.[25] In the Indonesian Civil Code Article 1333 stated "that an agreement has to have an object that at least its type can be determined". An agreement should have a specific object, and an agreement must be of a particular object (certainty of terms), means that what was agreed, the rights and obligations of both parties. The goods referred to in the agreement can be determined for at least the type (determinable).

The term of goods in the Dutch called *zaak*. *Zaak* in the Dutch language does not only mean of goods in a narrow sense, but it also means, more broadly, namely the subject matter. Therefore, the objects of the agreement were not only goods but also can be a service.

In general, a particular object in the agreement can be in form of right, service, thing or something, either already exist or not exist, as long as can be determined its type. However, a contract may be

[23] *Ibid*, page 15.
[24] J. Satrio, op. cit., page 28.
[25] Ridwan Khairandy, *op. cit.*, page 2.

canceled when the deadline for the contract had expired and the contract has not been met.[26]

J. Satrio concludes that what is meant by a particular object in the agreement is the object of performance. The substance of the performance must be certain or at least its type can be determined.[27] Indonesian Civil Code specifies that goods referred should not be mentioned, as long as it can be calculated or determined later.

2) Lawful Performance[28]

Performance in the agreement must be permitted by the law. In other words, the performance must not contradict with the law. According to Article 1337 Indonesian Civil Code states, ”a cause is forbidden, if it is forbidden by the law, or if in contrary to good moral or public order”.

A cause stated contrary to the law, if the cause in the related agreement contrary to the applicable law. To determine whether a cause of agreement contrary to the morals (*zeden geod*) is not easy, because morals is a very abstract term, that the substance can be different among one region with others or among one community groups and others. Moreover, the assessments of morals can also changes in accordance with the development of era.[29]

3) No requirement the performance must be possible to meet[30]

[26] *Ibid,* page 3.

[27] J.Satrio, *Hukum Perikatan Tentang Hapusnya Perikatan Buku II, Citra Aditya Bakti, Bandung, 1996.* Page 41.

[28] J. Satrio, op. cit.,*...Perikatan pada Umumnya* , page 32.

[29] J. Satrio, *op.cit…Hapusnya Perikatan Buku II,* page 109.

[30] J satrio, Loc.cit,.*Perikatan pada Umumnya.*

Impossibility to do the performance from the debtor should be viewed from the creditor's point, namely whether the creditor knew or should have known about the impossibility of it. If the creditor knows, then the agreement is void. Instead, if creditors do not know, the debtor remains obligated to carry out the performance.[31]

b. that exist now or thereafter or contingent

A company is not impossible experiencing financial difficulties or unable to pay its debts, so entire of estate that exists today or in future can be used as collateral. In line with the circumstances, Indonesian Civil Code asserted that "every engagement or obligation, its fulfillment is secured by debtor's property the both immovable or not immovable, either already exist or in the future".[32]

Obligation or debts which incurred now or will incurred later in the bankruptcy context, refers to Article 1131 Indonesian Civil Code which states that "any property of the debtor, both movable or immovable, either presently exist of will be exist in the future, become as collateral for any individual agreement".

Obligation in this case can be equated with the engagement, as explained in the theory of the types of engagement, as follows:

1) Conditional engagement

An engangement stated as conditional if an engagement is attached to an event that will come and still not necessarily going to

[31] *Ibid.*
[32] Indonesian Civil Code, Article 1131.

happen, either suspend the birth of the engagement until the occurrence of the event.[33] This engagement consists of two kinds, namely:

a) Engagement with deferred conditions.

If an agreement is attached to the conditions, as long as the conditions were not met then the creditor cannot ask the fulfillment and debtor is not obliged to comply the performance. If the debtor meets his performance before conditions are met, then the payment is not owed and the debtor may demand the return.[34]

Regarding the risk of a conditional engagement regulated in 1264 Indonesian Civil Code, where according to paragraph 2 if the properties are destroyed beyond the debtor's fault, both parties released from their obligations. Meanwhile, in paragraph 3 defined that if without the debtor's fault the property decreased its value, then the creditor may choose either he will terminate the agreement or to claim for delivery of the property, without any decrement of agreed price.[35]

b) Engagement with termination preconditional

Engagement with termination preconditional means the engagement terminate if conditions is filled. If the engagement has been implemented entirely or partly, along with the fulfillment of conditions of engagement then the situation will be restored as if nothing happened or the termintation of engagement for further of

[33] http://wartosoemarno.blogspot.com/2009/01/hukum-perikatan.html last viewed on February 2nd 2012.

[34] R. Setiawan, *op. cit.*, page 44.

[35] *Ibid*

time.[36]

The law recognizes only the first possibility, which is governed by Article 1265 Indonesian Civil Code. This provision is not coercive, so it can be ruled out. Sometimes the return of the original condition is no longer possible.

2) Engagement with determined time

Engagement with determined time is engagement that the validity or terminations depend on time or event that will be occur and definitely occur.[37]

Time or event that specified in the engagement with determined time, it definitely occurs even it is not known when it will happen. Sometimes the time precisely determined, but its maybe also uncertain time. In this case the event was bound to happen, but it is not known when it is time.

In general, if the event is not definitely occurred then it is included in conditional engagement. It is possible that what is meant by the parties is engagement with determined time, although its formulation shows the conditional engagement. Therefore, to determine whether something included as condition or provision of time, have to seen the purpose of the parties.

c. incurred from an agreement or pursuant to the prevailing law

1) Engagement incurred from agreement

[36] *Ibid*, page 25.
[37] *Ibid*, page 47.

In principle, the agreement consists of one or set of promise made by the parties in the contract. On that basis, Prof Subekti defines agreement as events in which a person promises to others in which two people mutually promise to perform something.[38] The promise itself is statements made by one person to another that expresses a particular circumstance, or will be perform a certain act.[39] People are bound to its own promise, the promise given to other parties in the agreement. The promise is binding and causes the debt that must be fulfilled.[40]

According to Sudikno Mertokusumo, agreements should be distinguished with promise. Although the promise is based on consent, but it does not makes legal consequences, which means if the promise is broken, there was no legal effect or no sanctions.[41]Different from that, in common law literature the agreement is consist set of promises, but which meant by promise clearly stated that promise have legal effect when violated its fulfillment can be sued before the court.[42]

Article 1313 Indonesian Civil Code defines "an agreement as an act by which two or more person binding themselves to one or more person*"*. The definition is considered incomplete and too broad with various reasons. The first reason, because the definition only refers to a unilateral agreement only. It is seen from the formulation of the phrase "that occurs between one or more persons bind themselves to one

[38] Subekti, *Hukum Perjanjian*, Intermasa, Jakarta, 1984, page 36.
[39]A.G. Guest, (ed), *Anson's Law of Contract*, Clarendon Press, Oxford, 1979, page 2.
[40] J. Satrio, *Buku II*, op. cit., page 146.
[41] Sudikno Mertokusumo, *Mengenal Hukum*, Liberty, Yogyakarta, 1999, page 110.
[42] A.G. Guest, loc. cit.

person or more".[43] And due to the weakness, J. Satrio proposed that the formulation transformed into: “or in which both parties bind themselves to each other”.[44] The second reason, because the formulation of a legal act may include legal actions (*zaakwaarneming*) and tort (*onrechtmatigedaad*).

To fix the above definition, Article 6.213.I Dutch Civil Code defines "a contract in this sense of this title is a multilateral juridical act whereby one or more parties assume an obligation toward one or more other parties".[45]

The article 1320 Indonesian Civil Code regulates four qualifications for the validity of agreement, as follows:

a) Consent

In order to become valid agreement, the parties must agree to all terms that contained in the agreement.[46] Basically the consent is meeting or rapprochement of will between the parties in the agreement. Someone said to give consent if he desires what was agreed.[47]

Mariam Darus Badrulzaman describes definition of consent as requirement of will (*overeenstemende wilsverklaring*) that agreed between the parties. The Statement party that offering called as *offerte* and statement of the party who receiving an offer called

[43]Article 1313 Civil Code

[44] J. Satrio, *Hukum Perikatan, Perikatan Yang Lahir Dari Perjanjian, Buku I*, Citra Aditya Bakti, Bandung, 1995, page 27.

[45]Ridwan Khairandy, op. cit., page 17.

[46]Sudargo Gautama, *Indonesian Business Law*, PT. Citra Aditya Bakti, Bandung, 1995, page 76.

[47] J. Satrio, *Buku I*, op. cit., page 164.

acceptatie.[48] Thus it can be said that the *offerte*and *acceptatie* is a very important element to determine the birth of an agreement. In addition, a consensus can be expressed in various ways, namely:[49]

(1) Orraly

(2) Written

(3) By sign

(4) By symbol

(5) Silently

The requirements of the existence of consent in agreement, in Common Law legal system known as the agreement or assent. Section 23 of the American Restatement states that the important thing in a transaction is that both parties stated its approval in accordance with the statement of the opposite or other party.[50]

In article 1321 Indonesian Civil Code stated "there is no valid consent if such consent is given by mistake, or is obtained by violence extortion or by fraud". Therefore, the consent can be containing defect (defect of consent) or the consent will be null if there are things that mentioned below:

(1) Dures (*dwang*)

Any unfair action or threats that prevent free will of parties included in the act of coercion (*dwang*). In this case, any actions or threat that violates the law if the act was an abuse of power by one party with making a threat in order to make the

[48] Mariam Darus Badrulzaman, *Aneka Hukum Bisnis*, Alumni, Bandung, 1994, page 24.
[49] *Ibid*
[50] Ridwan Khairandy, *op. cit.*, page 24.

others party gives its rights, authority or privileges. Dures can be a crime or threat of crime, imprisonment or the threat of imprisonment, confiscation and unauthorized possession, or threat of confiscation or ownership of an object or the land which is done illegally, and other acts that violate the law, such as pressure economic, physical and mental suffering, makes someone in a state of fear, and others.[51]

According Sudargo, coercion (*duress*) is any act of mental intimidation. One of example is the threat of physical harm and it may be possible make prosecution to it. However if the threat of physical harm is an act that allowed by the law then in this case was not given the threat of legal sanction, and stated that there is no compulsion at all.[52]

(2) Fraud (*Bedrog*)

Fraud is the act of deception. Article 1328 Indonesian Civil Code expressly states that fraud is a reason for the cancellation of the agreement. The element of fraud is not only a false statement, but there should be a set of deceit (*samenweefsel van verdichtselen*), a set of stories that are not true, and every action or attitudes that are deceptive.[53]

In other words, fraud is an action that has bad intention committed by one of party before the agreement was made. The

[51]John D. Calamari and Joseph M. Perillo, *Contracts*, Second Edition, West Publishing Co., 1977, page 262-264.
[52] Sudargo Gautama, *loc. Cit.*
[53] J. Satrio, op.cit… Buku I, page 350-355.

agreement has the intent to deceive others and make the other party signed the agreement. A false statement itself is not a fraud, but must be accompanied by a deceptive act. Acts of fraud must be made by or on behalf of the parties to the contract, a person who did the act must have a purpose or intent to deceive, and it must be an act that has bad intention.[54]

From the explanation above, it can be concluded that the fraud consists of four elements, namely:[55]

(a) an act that contain bad intention, except for cases of negligence in informing hidden defects in an object;

(b) before the agreement was made;

(c) with the purpose or the intention that makes other party signed the agreement;

(d) taken solely with bad intention.

Agreement that has elements of fraud does not make the agreement null and void, but the agreement may only be canceled (voidable). This means that as long as aggrieved party does not demand to the court that has competent jurisdiction then the contract is still valid.

(3) Mistake or misrepresentation (*Dwaling*)

In this case, one party or several parties have the wrong perception of the object or the subject contained in the agreement. There are two kinds of errors; the first one is *error in*

[54] Sudargo Gautama, op.cit, page 77.
[55] *Ibid*.

persona, namely is a mistake on the person (subject). The second is the *error in the substantia* namely errors that related with characteristics of an object.[56]

(4) Undue influence (*misbruik van omstandigheiden*)

Undue influence is a concept derived from the values that present in the court. This concept isbasics to regulate unbalance transactionsthat have been determined previously by the dominant party to the weaker party. Undue influence exists when the parties perform an action or make an agreement under coercion or the influence of terror or threats, or coercion of short-term detention.

In general there are two kinds of undue influence, namely: the first one is a person that using its dominant psychological position unfairly used to suppress the weaker party, in order to make them agree to anagreement in which they do not want to approve it. Second, where one of party uses the position of authority and trust that used unfairly to persuade others to do a transaction.[57]

According to the doctrine and jurisprudence, agreement which contains defect remains binding on the parties, only parties who feel has given a statement which contains such defects can be request cancellation of the agreement. Therefore,in the Article 1321 Indonesia Civil Code states that

[56] Mariam Darus Badrulzaman, et.al, *Kompilasi Hukum Perikatan*, PT Citra Aditya Bakti, Bandung, 2001, page 75.

[57] Ridwan Khairandy, loc. cit.

"if in the agreement there is mistake, extortion or fraud, then it means there is a defect in the agreement between the parties to the agreement and thus the agreement can be canceled".

b) Capacity

Article 1329 Indonesian Civil Code stated that everybody is capable to enter into an agreement, unless otherwise declared by the law. Then in article 1330 Indonesian Civil Code stated unqualified to enter into an agreement are:

(1) minor person
(2) person put under custody
(3) females, in the matters as determined by the law, and in general to whom the law has restricted to enter into certain agrements.

The functionary of notary act number 30 of 2004 specifically regulates about someone capacity to make an agreement in front of a notary. Someone stated already have capacity if it meets some requirements, as follows: [58]

(1) at least 18 (eighteen) years old or married; and
(2) Capable to do legal action.

c) a particular object

The third qualification for validity of agreement is a particular object (*een bepaald onderwerp*), a particular object kind of things can be determined (determinable).[59]

[58] Act Number 30 of 2004 Article 39.
[59] Sudargo Gautama, *op.cit*, page 79.

Article 1333 Indonesian Civil Code determines that an agreement has to have an object that at least its type can be determined. An agreement should have a specific object, and an agreement must be concerning a particular (certainty of terms), means that what is agreed, the rights and obligations of both parties.

J. Satrio concludes that what is meant by a particular object in the agreement is the object of performance. The substance of performance must be certain or at least its type can be determined.[60] Indonesian Civil Code determines that the object that referred not to be mentioned, as long as can be calculated or determined later on.[61]

d) a lawful cause

The fourth qualification for validity of agreement is the existence of lawful cause.If the object of the agreement illegal, or contrary to morality or public order, and then the agreement becomes null and void.[62]

According to Article 1335 Jo 1337 Indonesian Civil Code states that a cause expressly prohibited if contrary to law, morality and public order.

A lawful cause in common law system known with the term of legality that associated with public policy. A contract can become illegal if contrary to public policy. Although, until now there is no definition of public policy which is widely accepted, the court decides that an agreement contrary to public policy if it has a

[60] J. Satrio, *Buku II*, op.cit, page 41.
[61] Indonesian Civil Code Article 1333.
[62] Sudargo Gautama, *op.cit*, page 80.

negative impact on the community or interfere the safety and welfare of the community.[63]

The qualification for validity of an agreement as explained before, related both of subject and object agreement. The first and second requirements related to the subject of the agreement and annulment for both conditions is irrevocable (voidable). The third and fourth qualification with respect to object to the termination of the agreement is null and void.

Voidable means that as long as the agreement has not been submitted for annulment to a competent court so the agreement is still valid, whereas null and void means that the agreement since it was first made was not valid, so that the law considers that the agreement never existed before.

2) Incurred from prevailing law

Article 1233 Indonesian Civil Code stated that every agreement is establish either by consent, or by the law. In this case the legislators distinguish the engagement based on its source. Thus, the source of the engagement is an agreement and law.

Then article 1353 Indonesian Civil Code stated that "agreement established by virtue of law as the result of aperson's action, arisen from lawful action (*rechtmatige*) or unlawful action (*onrechtmatige*)".

Performing the obligations as intended in the agreement is a legal action has been duly carried out, in the implementation of the

[63] Ridwan Khairandy, op. cit., page 27.

agreement if there is a party who not performing its obligation and cause losses to the other party may impose as civil wrong doing as intended by the agreement.

Indonesian Civil Code also stated about civil wrong doing, which is:

> "Every unlawful action, that's brings damage to other person, obliges the person by whose fault causing such loss, to compensate such loss".[64]

By the stilputation of Indonesian Civil Code, Hoffman explains that the civil wrong doing should cointains four element, as follows:[65]

a) There is someone who conduct an act; (*Er moet een daad zijn verricht*)
b) The act should against law; (*Die daad moet onrectmatig zijn*)
c) The act causes losses to other parties; (*De daad moet aan een ander schade heb bentoege bracht*)
d) The act can be claimed to the actor; (*De daaad moet aan schuld zijn te wijten*).

In accordance with Hoffman, Mariam Darus Badrulzaman stated the criteria to determine any act that classified as civil wrong doing, as follows[66]:

a) There should have an act, which mean by act is either positive or

[64] Indonesian Civil Code Article 1365

[65] L.C Hoffman, Het *NedherlandschVerbitenisserecht*, *eerst deel*, *De Algemene Leer der Verbiten*, (Tweede druk, J.B, Wolters, Batavia, 1932) page 257-265 as quoted by Komariah Emong Sapardjaja, *Ajaran Sifat Melawan Hukum Material Dalam Hukum Pidana Indonesia*, (bandung: Alumni, 2002) p.34 also quoted by Rosa Agustina, Perbuatan Melawan Hukum, Jakarta, Program Pasca Sarjana FH UI, 2003, page 49.

[66]Mariam Darus Badrulzaman, KUH *Perdata Buku III Hukum Perikatan dan Penjelasan*, (bandung: Alumni, edisi kedua, 996) p.146-147 as quated by rosa agustina, op.cit., page 50.

negative act, means every thing which do or not do;

b) The act should against law;

c) There are some losses;

d) There is a causality reason upon the act with losses;

e) There is an error (*schuld*).

The lawmaker applied the term of *schuld* (error) into several meaning:[67]

(1) Liabilities of the actors upon their deed and the loss that occurs by the deed;

(2) Negligence against of deliberation;

(3) As a form of against the law.

The Article 1366 of Indonesian Civil Code stated that:

"Everybody is responsible not only for the damage caused by his deed, but also for the damages caused by his negligence or carelessness".

The element of deliberatness in civil wrong doing considered exist when the act was deliberately performed with specific consequences for physical and/or mental or property of victims, although not an deliberately to harm (physical or mental) of the victims.

Civil wrong doing with element of negligence different from civil wrong doing with the element of deliberatness. Deliberately means there is an intention of offender to cause particular harm to victims, or at least can know certainty that the result of its actions will occur,

[67] Vollmar., *Verbitenissen en bewijsrecht*, p. 327 in Moegni Djojodirjo, *Perbuatan Melawan Hukum* (Jakarta: Pradnya Paramitha, 1982) p.67 as quoted by Rosa Agustina, op.cit., page 66.

however, but in the negligence there is nointention of the offender to cause harm, indeed there may be a desire to prevent such losses.[68]

According to Kartini Mulyadi, obligation is debt that provides creditor the right to invoice.[69]According to Kartini and Gunawan Widjaja, debt is a engagement that is an obligation in the field of property that must be fulfilled by the debtor, and if not met, the creditor entitled to the fulfillment of the debtor's property.[70]

Another opinion that states the debt must be interpreted widely by Sutan Remy Sjahdeini, which adheres to the understanding of Jerry Hoff, as follows:[71]

> *"*Debt should be given a broad sense; either in the sense of obligation to pay a certain debt that incurred because of the loan agreement (where the debtor has received a certain amount of money from creditors), and the obligation to pay a certain sum of money incurred from the agreement or other contract, which meant debt is not just an obligation to pay a certain amount of money due to the debtor has received a certain amount of money because of loan agreement, but also the obligation to pay the debtor incurred from other agreements.*"*

Definition of debt in Act Number 37 of 2004 is an obligation, means that when the debtor does not perform the obligation as agreed, then he can be declared bankrupt. Thus, the definition also includes the definition of debt in a broad sense.

As the comparison, the understading of debt under the United States Bankruptcy Code, what is meant by the claim is defined in section 101,

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[68] Munir Fuady, *Perbuatan Melawan Hukum*, ctk. Ketiga, Citra Aditya Bhakti, Bandung, 2010, page 72.

[69] Kartini Mulyadi dan Gunawan Widjaya, as quoted by Jono, *Hukum Kepailitan*. CtkI, Sinar Grafika, Jakarta, 2008, page 11.

[70] *Ibid*.

[71] Sutan Remi.. *Op. cit*. page 87.

namely:[72]

> (1) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
> (2) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

The definition does not cover all obligations of the debtor. Claim according to the U.S. bankruptcy code requires the existence of right to payment. A right of payment can be the claims even if the form of contingent, unliquidated, and unmatured. A contingent claim is a "one the which the debtor will from called upon to pay only upon the occurrence or happening of an extrinsic event will the which triggers the liability of the debtor to the alleged creditor and if the triggering event or occurrence was one reasonally contemplanted by the debtor and creditor at the time the events giving rise to the claim ccurred".[73]

As stated by Jordan and Bussel, even if a claim is defined as the right to payment but not necessary that these rights is a presence right to receive money. Therefore, according to the definition if the obligation not to cause a right to payment, then the obligations of the debtor can not be classified as a claim.[74]

In the case, PT Mitra Kayu Sejati have debts to PT Bank Negara Indonesia (Persero) Tbk consisting of 9 Loan Agreements. The Detail of these agreements, as follows:

1. Loan Agreement Number 2000.006 dated on February 17th 2000 with

[72] United States Bankruptcy Code
[73] *Ibid*, page 86
[74] *Ibid.*

maximum credit in amout of Rp 1.250.000.000. (Vide: P.2). The agreement amend twice on December 7th 2000 and March 21th 2001 that regulate extention of due date until February 17th 2008. (Vide: P.2-2 & p. 2.3)

2. Loan Agreement Number 2000.023 dated on Mei 29th 2000 with maximum credit in amout of Rp 2.500.000.000 (Vide: P.3). The agreement amend twice on Mei 23th 2001 and 14 December 2001 that regulate extention of due date until December 6th 2002.
3. Loan Agreement Number 2000.076 dated on December 7th 2000 with maximum credit in amout of Rp 200.000.000 (Prove: P.4). The agreement amends on March 21th 2001 that regulate extention of due date until Juni 7th 2006 (Vide: P.4-2)
4. Loan Agreement Number 2001.013 dated on March 21th 2001 with maximum credit in amount of Rp 650.000.000 (Prove: P.5). The agreements amend on Mei 23th 2001 regulates extention of due date until September 20th 2003 (Vide: P.5-1).
5. Loan Agreement Number 2001.062 dated on December 14th 2001 with maximum credit in amount Rp 1.000.000.000. The agreement due on December 6th 2002 (Vide: P.6).
6. Loan Agreement Number 2001.063 dated on December 14th 2001 with maximum credit in amout of Rp 5.900.000.000. The agreement due on December 13th 2007 (Vide: P.7).
7. Loan Agreement Number 2002.058 dated on August 2nd 2002 with maximum credit in amout of Rp 900.000.000. The agreement due on1

November 2002 (Vide: P.8).

8. Loan Agreement Number 2002.078 dated on October 30th 2002 with maximum credit in amout Rp 1.100.000.000. The agreement due on April 29th 2008 (Vide: P.9).
9. Loan Agreement Number 2002.084 dated on November 13th 2002 with maximum credit in amout Rp 600.000.000. The agreement due on March 12th 2003 (Vide: P.10).

Based on the fact of 9 loan agreement, it can be said that the PT Bank Negara Indonesia (Persero) Tbk give revolving loan facilities to PT Mitra Kayu Sejati.[75]

Therefore, what is meant by obligation or debt in this case is not only limited to the underlying agreement (Loan agreement), but also included the auxiliary agreement (underwriting agreement) because the definition of debt in Act Number 37 of 2004 intrepreted widely.

Moreover, there is an interesting fact when one of the collateral (SHM Number 558/semaki) that has been burdened mortgage to guarantee debt of Loan Agreement Number 2000.006. Afterward, with same object (SHM Number 558/semaki) PT Mitra Kayu Sejati also pledged towards Bambang Wahyudi. Besides, over Loan Agreement Number 2000.006 between PT Mitra and PT Bank Negara Indonesia (Persero) Tbk occurs amicable settlement (*acte vandading*).

[75] A revolving loan Facilityis a financial institution that allows the borrower to obtain a business or personal loan where the borrower has the flexibility to decide how often they want to withdraw from the loan and at what time intervals. A revolving loan facility allows a company to drawdown, repay and re-draw loans advanced to it. This type of loan is considered a flexible financing tool due to its repayment and re-borrowing flexibility.

Whereas the problem of existence of the debt in this case occur when there is a debt in which occurs amicable settlement (*acte vandading*), where the amicable settlement become question whether the existence of debt as defined in Act Number 37 of 2004 included as simple evidentiary in the bankruptcy decision.

The amicable settlement begins from a civil lawsuit that submitted in District Court of Yogyakarta. The plaintiff in this case is Bambang Wahyudi and Defendant I is H.Toriq Husein (PT Mitra Kayu Sejati), Defendant II is PT Bank Negara Indosia (Persero) Tbk. Disputing parties agree to settle the dispute with the amicable settlement *(acte vandading).*

Amicable settlement is a formal agreement that unvalid if not performed in accordance with a certain formality, which made in writing form. In practice an amicable settlement is a deed, because the agreement was made intentionally by the parties concerned to be used as evidence in order to settle the dispute. Amicable settlement can be divided into two, as follows:

1. Amicable settlement with the approval of a judge or *acte vergelijk van.*

   Article 130 *Herzien Inlandsch Reglement* (HIR) requires the peaceful settlement of disputes, the article stated: "If on the appointed day both of parties come the district court with the assist of chairman trying to reconcile them".

   According to the provision of Article 1858 paragraph (1) Indonesian Civil Code, “that an amicable settlement have, among the parties, enforcement as a judge’s verdict in the final stage”. This was also asserted in the last sentence of Article 130 paragraph (2) HIR, “the

decision of the deed of peace has the same force as the verdict that has permanent legal force".

In general, a new verdict becomes legally enforceable, if the legal efforts to it were closed. Usually, in order for a decision to have such force, when it already taken an appeal and cassation. However, against the decision of the amicable settlement, the law itself that embed directly to him that force. Immediately after the verdict was pronounced, direct inherently permanent legal force on it, so that the peace that has the same legal forces with a court decisions that permanent legal force.[76]

Amicable settlement that is based upon verdict of judges in the court already has the execution force. If either party did not comply with or implement voluntarily the substance as stipulated in the amicable settlement, it can be asked to execute to the district court, so the Chairman of the District Court instructed the execution. The decision cannot ask for an appeal or cassation.

According to Supreme Court Regulation Number 1 of 2008, amicable settlement is deed which contains the substance of amicable settlement and a court decision affirming the amicable settlement that not subject to ordinary or extraordinary legal effort.

2. Amicable settlement without the consent of the judge or *Acte Van Dading*

According to Prof. R. Subekti and R. Tjitrosudibio: *"Dading"* is an agreement (*overeenkomst*) that subject to the Indonesian Civil Code Book III, and in line with the provisions of Article 1338 Indonesian Civil Code

[76] M. Yahya Harahap, *Hukum Acara Perdata*, cet. 8, Sinar Grafika, Jakarta, 2008, page 279-280.

paragraph (1), *acte vandading* as an agreement, provided that lawfully made (*wettiglijk*) binding on the parties that made as law. Therefore, the *acte vandading* is legal as long as made in accordance with the provisions of Article 1320 Indonesian Civil Code.

Thus, Acte vandading only be annulled or revoked when:

a) The parties are bound by acte vandading agree to annul or terminate the agreement *(metwederzijdsche toestemming).*

b) Based on a valid reason that according to laws stated sufficient to revocation or withdrawal (*hoofde der uit de Wet daartoevoldoende redenen welke verklaart).*[77]

Acte vandading that occur in this case meet the elements agreement on Article 1338 Indonesian Civil Code and have permanen legal force. Therefore, parties to the dispute must comply with the *acte vandading.*

In the amicable settlement the parties mutually waive some of their demands, in order to end an ongoing case or to prevent the occurrence of case. PT Bank Negara Indonesia (Persero) Tbk agreed reduce the obligation of PT Mitra Kayu Sejati after PT Mitra Kayu Sejati carries out its obligation in accordance with *acte vandading*.

What has occured in this case is PT Mitra Kayu Sejati has been perform its obligation to pay sum of money in amout of Rp 1.250.000.000 to the account of PT Bank Negara Indonesia (Persero) Tbk. But PT Bank Negara Indonesia (Persero) Tbk does not perform its obligation to submit certificate SHM Number 558/Semaki in accordance with the *acte*

[77]Permohonan peninjauan kembali diajukan terhadap akta perdamaian hasil prosedurhakim. http://pwppamungkas.wordpress.com Last viewed on Janury 23th 2012.

vadading. It can be argued that the PT Bank Negara Indonesia (Persero) Tbk has been in default towards the *acte vandading*.

Therefore, based on the theory of existence of debt and based on the evidence that shown in the court session, the debt in which incurred *acte vandading* (Loan Agreement Number 2000.006) can not prove in simple in accordance with article 8 paragraf (4) Act Number 37 of 2004 because *acte vandading* is categorized as an agreement that caused right and obligation for both of the parties. In fact, one of the parties namely PT Bank Negara Indonesia (Persero) Tbk does not fulfill its obligation to deliver the SHM toward PT Mitra Kayu Sejati. Thus, the doctrine of *exception non adimplenti contractus* can be applied in this case.

2. At least one debt has due and payable.

Besides the requirements existence of debt, other requirement for bankruptcy petition is the debt has due and payable. An agreement usually includes a clause when the debt matured. But it may happen that although the debt has not been due but has been able to payable because occurred one of actions called *events of default*.[78]

In the explanation of Article 2 paragraph (1) Act Number 37 of 2004 explained the "Debt that has become due and payable" should mean the obligation to pay debt that has become due, either under the contract, accelerated or due to the sanctions imposed by the regulatory body or decision of the court, arbitrator or panel of arbitrators.

[78] Sutan Remy Sjahdeini, *op. cit.*, page 57.

Actually, the term of due and payable have different meanings. Debt that has been due is debt that exceeds the time specified in the agreement or because of the creditors has the right to collect. In addition, there are still some definition explains when a debt which due and payable, namely:[79]

a. Negligence done by debtor and the debtor has been extended in several times.
b. Debtors admit late payment of debt to the creditor and admit its debt has been due.
c. Debtor's negligence in pay installments indicate that the debtor has been failed keeps its promise, so its debt become due and payable.
d. Debtor do not commit debt payment, that agreed will be sales of debtor's asset.
e. Failure to comply with Notice of Default from the debtor.
f. Failure to comply in twice the Notice of Default in order to debtors pay off its debt.

Debt that has been due debt that has undoubtedly become payable, but the debt that has been payable may not be a debt that has been due.[80] A debt that is payable, in case occured an incident that is one from the events of default.[81] In the loan agreement, to put the clauses that called events of default clause into the agreement is prevalent.[82]

Article 1238 Indonesian Civil Code explains the debtor is considered

[79] Siti Anisah, *op. cit*., page 101.
[80] Sutan Remy Sjahdeini, *op. cit*., page 58.
[81] *Ibid.*
[82] *Ibid*, page 57.

negligent if the the debtor with notice of default (*subpoena*) was stated negligent and if in the notice of default the debtor is given time to pay off the debt but after the termination of the period that specified in the notice of default the debtor has not paid yet. Consequently, the debtor is considered negligent, thus debt has been payable.[83]

In this case, PT Bank Negara Indonesia (Persero) Tbk has sent Notice of defaults towards PT Mitra Kayu Sejati, as follows;

1. Letter Number KAK/V/9.5/233 dated on September 22th 2006.
2. Letter Number KAK/V/9.5/249 dated on September 25th 2006.
3. Letter Number KAK/V/9.5/249 dated on November 8th 2006.

Based on the description above, it can be said that PT Mitra Kayu Sejati has done one of the events from the *event of default*. Therefore, debt owned by PT Mitra Kayu Sejati is considered to have due and payable.

3. Existence of Debtor

The object of bankruptcy laws is debtor, namely the debtor that not pays off its debts to its creditors.[84] Debtors are parties who have an obligation to pay a sum of money that emergence of liability may occur due to any cause, whether incurred due to debt agreements and other agreements, as well as those incurred from the legislation.[85]

[83] *Ibid*, page 59.
[84] Herma Pardede, *Debitor Yang Dapat Dinyatakan Pailit*, http://hernathesis.multiply.com, last viewed on January14th 2012.
[85] *Ibid.*

According to provison Article 1 number 3 Act Number 37 of 2004 what mean by debtor is "a person who has indebtedness for which it may be demanded to pay before the court."

The law does not distinguish whether debtor filed for bankruptcy can be any person who runs the company or not running the company, whether the debtor is an individual person or legal entity. In other words, the Act Number 37 of 2004 does not distinguish the rules for bankruptcy of debtor who is a legal entity or *natural person* (individual).[86]

According to Sutan Remy Sjahdeini, meaning of debtor can be divided into two namely debtors in a broad sense and in the narrow sense, that follow meaning of of debt in the narrow sense, argue that what is meant by the debtor is a party that has a debt arising solely from debt agreement.[87] While that follow the formulation of debt in the broadest sense, would argue that what is meant by the debtor is a party who has the obligation to pay a sum of money that the emergence of liability that may occur due to any cause, whether incurred due to loan agreement or other agreements as well as incurred from legislation.

Indonesian Civil Code (ICC) does not use the term debtors and creditors, but used the term of *schuldenaar* (debtor) and the *schuldeischer* (creditor). According to article 1235 Indonesian Civil Code connected with Article 1234 Indonesian Civil Code, and Article 1239 Indonesian Civil Code, *schuldenaar* is party required to give something, do something or not to do something related to its engagement, whether the engagement

[86] Sutan Remy Sjahdeini, op. cit., page 96.
[87] *Ibid*, page 93.

arises because agreement or because of legislation. In obligation law, debtor is party required to carry out a performance or a party who has a debt (duty). While the creditor is the party who entitled to claim the fulfillment of a performance from the debtor, or the party that has a receivable (right).

In this case the debtor is PT Mitra Kayu Sejati. The debt incurred from the loan agreement from PT Bank Negara Indonesia (Persero) Tbk to PT Mitra Kayu Sejati. In addition to having debt to PT Bank Negara Indonesia (Persero) Tbk, PT Mitra Kayu Sejati also has debt to PT Samudra Pasific Maju and Bambang Wahyudi.

Under these circumstances it can be seen that there are three legal relationships that occurred, as follows:

a. PT Mitra Katu Sejati with PT Bank Negara Indonesia (Persero) Tbk, the legal relationship is loan agreement.
b. PT Mitra Kayu Sejati with PT Samudra Pasific Maju, the legal relationship is loan agreement.
c. PT Mitra Kayu Sejati with Bambang Wahyudi, the legal relationship is loan agreement.

4. Two or more creditor *(Concurcus Creditorum)*

The existence of requirement of *Concursus creditorium* is as consequence enactment of provision Article 1131 Indonesian Civil Code which states that bankruptcy is a general seizure of all property the debtor to then after verification of debts not achieved peace or *accoord*,

performed the liquidation process of the entire property of the debtor for later result of the acquisition were distributed to all creditors in approrpriate with level of creditors that has been regulated by law.[88]

If the debtor has only one creditor, then the enactment of Bankruptcy Act losing its *raison d'etre*. If the debtor has only one creditor, then the entire assets of the debtor automatically becomes collateral for debtor's debt settlement and not required to share in *pari passu prorata parte* and the debtor cannot stated bankrupt because only has one creditor.[89]

Bankruptcy Act does not strictly regulate concerning proof that the debtors have two or more creditors, but because in the bankruptcy law applies civil law procedur, then Article 116 *Herzien Inlandsch Reglement* (HIR) applies in this case. Article 116 *Herzien Inlandsch Reglement* (HIR) or Article 1865 Indonesian Civil Code asserts that the burden of proof shall be used by the applicant to prove the lawsuit,[90] then in accordance with the imposition of compulsory evidence explained above, so the applicant must be able to prove that the debtor has two or more creditors as required by bankruptcy Act.[91]

According to Sutan Remy Sjahdeini, bankruptcy law is not regulated bankruptcy that due to debtor does not pay its obligations only to one

[88] Sutan Remy Sjahdeini, page 64.
[89] Jono, "Hukum Kepailitan" Sinar Grafika, Jakarta, 2008, page 97.
[90] Provision Article 116 HIR dan Article 1865 Burgerlijk Wetboek
[91] Sutan Remy Sjahdeini, op.cit, page 64-65.

creditor, but the debtor must be in insolvency[92] or only if the debtor is financially unable to pay its debts to the majority of its creditors.[93]

According to provison Article 1 number 2 Act Number 37 of 2004 what mean by "Creditor shall means the person who has receivables from an agreement or a law that may be collected before the court".

Creditors as referred to in Act Number 37 of 2004 shall mean concurrent creditor, separated creditor, and preferred creditor. Specifically for separated creditor and preferred creditor, they may file a petition for declaration of bankruptcy without losing their collateral right in respect of the Debtor's properties and their prioritized right.[94]

Based on the level of debt settlement, the creditor can be categorized as follows:

a. Preferred creditor (privilege) that consist of:

1) Preferred creditor due to law

Creditors that given a higher level than other creditors by the law solely based on the nature of the receivables are set forth in Article 1139 Indonesian Civil Code and Article 1149 Indonesian Civil Code.

2) Secured creditor

Creditors can sell the collateral object as if no bankruptcy occurred, which means the secured creditor can still exercise the rights of execution even though debitornya declared bankrupt.

[92] Insolvency is a condition unable to pay, see Sudarsono, Kamus Hukum, Rineka Cipta, Jakarta, 2005, page184.

[93] Sutan Remy Sjahdeini, op.cit, page 71.

[94] Explanation Article 2 paragraph 1 Act Number 37 of 2004.

Mariam Darus Badrulzaman mentioned that the creditor who holds collateral right has preffred right and his position as secured creditor.[95] The difference between the right and the position of creditor that its claim secured with right of good, namely its right is called preferred because it is classified by law as creditor who has previlege in the matter of payment, while the position is as separatist creditor because he has a right to separate from other preferred creditors namely the claims secured with the right of goods.[96]

b. Unsecured creditor

Unsecured creditor who is not included in secured and preferred creditor. The settlement of their receivables comes from the rest of the bankruptcy estate after reduced by the secured and preferred creditor. The remaining proceeds of the bankruptcy estate are divided according to the size of the accounts receivable balance of the unsecured creditors.[97]

In the case of PT Mitra Kayu Sejati and PT Bank Negara Indonesia (Persero) Tbk the provision of two or more creditors to may file petition of bankrupt have been fulfilled. In Article 2, paragraph (1) of Act Number 37 of 2004 that requires the existence of two or more creditors for the debtors in this case is PT Mitra Kayu Sejati has been proven and undisputed.

The list of the creditors of PT Mitra Kayu Sejati, as follows:

[95]Mariam Darus Badrulzaman. *Bab-Bab Tentang Creditverband, Gadai dan Fidusia*, Citra Aditya Bakti, Bandung, 1991, Page 17.

[96] *Ibid.*

[97]Article 1132 Indonesian Civil Code.

1. PT Bank Negara Indonesia (Persero) Tbk, Wilayah 05 Semarang, having domicilie in MT Haryono street Number 16 Semarang 50122.
2. PT Samudra Pasific Maju, having domicilie in Imam Bonjol street Number 54 Semarang.

   In the hearing, PT Mitra did not deny the existence of the debt against PT Samudra Pacific Maju that amounted to 11,747.93 USD (Vide KL.1.1-KL1.15)
3. Indarto Dwipayana, having domicilie in Babadan Street Purwomartani Sleman, Yogyakarta.

   In this case the PT Bank Negara Indonesia (Persero) Tbk in its lawsuit stated that the PT Mitra Kayu Sejati has debts in amout of Rp 140.000.000 against Indarto Dwipayana. PT Mitra Kayu Sejati denied the debt and at the hearing of PT Bank Negara Indonesia (Persero) Tbk revokes the evidence of creditors on behalf of Dwipayana Indarto.
4. Bambang Wahyudi, having domicilie Cantel baru street Number 1 Semaki, Yogyakarta.

   Bambang wahyudi as creditors of PT Mitra revealed in *acta vandading* over case Number 8/Pdt.G/2007/Pn.Yk. In this case, Bambang Wahyudi has receivables against PT Mitra Kayu Sejati that secured with SHM Number 558/Semaki.

Based on list of the creditors, it is proved that the PT Mitra Kayu Sejati legally proved have three creditors namely PT Bank Negara

Indonesia (Persero) Tbk, PT Samudra Pasific Maju and Bambang Wahyudi. Therefore, one of the elements of Article 2 paragraph (1) Act Number 37 of 2004 which requires the presence of two or more creditors has been fulfilled.

H. Conclusion

Based on the analysis that has described in this legal case study, it can be concluded that the debts of PT Mitra Kayu Sejati to PT Bank Negara Indonesia (Persero) Tbk can be proved in a simple (sumir), except for one of the debt in which incurred amicable settlement (acte *vandading)* which can be not proven in simple in accordance with Article 8 paragraph (4) Act Number 37 of 2004 because there is existing prior court decision (acte *vandading)* which binding both of the parties that not yet implemented by the applicant.

Consequently, the doctrine of *exception non adimplenti contractus* can be applied in this case, because the applicant has neglected its obligations in accordance with the decision of amicable settlement (acte *vandading).* Due to the existence of doctrine *Exceptio Non Adimplenti Contractus*, means that the PT BNI also guilty, then in order to decide whether each parties have been implemented their rights and obligations required further evidence. Therefore, the existence of debt in which incurred amicable settlement is debatable and ensued the unsimple evidentiary.

References

Books

Abdul Kadir Muhammad, *Hukum Perjanjian*, Alumni, Bandung, 1980.

A.G. Guest, *Anson's Law of Contract*, Clarendon Press, Oxford, 1979.

Beny Ponto, et. al., eds., *Penyelesaian Utang Piutang melalui Pailit atau Penundaan Kewajiban Pembayaran Utang*, Ctk. Pertama, Alumni, Jakarta, 2001.

J. Satrio, *Hukum Perikatan, Perikatan pada Umumnya*, Alumni, Bandung, 1993

J.Satrio, *Hukum Perikatan Tentang Hapusnya Perikatan Buku II, Citra Aditya Bakti, Bandung, 1996.*

J. Satrio, *Hukum Perikatan, Perikatan Yang Lahir Dari Perjanjian*, Buku I, Citra Aditya Bakti, Bandung, 1995.

Jono, *Hukum Kepailitan.* Jakarta: Sinar Grafika, 2008.

Rany Mangunsong, *Indonesian Civil Code*, Gramedia Pustaka Utama, Jakarta, 2008.

Retnowulan Sutanto dan Iskandar Oripkartawinata, *Hukum Acara Perdata Dalam Teori dan Praktek*, Alumni, Bandung, 1985

Ridwan Khairandy, *Bahan Kuliah Hukum Perikatan, Fakultas Hukum, UII, Yogyakarta, 2008.*

Rosa Agustina, *Perbuatan Melawan Hukum*, Jakarta, Program Pasca Sarjana FH UI, 2003.

R. Setiawan, *Pokok-Pokok Hukum Perikatan*, Binacipta, Bandung, 1986

Sudarsono, Kamus Hukum, Rineka Cipta, Jakarta, 2005.

Mariam Darus Badrulzaman, *Aneka Hukum Bisnis*, Alumni, Bandung, 1994

Mariam Darus Badrulzaman. *Bab-Bab Tentang Creditverband, Gadai dan Fidusia*, Citra Aditya Bakti, Bandung, 1991.

Mariam Darus Badrulzaman, *Kitab Undang-Undang Hukum Perdata Buku III Tentang Hukum Perikatan dan Penjelasannya*, Alumni, Bandung, 1983.

Munir Fuady, *Perbuatan Melawan Hukum*, ctk. Ketiga, Citra Aditya Bhakti, Bandung, 2010.

Munir Fuady, *Hukum Pailit dalam Teori dan Praktek*, Ctk. Ketiga, Edisi Revisi, Citra Aditya Bakti, Bandung, 2005.

M. Yahya Harahap, *Hukum Acara Perdata*, cet. 8, Sinar Grafika, Jakarta, 2008.

Siti Anisah. *Perlindungan Kepentingan Kreditor Dan Debitor Dalam Hukum Kepailitan Di Indonesia (Studi Putusan-Putusan Pengadilan).*Yogyakarta: Total Media, 2008.

Subekti,*Hukum Pembuktian,* Pradnya Pasramita, Jakarta,1975.

Subekti, *Hukum Perjanjian*, Intermasa, Jakarta, 1984.

Subekti and R. Tjitrosoedibio. *Kamus Hukum*. Jakarta: Pradnya Paramita, 7th Edition, 1983.

Sudargo Gautama, *Indonesian Business Law*, PT. Citra Aditya Bakti, Bandung, 1995.

Sudikno Mertokusumo, *Mengenal Hukum*, Liberty, Yogyakarta, 1999.

Sutan Remy Sjahdeini.*Hukum Kepailitan-Memahami Undang-Undang Number 37 Tahun 2004 Tentang Kepailitan.* Jakarta: Grafiti, 3rd Edition, 2009.

Widjanarko, *Dampak Implementasi Undang-Undang Kepailitan Terhadap Sektor Perbankan, Jurnal Hukum Bisnis,* Volume 8, Yayasan Pengambangan Hukum Bisnis, Jakarta, 1999.

Victorious M.H Randa Puang, *Penerapan Asas Pembuktian Sederhana dalam Penjatuhan Putusan Palit*, Cet 1, Satu Nusa, Bandung.

English to Indonesian Legal Language/ Bahasa Hukum A Guidebook for Interpreters and Translators/ Buku Panduan untuk Penerjemah.

Act

Act Number 37 of 2004 concerning Bankruptcy and Suspension of Payment.

Supreme Court Regulation Number 1 of 2008

Decision

Yogyakarta District Court Decision Number 81/Pdt.G/2007

Semarang Comercial Court Decision Number 04/PAILIT/2011

Websites

Herma Pardede, *Debitor Yang Dapat Dinyatakan Pailit*, dalam http://hernathesis.multiply.com, last viewed on January, 14th 2012.

Permohonan peninjauan kembali diajukan terhadap akta perdamaian hasil prosedur hakim.http://pwppamungkas.wordpress.com. Last viewed on Janury, 23th 2012

http://wartosoemarNumber.blogspot.com/2009/01/hukum-perikatan.html last viewed on February, 2nd 2012

http://www.investopedia.com/terms/r/revolving-loan-facility.asp#ixzz1oAFUNyhW last viewed on March 04th 2012.