THE LEGAL CONSIDERATIONS OF JUDGES IN DECLARING BANKRUPTCY AGAINST A PERSONAL GUARANTOR DUE TO DEBTOR DEFAULT

UNDERGRADUATE (S1) THESIS

Written by:

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Student Number: 19410032

UNDERGRADUATE PROGRAM IN LAW

FACULTY OF LAW

UNIVERSITAS ISLAM INDONESIA

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Presented as the Partial Fulfillment of the Requirements to Obtain a Bachelor's Degree at the Faculty of Law, Universitas Islam Indonesia, Yogyakarta

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بِسْمِ اللَّهِ الرَّحْمَٰنِ الرَّحِيمِ

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Yang bertanda tangan di bawah ini, saya:

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Karya Ilmiah ini akan saya ajukan kepada Tim Penguji dalam Ujian Pendadaran yang akan diselenggarakan oleh Fakultas Hukum Universitas Islam Indonesia.

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Yogyakarta, 30 September 2023

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MOTTO

"The best among you are those who have the best manners and character."

(The Prophet Muhammad SAW)

"When a person gets closer to the Prophet, they become more aware of how to speak, how to see, how to think, and how to live.
Thus, their life becomes more well-preserved."

(Unknown)

"The service to others is the rent you pay for the room you have here on earth."

(Muhammad Ali)

"If we are not willing to think deeply about the tendency of diminishing love for the scholars and the homeland, it is difficult to further maintain what we often proclaim as unwavering love for the homeland, the Republic of Indonesia."

(Habib Luthfi bin Yahya)

"Do not blame the person who gets angry with you, for it is not their fault. Instead, look within yourself and ask, 'What have I done to make this person angry with me?"

(Husein Mohamad Assagaf)

"Whoever walks earnestly on their path will surely reach their destination."

(Muhammad Arkan Assagaf)

DEDICATION

This thesis is wholeheartedly dedicated to:

Allah *Subhanallahu wa ta'ala,*

Thanks to Allah SWT who always gives me faith, patience, health, and knowledge which made it possible to complete my thesis;

My Beloved Parents, and Family,

Who always provided me with love, continuous support and affection;

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Universitas Islam Indoneisa;

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Who have taught and guided me to complete my study;

All My Friends,

Who always be on my side in easy and hard times;

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Yogyakarta, September 30, 2023

Author,

Muhammad Arkan Assegaf

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ABSTRACT

This research explores crucial dimensions within bankruptcy cases involving personal guarantors: by delving into the legal considerations' judges declaring bankruptcy against a personal guarantor in cases of debtor default. Additionally, by analyze the extent of personal guarantor liability when declared bankrupt due to the debtor's default. When a debtor fails to meet financial obligations, the personal guarantor, who provided the guarantee, may become directly responsible. They must fulfill all commitments to the creditor, especially in cases of debtor defaults. This study investigates situations involving both the primary debtor and personal guarantor in defaults, exploring the possibility of personal guarantor bankruptcy and the applicable bankruptcy process. Our research employs several approaches, including statutory, conceptual, and case approach. This study highlights on two critical objectives: Firstly, to comprehensively analyze the legal considerations made by judges when initiating bankruptcy proceedings against a personal guarantor due to a debtor's default. Secondly, to thoroughly investigate and ascertain the scope of personal guarantor liability upon being declared bankrupt because of the debtor's failure to meet their obligations. These objectives are fundamental in understanding the intricate legal landscape surrounding personal guarantor bankruptcy in instances of debtor default, providing essential insights for legal processes, and ensuring equitable outcomes in financial matters.

Keywords: Considerations, Debtor Default, Personal Guarantor, Bankruptcy.

CHAPTER I
INTRODUCTION

A. Background of Study

The development of science and technology has increased human needs. This development will also have an impact on all aspects of Indonesia, both social and cultural, and, most importantly, in the economic field. The community drives economic progress by starting small businesses or creating their own companies to meet their everyday needs.[1] The company is a form of business that runs any type of business that is permanent and continuous in nature, and it is established, works, and is domiciled within the territory of the Republic of Indonesia. This company aims to make a profit. Profits are obtained by running and developing the company according to the form and activities of its business. In running and developing the company, of course, additional funds are needed. These additional funds can be obtained through other parties, such as banks or financing institutions, as the owner of the funds.

Funds are "oxygen" for a company's commercial operations. Companies will die without capital. Humans cannot survive without air. Companies get funds from a variety of sources, including equity and loans.[2] Therefore, many companies are borrowing money needed by other parties. The party providing the loan is the creditor, while the party borrowing the

[1] Andy Hartanto, *Hukum Jaminan dan Kepailitan*, Laksbang Justitia, Surabaya, 2015, p. 5.
[2] Sutan Remi Syahdeini, *Hukum Kepailitan Memahami Undang-Undang No. 37 Tahun 2004 Tentang Kepailitan*, Grafiti, Jakarta, 2010, p. 295.

funds is the debtor. In the case of borrowing funds, this is closely related to the principle of trust from the creditor for the debtor to be able to return the loan funds on time.

Borrowing activities generally require a debt guarantee from the debtor to the creditor. This debt guarantee can be in the form of goods (objects), which are called material guarantees, or it can be in the form of a guarantor for guaranteeing debts, which is called a personal guarantor.[3] A personal guarantor is a statement of ability given by a third party to guarantee the fulfillment of the debtor's obligations to the creditor if the debtor defaults.[4]

A personal guarantor is regulated in Book III Chapter 17 Article 1820–1850 of the Civil Code. According to the provisions of Articles 1831 and 1837 of the Civil Code, the guarantor has the right to demand that the debtor be billed in advance; if there is a shortage, then the shortfall is billed to the guarantor. If there are other guarantors, the debt is divided equally among the guarantors.[5]

When the debtor is unable to pay or pay off the loan within the stated time frame, the creditor may issue a written warning, also known as a sommatie. The warning normally states that the debtor must complete the

[3] M. Bahsan, *Hukum Jaminan dan Jaminan Kredit Perbankan Indonesia*, Jakarta: PT RajaGrafindo Persada, 2012, p. 2.

[4] Supianto, *Hukum Jaminan Fidusia-Prinsip Publisitas pada Jaminan Fidusia*, Yogyakarta: Garudhawaca, 2015, p. 71.

[5] Thomas Suyatno, et. al., *Dasar-Dasar Perkreditan*, Jakarta: PT Gramedia Pustaka Utama, 2007, p. 94.

achievements within the specified time, and if the debtor does not complete them within that specified time, the debtor is labelled negligent or in default.[6]

Then, if the debtor is negligent or defaults, the creditor may sue the guarantor based on Articles 1831 and 1837 of the Civil Code. Article 1831 of the Civil Code states that the guarantor of the debtor has the privilege of guaranteeing debts to the debtor that have been stipulated in the Civil Code, but the provisions in Article 1832 of the Civil Code allow the guarantor to release his privileges in the guaranteed deed so that his position is the same as that of the debtor; the description is as follows: Based on Article 1831 of the Civil Code:[7]

> **"**The guarantor shall not be obliged to pay the creditor unless the debtor fails to settle his debt; and, in this regard, the debtor shall be dispossessed of his assets in advance in order to settle the debt**."**

While Article 1832 Civil Code:[8]

1. if he has relinquished his privileged right of dispossession;
2. if he, has severally bound himself to the principal debtor; in which case the consequences of the same contract shall be regulated in accordance with the basic principles which have been established with respect to several liability debts;
3. if the debtor can submit a demurrer which is only relevant to him personally;
4. if the debtor becomes bankrupt or insolvent;
5. in the case of a guarantee ordered by the court**.**

[6] Abdulkadir Muhammad, *Hukum Perdata Indonesia*, Bandung: PT Citra Aditya Bakti, 2010, p. 242.

[7] Article 1831 Civil Code Concerning The Consequences of The Guarantee Between The Creditor and the Guarantor.

[8] Article 1832 Civil Code Concerning The Consequences of The Guarantee Between The Creditor and the Guarantor.

In the event that, after being billed, the debtor cannot fulfill obligations, the creditor can take other measures, namely by demanding payment from the guarantor. If the debtor and guarantor also do not fulfill their obligations, the creditor can file a legal action against the debtor and guarantor for compensation. If the debtor and guarantor have debts to two or more creditors and one of them is past due, then the creditor has sufficient reason to apply for bankruptcy to the commercial court.

Bankruptcy is regulated by Law Number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations. According to the regulations of Article 1 paragraph (1) of Law Number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations, what is meant by bankruptcy is a general confiscation of all the bankrupt debtor's assets, which are managed and/or handled by the curator under the supervision of a supervisory judge. In order to apply for a bankruptcy statement, the applicant must first understand the conditions that must be met. These conditions are stated in Article 2 paragraph (1) of Law Number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations; basically, the debtor has two or more creditors and does not pay off at least one current and collectible debt. If these conditions are met and proven in a straightforward fashion, the panel of judges at the commercial court must grant the application for a declaration of bankruptcy, namely by issuing a decision on a declaration of bankruptcy and declaring the debtor bankrupt with all the legal implications. The court's decision on the

application for a declaration of bankruptcy must be issued no later than 60 (sixty) days after the day the application is submitted.

The guarantor, as the one giving the guarantee, is responsible if the debtor is no longer able to fulfill his obligation. A guarantor has authority when issuing guarantees, including the right to request that the debtor's assets be confiscated and auctioned in advance to pay the creditor's debt. As well as the authority to ask creditors to split accounts receivable if there is more than one guarantor. The provision of these specific rights is a type of legal protection given to the guarantor by law. The guarantor has the option to keep or give up these privileges.

This discussion addresses into The Legal Considerations of Judges in Declaring Bankruptcy Against a Personal Guarantor Due to Debtor Default as well as obligations of personal guarantor in bankruptcy cases. Complexity arises when, in a situation where the primary debtor defaults and faces legal action, the bankruptcy process can subsequently be initiated against the guarantor under certain circumstances. This raises questions regarding the status and obligations of the guarantor, underscoring the need for clarification and equitable treatment in bankruptcy cases involving personal guarantors. the author planned to write a thesis referring to the juridical review of Commercial Court Decision Number: 8/Pdt.Sus-Pailit/2018/PN Niaga SBY. As title "The Legal Considerations of Judges in Declaring Bankruptcy Against a Personal Guarantor Due to Debtor Default."

B. Problem Formulations

1. What are The Legal Considerations of Judges in Declaring Bankruptcy Against a Personal Guarantor Due to Debtor Default?
2. What is the personal guarantor's liability when declared bankrupt due to the debtor's default?

C. Research Objective

1. To analyze and understand the legal considered by judges when declaring bankruptcy against a personal guarantor in cases of debtor default.
2. To investigate and determine the extent of personal guarantor liability when they are declared bankrupt because of the debtor's default.

D. Originalities of The Research

No	Sources	Research Result	Differences
1.	Lenny Nadriana, Legal Protection of Heirs' Assets from Personal Guarantee Deed Guarantor Heirs in Bankrupt Companies, *Jurnal Bima Mulia Hukum* Vol.2 No.1	The regulation and application of law to the heirs of the heirs who hold personal guarantors guaranteed in the decisions of the Commercial Court have an impact on the obligations of the heirs to bear all assets, The curator managed the assets owned by the person and those they inherited, leading to bankruptcy., as stated in Article 1 point (1) and Article 21 Law Number 37 of 2004 concerning Bankruptcy and Postponement of Debt	The difference between this research and the research conducted is that the reformers are more concerned with the legal protection of the heirs of the guarantor, while in this research, we'll examine considerations of judges in declaring bankruptcy against a personal guarantor due to debtor default and we'll examine the legal obligations of personal guarantors in bankruptcy.

	September 2017)[9]	Payment Obligations, but looking at the provisions it wasn't in sync with Article 209 of the Bankruptcy Law, which separated the heir's personal assets from the heir's assets.	
2.	Endah Wulandari (Universitas Brawijaya) *Legal Protection for Banks in Preventing Losses Due to Problem Credit with Personal Guarantee from Guarantor* (Thesis)[10]	A form of legal protection for banks to prevent losses if there are no problem loans with a personal guarantor is not yet found both through legislation and through regulations for financial services. This is due to the law, namely the Civil Code, which regulates the responsibility of the guarantor in articles 1820–1850. Protection is only given to guarantors with some of its privileges. The incompleteness of this regulation causes the bank not to take steps to resolve problems regarding debtors with problem loans.	Unlike Endah Wulandari's research, which mainly focused on protecting banks with personal guarantors during loan issues, this study also discusses clause formulation recommended by the author to be issued by the financial services authority (OJK). These clauses aim to help banks avoid losses caused by credit problems, while in this study, we'll examine considerations of judges in declaring bankruptcy against a personal guarantor due to debtor default and we'll examine the legal obligations of personal guarantors in bankruptcy.
3.	Khamarul Hadi (Universitas Riau) *Analysis Against Guarantor Bankruptcy Private (Borgtocht)*	In Supreme Court Decision No. 39 K/N/1999 Jo Supreme Court Decision No. 43 K/N/1999, the Supreme Court argued that the Respondent as guarantor has waived his privileges, the creditor can	The difference in our research is that the research conducted by Khamarul Hadi is more focused on discussing the transition from the original debtor to the guarantor whose analysis is based on the

[9] Lenny Nadriana. "Perlindungan Hukum terhadap Harta Ahli Waris dari Pewaris Penjamin Akta Personal Guarantee di Perusahaan Pailit", *Jurnal Bina Mulia Hukum* 2.1, 2017.

[10] Endah Wulandari. "Perlindungan Hukum Bagi Bank Dalam Mencegah Kerugian Akibat Kredit Bermasalah Dengan Jaminan Personal Guarantee". Thesis, Faculty of Law Universitas Brawijaya, 2017.

	In Case Bankruptcy Number 09/Bankruptcy/ 2005/Pn.Niaga . Jkt. Pst (Thesis)[11]	directly sue the Respondent to carry out the debtor's obligations to the creditor. Simultaneously in the Bankruptcy case Number 09/Bankrupt/2005/PN.Nia ga .Jkt.Pst has also fulfilled the requirements for bankruptcy according to Article 2 paragraph (1) Law Number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations namely: Private guarantor (*Borgtocht*)/Hendro Tjokrosetio is a debtor from Bank PAN and Jubilee; Private Guarantor (*Borgtocht*)/Hendro Tjokrosetio has more from 1 (one) creditor; There are debts that are due and collectible.	Decision Supreme Court No. 39 K/N/1999 in conjunction with Supreme Court Decision No. 43 K/N/1999 and what the judges considered on the decision as well as analyzing whether Decision No. 9 Bankruptcy/2005/PN.Niag a.Jkt.Pst complies with the provisions of Law Number 37 of 2004 Law Number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations, while in this study examine considerations of judges in declaring bankruptcy against a personal guarantor due to debtor default and we'll examine the legal obligations of personal guarantors in bankruptcy.

E. Literature Review

1. Bankruptcy Application Requirements

The terms of the bankruptcy application are submitted to the Commercial Court, and the requirements according to Article 2 paragraph (1) jo Article 8 paragraph (4) Law Number 37 of 2004

[11] Khamarul Hadi, "Analisis Terhadap Kepailitan Penjamin Pribadi (*Borgtocht*) Dalam Perkara Kepailitan Nomor 09/PAILIT/2005/PN. NIAGA. JKT. PST". Thesis, Faculty of Law Universitas Riau 2013.

concerning Bankruptcy and Postponement of Debt Payment Obligations are:[12]

1. There are two or more creditors. Creditors are people who have receivables due to agreements or laws that can be collected before a court. "Creditors" here include both concurrent creditors, separatist creditors and preferred creditors;
2. There is a debt that has matured and can be collected. This means the obligation to pay debts that are due, either because it has been agreed, because of the acceleration of the collection time as agreed, because of the imposition of sanctions or fines by the competent authority, or because of a court decision, arbitrators, or arbitral tribunal; and
3. Both of these things (the existence of two or more creditors and the existence of debts that are past due and collectible) can be proven simply. The application for a declaration of bankruptcy must be granted by the Commercial Court if the three requirements mentioned above are met. However, if one of the requirements above is not fulfilled, the application for bankruptcy declaration will be rejected.

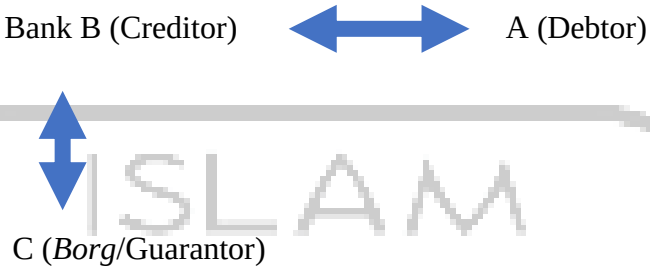
2. Legal Construction of the *Borgtocht* Agreement

From the formulation of Article 1820 of the Civil Code, it is known that a debt guarantee is an agreement that gives birth to a conditional agreement, namely an agreement with tough conditions as stated in Article 1253 jo. Article 1258 of the Civil Code.[13]

[12] Article 2 paragraph (1) jo Article 8 paragraph (4) of Law Number 37 of 2004 Concerning Bankruptcy and Suspension of Debt Payment Obligations.

[13] Gunawan Widjaja and Kartini Mulyadi, *Pedoman Menangangani Perkara Kepailitan*, *PT RajaGrafindo Persada*, Jakarta, 2003, p. 145.

An example of a guaranteed agreement is:



C (*Borg*/Guarantor) legally provide all assets, both movable and immovable owned either existing or will exist in the future to guarantee debt A to Bank B.

This special guaranteed agreement was deliberately agreed upon by the parties. A special guaranteed agreement can be in the form of a guaranteed agreement with guarantees in the form of material guarantees or a guaranteed agreement with guarantees in the form of individuals (*borghtocht*). In material guarantees, there are certain objects that are used as collateral. Whereas for individual guarantees, there are certain people or parties who can pay or fulfill the debtor's achievements to creditors when the debtor defaults. If a guaranteed agreement has a guarantee in the form of an individual guarantee that is embodied in the agreement guarantee, then this guaranteed agreement is an implementation or embodiment of the existence of individual guarantees from each engagement, especially in terms of debts.[14]

[14] Sri Soedewi, *Hukum Jaminan di Indonesia Pokok-Pokok Hukum Jaminan dan Jaminan Perorangan*, Liberty Offset, Yogyakarta, 2007, p. 82.

From the provisions of the law, it can be concluded that the guarantor who has paid has two kinds of rights to reclaim the debtor, namely:

a. The guarantor has the right to claim back, which is his own right against the debtor.
b. The guarantor who has paid it because the law acts in place of the position of the creditor regarding his rights to the debtor replaces the creditor's rights due to subrogation.

From the two types of re-prosecution from the guarantor, it can be concluded that there is a difference regarding the legal consequences. In the right of regress, which is the right of the guarantor, the guarantor has the right to claim back not only the debt he has paid but also the right to demand compensation for losses arising from the sale of the guarantor's goods.

The right to claim compensation for such losses does not exist with the guarantor, who replaces the position of debtor. Conversely, the guarantor who replaces the creditor's rights due to subrogation obtains the creditor's rights against the debtor, including accessory guarantees attached to the creditor's rights he replaced. For example, if the principal debt is secured by a mortgage, the guarantor also obtains the mortgage rights attached to the debt.

While there are several guarantors who have bound themselves to guarantee the same debtor and the same debt, the guarantor who has paid

off the debtor's debt has the right to sue the other guarantors according to their share. Several guarantors who guarantee the same debtor and the same debt are treated as people who owe on guarantees unless they use their privileges to request settlement of their debts.

3. Obligations of the Personal Guarantor as the Basis for a Bankruptcy Application

Based on Article 1 number 1 and Article 2 paragraph (1) of Law Number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations, the requirement for bankruptcy is a debtor, so whether the guarantor is a debtor, the guarantor can be filed for bankruptcy. A guarantor is obliged to pay the debtor's debt to the creditor when the debtor is negligent or defaults. The guarantor will become the debtor or is obliged to pay after the debtor's debt is borne by the default and the property belonging to the main debtor or the debtor who is underwritten has been confiscated and auctioned first but the proceeds are insufficient to pay the debt, or the main debtor is negligent, or the defaulter does not have any assets. Based on these provisions, the guarantor is not obliged to pay creditors unless the debtor fails to pay.

The guarantor in this case can only be said to have a role in the case of a bankruptcy application if the debtor defaults or in other words is unable to pay one or more debts that must be paid immediately or are due and can be collected. So, it can be concluded from this statement that the Personal Guarantor must fulfill what has been left by the debtor. The

role of the Personal Guarantor is as a third party who voluntarily binds himself to the creditor to be able to convince the creditor that the debtor will be able to pay off his debts, even though the debtor has been declared bankrupt or is currently bankrupt.[15]

F. Research Method

1. Type of Research

The normative juridical research approach is used by the author, in which legal research is undertaken by studying library resources or secondary data is classified under the category of normative legal research.

2. Method of Approach

There are various methods of research. With this method, the researcher will collect information from various elements of the subject toward which solutions are being sought. The approach used in this study is the statutory approach.[16] Certainly, normative research must use a statutory method, because what will be evaluated are numerous legal norms that serve as the central and core issue of a study. In this research, the author will use several approaches to this type of normative research, such as:

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[15] Disriani Latifah, *Kedudukan Guarantor Dalam Kepailitan*, s: http//staff.blog.ui.ac.id/disriani.latifah/2009/06/09/kedudukan- guarantor dalam-kepailitan/, accessed on January 23, 2023.

[16] Peter Mahmud Marzuki, *Penulisan Hukum*, Jakarta: Kencana Pranada Media Grup, 2005, p. 93.

1. The Statute Approach is research based on research on legal rules.[17] In this approach, the researcher will examine all laws and regulations related to the research that will be conducted. This legal approach is carried out by studying the legal ratio and ontological basis of a law to capture its philosophical content, with the aim of being able to conclude whether there is a philosophical conflict between the law and the issues that faced.[18]
2. The Conceptual Approach is an approach to legal writing that departs from the views and doctrines that have developed in the science of law. Studying these views and doctrines will help find different ideas that gave birth to legal notions, legal concepts, and legal principles that are relevant to the issues at hand.[19]
3. The Case Approach is carried out by examining cases related to issues that have become court decisions and have permanent legal force through an understanding of ratio decidendi, namely the legal reasons used by judges to arrive at their decisions.[20]

3. Type of Data

Secondary data, mainly documents or libraries, are processed in normative legal research by gathering, reviewing, or tracking documents

[17] Bahder Johan Nasution, *Metode Penelitian Ilmu Hukum,* Bandung: Mandar Maju, 2008, P. 92.
[18] Peter Mahmud Marzuki, *Loc.Cit.*
[19] *Ibid,* p. 95.
[20] *Ibid,* p. 94.

and libraries that might supply information or information requested by researchers. Among the legal materials used in this investigation were:

1) Primary Legal Material

Namely binding legal materials consisting of applicable laws and regulations or applicable provisions, including:

a) Indonesian Civil Code (*Burgelijk Wetboek;*
b) Law Number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations;
c) Law of Republic of Indonesia Number 42 of 1999 concerning fiduciary.
d) The Commercial Court's Decision Number 8/Pdt.Sus-Pailit/2018/PN Niaga/SBY.

2) Secondary Legal Materials

Secondary legal materials used to support primary legal materials include journals and literature books that can be used as references to support this research.

3) Tertiary Legal Materials

Tertiary legal materials that support secondary legal materials derived from legal dictionaries and terminology.

4) Method of Data Collection

The data gathering method employs a literature study strategy in which data is gathered from legal documents in the form

of law or research studies on written works, such as books, journals, or news about bankruptcy.

5) Method of Data Analysis

All legal information collected will be extensively studied through a literature review. Then, proceed with the methodical and logical selection of legal resources in line with the purpose of the writing. The selected legal papers are processed and selected, then classified into numerous chapters, and finally, data analysis is performed, which results in findings about The Legal Considerations of Judges in Declaring Bankruptcy Against a Personal Guarantor Due to Debtor Default.

G. Writing Systematics

This writing's systematics consist of four sequentially structured chapters with the goal of producing a systematic discussion and facilitating understanding of the overall conclusions of this writing. Starting with CHAPTER I and ending with CHAPTER IV, the outline is as follows:

Chapter I is an introduction. In this chapter, discussed the background, namely the foundation that is ideal *das sollen* and *das sein*, which is the background of an issue that was studied in greater depth. Following that, there is a problem formulation in the background, which has an issue to be debated and studied. To help with the preparation of these laws,

there is the Purpose of Writing, Type of Approach, Type of Data, Method of Data Collection, Method of Data Analysis and Writing Systematics.

Chapter II is Theoretical Review. This chapter consisted of concepts and explanations of theoretical studies pertinent to the subject, which were used as the basis for analyzing the law of writing in the following chapter, namely chapter III Finding and Result.

Chapter III is Finding and Result. This Chapter was presented the results of writing, the topic of discussion as the object of study in writing, the focus of the problems studied in this chapter, and then all of these problems were described with systematic writing and the use of the legal materials mentioned above so that answers can be found from these problems.

Chapter IV is Conclusion and Recommendation. In this Chapter is the final chapter in creating this thesis, and it offered the author's conclusions and recommendations for the concerns mentioned in Chapter III.

CHAPTER II

BANKRUPTCY LAW, PERSONAL GUARANTOR, AND ISLAMIC PERSPECTIVE ON BANKRUPTCY AND PERSONAL GUARANTOR

A. Overview of Bankruptcy Law

1. Definition of Bankruptcy Law

The term bankruptcy is derived from the word "bankrupt". If we delve deeper into the origins of the word "bankruptcy," we can discover that it exists in various languages around the world, such as Dutch, French, Latin, and English, each with its own unique term. The term *failliet* in Dutch has a dual meaning as both a noun and an adjective and is commonly used to refer to bankruptcy. The French word for bankruptcy is *faillite*, which refers to a situation where a person or business is unable to pay their debts. Interestingly, the word *faillite* also means a strike or payment jam. In French, individuals who go on strike or stop paying are referred to as *lefaili*. The word "to fail" has the same meaning in English. The term for "failure" in Latin is *failure*. The terms "bankrupt" and "bankruptcy" are used in English-speaking countries to refer to the concepts of insolvency and bankruptcy.[21]

According to Titik Tejaningsih, Algra's definition of bankruptcy as stated in the literature is "*Faillissementis een gerechtelijk beslag op het*

[21] Zainal Asikin, Hukum Kepailitan dan Penundaan Pembayaran Utang di Indonesia, PT Raja Grafindo Persada, Jakarta, 2001, p. 26-27.

gehele vermogen van een schuldenaar ten behoeve van zijn gezamenlijke schuldeisers." Bankruptcy can be defined as the process of seizing the debtor's entire assets to pay off their debts to creditors.[22] According to Henry Campbell Black, bankruptcy is a legal process that allows a debtor, typically one who is unable to pay their debts, to receive financial assistance and undergo a court-monitored reorganization or liquidation of their assets for the benefit of their creditors.[23] Based on Henry Campbell's interpretation, bankruptcy is a legal ruling that mandates an individual who is unable to pay their debts to sell off all their assets to repay their creditors.

Jerry Hoff proposed a more detailed explanation of bankruptcy, defining it as a legal process that involves seizing all the debtor's assets. The bankruptcy filing only pertains to the assets. Bankruptcy does not affect an individual's personal status and they will not be placed under guardianship. Even after declaring bankruptcy, a company can continue to exist. In bankruptcy proceedings, only the receiver is authorized to act regarding the bankruptcy estate. However, other actions still fall under the responsibility of the debtor's corporate organs.[24]

Bankruptcy is a commercial solution for individuals or businesses who are unable to pay their debts to creditors. It is a way to alleviate the crushing burden of debt. If a debtor is aware that they cannot pay their matured obligations, they may consider applying for self-bankruptcy by

[22] Algra, Inleiding tot Het Nederlands Privaatrecht, Tjeenk Willink, Groningen, 1974, p. 425.

[23] *Ibid.*

[24] Jerry Hoff, *Indonesian Bankruptcy Law*, Tatanusa, Jakarta, 1999, p. 11.

submitting a voluntary petition. Alternatively, if evidence is found that the debtor is unable to pay their due and collectible debts, the court may issue an involuntary bankruptcy petition against them.[25] Henry Campbell Black in Black's Law Dictionary states that bankruptcy is:[26]

> "The state or condition of a person (individual, partnership, corporation, municipality) who is unable to pay its debts as they are or become due. The term includes a person against whom an involuntary petition has been filed, who has filed a voluntary petition, or who has been adjudged a bankrupt."

Meanwhile, the definition of bankruptcy according to Article 1 point (1) of Law Number 37 of 2004 concerning Bankruptcy and Postponement of Obligation for Payment of Debt states that:

> "Bankruptcy is the general confiscation of all assets of a bankrupt debtor whose management and settlement are carried out by a curator under the supervision of a supervisory judge as regulated in this law."

Bankruptcy refers to a situation where debtors are either unable or unwilling to fulfill their obligations to pay their debts to creditors that are due and collectible. Bankruptcy is a legal ruling that leads to the seizure of all assets belonging to the debtor, including those that may be acquired in the future. The curator is responsible for managing and resolving bankrupt assets while being monitored by a supervisory judge. Their main goal is to use the funds obtained from selling these assets to pay off all the debts of

[25] Ricardo Simanjuntak, "Esensi Pembuktian Sederhana dalam Kepailitan", in Emmy Yuhassarie (ed), *Undang-undang Kepailitan dan Perkembangannya*, Pusat Kajian Hukum, Jakarta, 2005, p. 55-56.

[26] Herry Campbell Black, *Black's Law Dictionary*, West Publishing Co., St. Paul Minnesota, 1974, p. 134.

the bankrupt debtor in a fair and proportionate manner, following the creditor structure.

2. Purpose on Bankruptcy Law

Radin states in his publication, The Nature of Bankruptcy, that the fundamental objective of bankruptcy legislation is to establish a platform for resolving the claims of multiple creditors against a debtor's assets that are deemed inadequate in value, thereby constituting a debt collection mechanism. The primary objective of bankruptcy law is to facilitate the liquidation of assets possessed by debtors, with the aim of providing financial benefits to their creditors. The Bankruptcy Act is a crucial tool for the reorganization and continuation of a debtor's business in the face of financial challenges related to the restructuring of debt and assets.[27]

Meanwhile, Elizabeth Warren in her book Bankruptcy Policy stated that:[28]

> "In bankruptcy, with an inadequate pie to divide and the looming discharge of unpaid debts, the disputes center on who is entitled to shares of the debtor's assets and how these shares are to be divided. Distribution among creditors is not incidental to other concerns; it is the center of the bankruptcy scheme."

Based on the opinions of Radin and Elizabeth Warren, it can be argued that bankruptcy law, both past and present, is "a debt collection

[27] Radin in his book "The Nature of Bankruptcy", as quoted by Titik Tejaningsih, *Perlindungan Hukum terhadap Kreditor Separatis dalam Pengurusan dan Pemberesan Harta Pailit*, First Edition, FH UII Press, Yogyakarta, 2016, p. 42-43.

[28] Elizabeth Warren, *Bankruptcy Policy*, in et al. Bankruptcy St. Paul, West Publishing Co., Minnesota, 1993, p. 2.

system", although bankruptcy is not the only debt collection system. In short, it can be stated that the purpose of bankruptcy is to distribute the debtor's wealth by the curator to all creditors by considering their respective rights.

Louis E. Levinthal stated that the main objectives of bankruptcy law are as follows:[29]

> "All bankruptcy law, however, no matter when or where devised and enacted, has at least two general objects in view. It aims, first, to secure and equitable division of the insolvent debtor's property among all his creditors, and in the second place, to prevent on the part of the insolvent debtor conduct detrimental to the interests of his creditors''. In other words, bankruptcy law seeks to protect the creditors, first, from one another and, second, from their debtor. A third object, the protection of the honest debtor from his creditors, by means of the discharge, is sought to be attained in some of the systems of bankruptcy, but this is by no means a fundamental feature of the law."

Based on the opinion above, it can be seen that the objectives of bankruptcy are:

a. To guarantee the distribution of the debtor's assets in accordance with the rights of each creditor.
b. Prevent debtors from taking actions that can harm the interests of creditors.
c. Protect debtors who have good faith from their creditors in the form of debt relief.

[29] Louis E. Levinthal, *The Early History of Bankruptcy Law*, in Jordan, et.al., Bankruptcy, Foundation Press, New York, 1999, p. 1.

The General Elucidation of Law Number 37 of 2004 Concerning Bankruptcy and Postponement of Debt Payment Obligations states several factors for the need for regulation regarding bankruptcy and postponement of debt payment obligations:[30]

a. To avoid the seizure of the debtor's assets if at the same time several creditors collect their receivables from the debtor.
b. To avoid the existence of creditors holding material security rights who demand their rights by selling the debtor's property without paying attention to the interests of the debtor or other creditors.
c. To avoid any fraud committed by a creditor or debtor. For example, the debtor tries to give an advantage to one or several creditors so that other creditors are harmed, or there is a fraudulent act by the debtor to run away all his assets to release his responsibilities to the creditors.

Sutan Remy Sjahdeini, in his book Bankruptcy Law: Understanding Law Number 37 Year 2004 concerning Bankruptcy, stated that the objectives of bankruptcy law are:[31]

a. Protecting concurrent creditors to obtain their rights in connection with the application of the guaranteed principle that "all debtor assets, both movable and immovable, both existing and those that will exist in the future, become collateral for the debtor's engagement," namely by providing facilities and procedures for them to meet their bills

[30] The General Elucidation of Law Number 37 of 2004 Concerning Bankruptcy and Postponement of Debt Payment Obligations.

[31] Sutan Remy Sjahdeni, *Hukum Kepailitan: Memahami Undang-Undang Nomor 37 Tahun 2004 tentang Kepailitan*, Pustaka Utama Grafiti, Jakarta, 2010, p. 29-31.

against debtors. According to Indonesian law, the principle of guarantee is regulated in Article 1131 of the Civil Code.

b. Ensuring that the distribution of debtor's assets among creditors is carried out proportionally based on the size of the claim and the position of each creditor, the principle of proportional distribution is guaranteed by Article 1132 of the Civil Code. Ensuring that the distribution of debtor's assets among creditors is carried out proportionally based on the size of the claim and the position of each creditor.

c. Preventing debtors from taking actions that can harm the interests of their creditors. When a debtor is declared bankrupt, he no longer has the authority to manage and transfer his assets. The court's bankruptcy decision determines the legal status of the debtor's assets under general confiscation.

d. According to United States bankruptcy law, an individual debtor will be released from his debts after the settlement or liquidation of his assets is completed. For debtors whose assets, after being liquidated by the liquidator, are insufficient to pay off all their debts to creditors, they are no longer required to pay off these debts. The debtor is allowed to get a fresh financial start. A fresh financial start is only given to individual bankrupt debtors and not legal entity bankrupt debtors. Meanwhile, according to Law Number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations, a fresh

financial start is not given to bankrupt debtors, either individual bankrupt debtors or legal entity bankrupt debtors. That is if after the bankruptcy estate has been settled by the curator and it turns out that there are still outstanding debts, the debtor is still obligated to settle his debts. The general explanation of Bankruptcy Law states that "bankruptcy does not relieve a person who is declared bankrupt from the obligation to pay his debts".

e. Punish the management, whose mistake has resulted in losses to the bankrupt estate.

f. Provide opportunities for debtors and creditors to discuss and make agreements regarding debt restructuring. In the Indonesian Bankruptcy Law, the opportunity for debtors to reach an agreement to restructure their debts with creditors is regulated in Chapter III on Suspension of Debt Payment Obligations (PKPU).

3. Principles of Bankruptcy Law

a. Principle of *Paritas Creditorium*

The principles regarding debt settlement from debtors to creditors include *paritas creditorium*, *pari passu prorata parte*, and structured *prorate*. The legal doctrine of *paritas creditorium*, which pertains to the equality of position among creditors, stipulates that all

creditors are entitled to an equal share of the debtor's assets.[32] In the event that the debtor is unable to fulfill their financial obligation, the creditor may seek to acquire the debtor's assets.[33] The principle of *paritas creditorium* dictates that the debtor's obligations are secured by all of their assets, including movable and immovable goods, as well as assets that are currently or will be owned by the debtor in the future.[34]

Suppose a debtor owes money to just one creditor and refuses to do anything to settle the debt on his own. If that happens, the creditor will file a civil suit against the debtor in the appropriate district court, and the debtor will have to pay the creditor back out of his own assets. Creditors will use any available means to prioritize getting their bills paid if the debtor has many creditors and insufficient assets to pay them all. It is extremely unfair and detrimental to creditors who come later to claim their receivables from the debtor because the debtor's assets have been exhausted. For these reasons, a bankruptcy institution came into being to regulate a reasonable process for paying debts to creditors.[35]

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[32] M. Hadi Shubhan, *Hukum Kepailitan: Prinsip, Norma, dan Praktik di Peradilan*, 7th Edition, Kencana, Jakarta, 2021, p. 27.

[33] Mahadi, *Falsafah Hukum: Suatu Pengantar*, Alumni, Bandung, 2003, p. 135.

[34] Kartini Muljadi, "Kreditor Preferen dan Kreditor Separatis dalam Kepailitan", in Emmy Yuhassarie (ed.), *Undang-undang Kepailitan dan Perkembangannya*, Pusat Pengkajian Hukum, Jakarta, 2005, p. 168.

[35] Kartini Muljadi, *Pengertian dan Prinsip-Prinsip Umum Hukum Kepailitan*, Makalah, Jakarta, 2001, p. 1-2.

The *paritas creditorium* principle is based on the philosophy that it is unfair for a debtor to possess property while they have outstanding debts to their creditors. The law ensures that the debtor's assets are legally protected for the purpose of paying off their debts, even if those assets are not directly connected to the debts. The *paritas creditorium* principle has another interpretation, which states that a debtor's general guarantee for their obligations is restricted to their assets only. This means that aspects such as personal status, political rights, and other non-asset related rights are not impacted by the debtor's debts and are not included in the guarantee.[36]

When a debtor's assets are worth less than the sum of all of the debts the debtor owes, an unfair distribution of *creditorium parity* can occur in the bankruptcy process. When the assets of a bankrupt debtor exceed their total debts, the application of the *pari passu prorata parte* principle becomes less significant. Similarly, it is inappropriate and irrelevant to utilize bankruptcy law institutions against debtors who possess assets exceeding the total amount of their debts. If the liabilities exceed the assets, bankruptcy may be inevitable.[37]

b. Principle of Pari Passu *Prorata Parte*

The principle of *pari passu prorata parte* means that a debtor's assets serve as joint guarantees for their creditors. The proceeds from

[36] M. Hadi Shubhan, *Op. Cit.*, p. 28.
[37] *Ibid.*

these assets must be distributed proportionally among the creditors, unless there are specific creditors who, according to the law, have priority in receiving payment. This suggests that distributing bankrupt assets to creditors in proportion to their claims is a fairer method than distributing them equally.[38]

The principle of *paritas creditorium* strives to ensure equality among all creditors, regardless of their relationship to the debtor's assets or the nature of their transactions. The *pari passu prorata parte* principle ensures equality among creditors by following the concept of proportional justice. This means that creditors with larger receivables will receive a greater portion of the payment from debtors compared to those with smaller receivables. Generalizing the position of creditors without considering the size of the receivables can lead to injustice.[39]

The unfair distribution of *creditorium parity* in bankruptcy occurs when the debtor's assets are less than their total debts. If the bankruptcy debtor's assets exceed the total amount of their debts, the application of the *pari passu prorata parte* principle becomes less significant. Also, inappropriate and irrelevant is the use of bankruptcy law institutions against debtors whose assets exceed the total amount

[38] Kartini Muljadi, "Actio Pauliana dan Pokok-Pokok tentang Pengadilan Niaga", in Rudhy A. Lontoh et.al., Penyelesaian Utang Piutang melalui Pailit atau Penundaan Kewajiban Pembayaran Utang, Alumni, Bandung, 2001, p. 300.

[39] M. Hadi Shubhan, Op.Cit., p. 30.

of their debts. If the assets are less than the liabilities, bankruptcy will occur.[40]

c. Principle of Structured Creditors

The use of the principle of *parity creditorium*, which is complemented by the *pari passu prorate parte* principle in the context of bankruptcy, still has a weakness if the creditors are not equal in position; it is not a matter of the size of the receivables but not the same position because some creditors hold material guarantees and/or creditors who have preferential rights under law. If the legal position between creditors holding material guarantees and creditors without material guarantees is equated, then the existence of a guarantee legal institution loses all significance. Similarly, equating the position of creditors who are accorded special rights by law in the form of preferential rights in paying off their debts with creditors who are not accorded preferential rights will result in an injustice.[41] In order to rectify this injustice, the principle of structured creditors (structured *prorate*) is required.[42] The principle of structured creditors classifies and categorizes various kinds of debtors based on their respective classes. There are three categories of creditors in bankruptcy

[40] *Ibid.*

[41] Jodi Gardner, "*Bankruptcy Reform in Singapore: What Can We Learn*?", Research Policy Report, Centre for Banking & Finance Law, Faculty of Law, National University of Singapore, 2016, p. 284.

[42] M. Hadi Shubhan, *Op., Cit.,* p. 31.

according to Jerry Hoff, such as separatist creditors, preferred creditors, and concurrent creditors.[43]

1) Secured Creditors

Secured creditors possess the right to security interests, which are vested in the creditor through an agreement and the fulfillment of specific formalities. These security interests are in rem rights. A creditor who possesses an in rem right as security is typically authorized to initiate foreclosure proceedings on the collateral without the need for a court order to fulfill their claim using the proceeds and with precedence over other creditors. The legal entitlement to initiate foreclosure proceedings without the need for a judicial ruling is commonly referred to as the right of immediate enforcement.[44]

2) Preferred Creditors

The creditors who hold preferred status because of an agreement with their debtor possess a preference for their claim. The matter of preference holds significance solely in cases where there exists a *concursus creditorum*, i.e., multiple creditors, and the debtor's assets are inadequate to satisfy all the creditors. Creditors who are given priority must submit their claims to the receiver for authentication and pay a proportionate share of the

[43] Sutan Remy Sjahdeni, *Op. Cit.*, p. 280.
[44] Jerry Hoff, *Op. Cit.*, p. 96.

costs associated with the bankruptcy. Several categories of preferred creditors are known as:[45]

a) Creditors who have statutory priority;
b) Creditors who have non-statutory priority;
c) Estate creditors.

3) Unsecured Creditors

Unsecured creditors are not accorded priority and will only receive payment if there are residual proceeds from the bankruptcy estate after all other creditors have been paid. Unsecured creditors are obligated to submit their claims for authentication to their appointed receiver and are subject to a proportional allocation of the expenses associated with the bankruptcy proceedings.[46]

The way creditors are put into these three groups is different from how creditors are put into groups in general civil law. In civil law there are only two different kinds of creditors: preferred creditors and concurrent creditors. Under civil law, preferred creditors can include creditors who have material security rights and creditors who, by law, must be paid before other creditors. On the other hand, in bankruptcy law, preferred creditors are only those who by law must be paid before their

[45] *Ibid*., p. 111-112.
[46] *Ibid.* p. 117

receivables. This includes people who own privilege rights, retention rights, and other rights. Under bankruptcy law, creditors who have material guarantees are called separatists.[47]

d. Principles of Debt

The concept of debt is crucial in bankruptcy proceedings, as a bankruptcy case cannot be evaluated without it. Bankruptcy is a legal proceeding designed to liquidate debtors' assets and use the proceeds to pay their debts to creditors. Without these debts, the essence of bankruptcy would not exist.[48] Ned Waxman said, "The concept of a claim is significant in determining which debts are discharged and who shares in the distribution".[49]

Ned Waxman makes a distinction between claims and debts. According to Robert L. Jordan, a claim refers to the right to get payment, regardless of whether it is unliquidated, unmatured, disputed, or contingent. The statement implies that the right to an equitable remedy for breach of performance is included, provided that the breach gives rise to the right to payment. Debt is typically defined as a liability or obligation that one party owes to another.[50] If the debtor's obligation does not entitle them to receive payment, then it cannot be categorized as a claim. In Indonesia's bankruptcy law, debt

[47] M. Hadi Shubhan, *Op. Cit.*, p. 33.
[48] *Ibid.* p. 34.
[49] Ned Waxman, *Bankruptcy*, Gilbert Law Summaries, Harcourt Brace Legal and Profesional Publication Inc., Chicago, 1992, p. 6.
[50] Ned Waxman, *Op. Cit.*, p. 6-7.

is considered an obligation to fulfill a performance in an engagement. According to Fred B.G. Tumbuan, if an individual's actions or failure to act result in an obligation to pay compensation or not provide something, then they also have a debt and an obligation to fulfill their responsibilities. So, debt equals achievement.[51]

According to Article 1233 of the Civil Code, obligations or debts can arise from either an oral agreement or out of law. There are obligations to give something, do something, or not do something (Article 1234 of the Civil Code). The creditor has the right to expect the debtor to fulfill their obligations. The debtor has obligations to fulfill. From the debtor's perspective, these obligations are his debts. From the creditor's perspective, these obligations are his claim.[52]

The principle of debt is a fundamental concept that governs borrowing and lending activities. The concept of the amount of debt that can be used as the foundation for a bankruptcy claim, coupled with the limitations of the definition of debt, presents a significant consideration in the field of bankruptcy law. The purpose of putting a limit on the amount of debt that can be used to file for bankruptcy is to make sure that only creditors with debts below the minimum can file for bankruptcy and to set the level of bankruptcy. The only thing that limits the minimum debt value is legal standing in judicio, which

[51] Fred B.G. Tumbuan, "Mencermati Makna Debitor, Kredit, dan Utang Berkaitan dengan Kepailitan", in Emmy Yuhassarie, *Undang-undang Kepailitan dan Perkembangannya*, Pusat Pengkajian Hukum, Jakarta, 2005, p. 7.

[52] Jerry Hoff, Op. Cit., p. 15-16.

is the right to file a case. Creditors with receivables below the minimum value are treated the same way as other creditors when bankrupt assets are distributed.[53]

e. Principles of Debt Collection

The principal concept behind debt collection is that creditors can get back at bankrupt debtors by collecting their claims against the bankrupt debtor or the bankrupt debtor's assets.[54] Bankruptcy law is a tool that needs to be used in collection proceedings. We need bankruptcy law as a tool for collection proceedings. Without a bankruptcy law, each creditor would have to fight for their own share of the debtor's assets. So, bankruptcy law solves what is known as the "collective action problem," which is caused by the different interests of each creditor. The bankruptcy law can set up a way for creditors to decide together whether the debtor company should keep doing business as usual or not. The voting process can force minority creditors to go along with the procedure.[55]

The principle of debt collection is that bankruptcy is a way of enabling creditors to get their money by selling off the debtor's assets. Douglas G. Baired said that the goal of bankruptcy law is to help with

[53] M. Hadi Shubhan, *Op. Cit.*, p. 37.
[54] *Ibid.* p. 38.
[55] Emmy Yuhassarie, "Pemikiran Kembali Hukum Kepailitan Indonesia", in Emmy Yuhassarie (ed.), Undang-undang Kepailitan dan Perkembangannya, Pusat Pengkajian Hukum, Jakarta, 2005, p. xix.

collection proceedings.[56] The debt collection principle says that debts owed by debtors should be paid as soon as possible with assets owned by the debtor. This is to make sure that the debtor doesn't try to hide or steal all of his property, which is a general guarantee for his creditors. The principle of debt collection in bankruptcy is shown by the rules for quickly and liquidating assets, the code of simple proof, the fact that bankruptcy decisions can be put into effect right away (*uitvoerbaar bij voorraad*), the waiting period for holders of material guarantees, and the appointment of a curator as executor of management and management.[57]

f. Principles of Debt Pooling

The principle of debt pooling is the rule that says how the assets of a bankrupt company should be divided up among its creditors. The curator will follow the *creditorium parity* principle, the *pari passu prorate parte* principle, and the structured creditors principle when giving out these assets.[58] The principle of debt pooling also explains the specifics of the bankruptcy process, both in terms of bankruptcy as an unusual collection (*oneigenlijke incassoprocedures*) and a court that explicitly handles bankruptcy with its absolute

[56] Douglas G. Baired, "A World Without Bankruptcy", in Jagdeep S. Bhandari and Lawrence A. Weiss (ed.), Corporate Bankruptcy: Economic and Legal Perspectives, Cambridge University Press, New York, 1996, p. 29.

[57] M. Hadi Shubhan, Op. Cit., p. 41.

[58] *Ibid.*

competence related to bankruptcy and other issues that come up in bankruptcy.[59]

g. Principles of Debt Forgiveness

The principle of debt forgiveness means that bankruptcy isn't always an accusation against the debtor or a way to put pressure on them. It can also mean the opposite: that it's a legal tool that can be used to make the debtor's life easier if they can't pay his debts according to the original contract because the debtor has money problems. In some cases, their debts can even be forgiven. The debt forgiveness principle is put into practice in bankruptcy law by giving debtors a "moratorium," which means postponing their debts for a certain amount of time, exempting certain debtor assets from the bankruptcy estate (called "asset exemption"), cancelling debts, giving debtors a "fresh start," rehabilitating debtors after the bankruptcy scheme is over, and other reasonable legal protections.[60] Giving debt forgiveness to people who have filed for bankruptcy is a way to balance out the bankruptcy system. Pardon is a way for debtors to unpaid off their debts.[61]

Under Indonesian bankruptcy law, a debt write-off scheme for the debtor's remaining debts cannot be undone after all the debtor's assets have been sold. Even though the bankruptcy has been revoked

[59] *Ibid*. p. 43.
[60] *Ibid.*
[61] Karen Gross, *Failure and Forgiveness: Rebalancing the Bankruptcy System*, Yale University Press, New Haven-Connecticut, 1997, p. 244.

because the bankrupt's assets aren't enough to cover the debts, the bankrupt's remaining debts still follow the debtor. Let's say the debtor is a legal entity, like a limited liability company, that has gone bankrupt. In that case, the bankrupt limited liability company is dissolved by law if the bankrupt debtor's assets are not enough to pay off its debts. There is also no "fresh start" principle in Indonesian bankruptcy law, which is a form of the "debt forgiveness" principle. This idea of a "fresh start" means that a bankrupt debtor is free of all his debts and can start a new business without being tied down by his old debts. Under Indonesian bankruptcy law, a debtor's debts will follow him even after he files for bankruptcy, and he may even file for bankruptcy more than once. Indonesian bankruptcy law only gives legal institutions within the framework of the principle of debt forgiveness in the form of a debt moratorium called Debt Payment Obligation Suspension. The idea of rehabilitation is to help someone get back on their feet after all their debts are paid off, to give them a fresh start.[62]

h. Principle of Universal and Territorial

The universal principle of bankruptcy means that the bankruptcy decision comes from a court in a country. The bankruptcy decision applies to all of the debtor's assets, whether they are in the country where the decision was made or in another country. This

[62] M. Hadi Shubhan, *Op. Cit.*, p. 156.

principle puts the focus on what is called "cross-border insolvency," which is the international aspect of bankruptcy.[63]

Based on this, the territorial principle will cause trouble if the debtor's assets are located outside of the country. In general, most legal systems around the world do not allow their courts to carry out the decisions of courts in other countries. State sovereignty is closely linked to the idea that foreign court decisions should not be carried out. A sovereign state won't acknowledge a higher institution unless it submits to it on its own. Since a court is a tool in a country, it makes sense that it won't carry out decisions made by courts in other countries.[64] Rahmat Bastian also said that the principle of territorial sovereignty meant that foreign court decisions couldn't be put into effect right away on the territory of another country. This principle is also related to the rule of law principle, which says that foreign decisions can't be carried out in another country.[65]

4. Requirement of Filing Bankruptcy

M. Hadi Shubhan stated that the material requirements that must be met in filing a bankruptcy petition are the existence of one debt that has

[63] M. Hadi Shubhan, *Op. Cit.*, p. 47.

[64] Hikmahanto Juwana, "Relevansi Hukum Kepailitan dalam Transaksi Bisnis Internsional", in Emmy Yuhassarie (ed.), *Kepailitan dan Transfer Aset Secara Melawan Hukum*, Pusat Pengkajian Hukum, Jakarta, 2005, p. 290-291.

[65] Rahmat Bastian, "Prinsip Hukum Kepailitan Lintas Yuridiksi", in Emmy Yuhassarie Yuhassarie (ed.), *Kepailitan dan Transfer Aset Secara Melawan Hukum*, Pusat Pengkajian Hukum, Jakarta, 2005, p. 299.

matured and is collectable and the debtor having at least two creditors.[66] Article 2 paragraph (1) of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations states that:[67]

> "A debtor who has two or more creditors and does not pay off at least one debt that has matured and is collectible, is declared bankrupt by a court decision, either at his own request or at the request of one or more creditors."

Thus, the conditions for a person or legal entity to be declared bankrupt are as follows:

a. The debtor Has Two or More Creditors

According to Article 2 paragraph (1) of Law Number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations, one of the conditions that must be met is that the debtor has 2 (two) or more creditors. This means that it is only possible for a debtor to be declared bankrupt if the debtor has at least 2 (two) creditors. The requirement for the existence of at least two creditors or more is known as the principle of *concursus creditorum*.[68] It indicates that a debtor must have at least two or more creditors. If the debtor has only one creditor, there is no need to divide the bankruptcy estate among the creditors.

If a debtor with only one creditor is allowed to file for bankruptcy, then the debtor's assets, which are debt guarantees

[66] M. Hadi Shubhan, *Op. Cit.*, p. 1.

[67] Article 2 paragraph (1) of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations.

[68] Sutan Remy Sjahdeni, *Op. Cit.*, p. 64.

according to Article 1131 of the Civil Code, don't need to be divided up because the proceeds from the sale of those assets are the only way for the creditor to get paid back. Since there is only one creditor, there is no worry that the debtor's assets will be taken away.[69]

So, when a person files for bankruptcy, all their assets are taken away, and then they have to liquidate them. Then, the proceeds from the forced liquidation are split equally among the creditors, unless the law says that one of the creditors has a higher priority for getting paid.[70]

b. There Must Be Debt

Basically, bankruptcy happens when people don't pay their debts to creditors. So, having debt is one of the requirements for filing for bankruptcy. Article 1 point 6 of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations states that regarding debt, as follows:

> *"*Debt is an obligation that is stated or can be stated in the amount of money both in Indonesian currency and foreign currency, either directly or that will arise in the future or contingently, arising from an agreement or law and must be fulfilled by the debtor, and if not fulfilled, gives the creditor the right to obtain fulfillment from the debtor's assets."

From what I understand of the article above, the debtor's assets that are used as collateral for the receivables that the creditor owns

[69] Setiawan, "Ordonansi Kepailitan Serta Aplikasi Kini", in Rudy A. Lontoh (ed), *Menyelesaikan Utang Piutang melalui Pailit atau Penundaan Kewajiban Pembayaran Utang*, Alumni, Bandung, 2001, p. 122.

[70] Titik Tejaningsih, *Perlindungan Hukum Terhadap Kreditor Separatis dalam Pengurusan dan Pemberesan Harta Pailit*, First Edition, FH UII Press, Yogyakarta, 2016, p. 61.

don't just include the debtor's current assets but also the debtor's future assets. If the debtor's current assets aren't enough to cover his debts, the debtor's future assets will be used as collateral to make up for the shortfall in the creditor's receivables.

According to Article 1 point 6 of the Bankruptcy Law, the Supreme Court made Judicial Review Decision Number 05PK/N/1999, which clarifies that debt refers to both principal and interest. This means that debt refers to the legal relationship between borrowing money or having an obligation to pay a specific amount of money, which is a particular type of engagement among various forms of engagement in general.[71]

According to Tri Harnowo, there are three meanings of debt, namely:[72]

a) The definition of debt in a narrow sense, namely that debt only arises from moneylending agreements;

b) The definition of debt in a broad sense, namely debt does not only arise from a money-lending agreement but also arises because of an obligation that requires the debtor to pay, which arises from an agreement;

[71] J. Satrio, *Hukum Perikatan, Perikatan yang Lahir dari Undang-undang*, First Edition, Citra Aditya Bakti, Bandung, 1993, p. 88-89.

[72] Tri Harnowo, "Kreditor Preferen dan Separatis", in Emmy Yuhassarie, *Undang-undang Kepailitan dan Perkembangannya: Proseding Rangkaian Lokakarya Terbatas Masalah-masalah Kepailitan dan Wawasan Hukum Bisnis Lainnya Tahun 2004*, Pusat Pengkajian Hukum, Jakarta, 2005, p. 129.

c) The definition of debt in a very broad sense, namely that debt does not only come from an agreement but also comes from the law, arises not only as a result of an obligation to pay but also because there is also an obligation to do something or not to do something, namely based on Article 1234 of the Indonesian Civil Code.

The meaning of "debt that has matured and is collectible," as stated in Article 2, paragraph (1) of Law Number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment obligations, is the obligation to pay debts that have reached their maturity date. This can occur due to an agreement between the parties involved, acceleration of the collection time as agreed upon, imposition of sanctions or fines by the competent authority, or as a result of court decisions, arbitrators, or arbitral tribunals. When bankruptcy law uses the word "debt," it sticks to the broad definition of the word. In a broad sense, the idea of debt that is used as the basis for filing for bankruptcy must meet the following criteria:[73]

a) The debt has matured

A debt is said to have matured when the agreed-upon amount of time has passed or if there are other ways to get the money even though the debt has not yet matured. A default clause, an acceleration clause, and an acceleration provision can be used to get money for debts that are not yet due. The purpose

[73] M. Hadi Shubhan, *Op. Cit.*, p. 91-92.

of the acceleration clause is to let the creditor speed up the time until the debt is due if the creditor feels unsafe. So, the acceleration clause is used instead of the default clause if the creditor thinks it's necessary, even if the debt hasn't yet come due. Because the creditor can bring the debtor's debt due sooner if there is an event of default, which means that something has happened, or the debtor hasn't done what was agreed upon in the credit agreement. This makes the creditor bring the debt due sooner.

b) The debt can be collected

The debt does not arise from a natural engagement (*natuurlijke verbintenis*). A "natural engagement," which is an agreement that can't be tested in court, can't be used as a reason to file a petition for a declaration of bankruptcy.

c) The debt is not paid off

In cases where debts have been paid but the obligations have not been fulfilled, the debt can still be used as a basis for applying for a declaration of bankruptcy.

5. Authorized Parties to File an Application for Bankruptcy

Various types of parties have the option to file for bankruptcy based on the specific provisions stated in laws and regulations. The following are the parties involved:

a. **Debtor himself (Article 2 paragraph (1) of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment obligations)**

Under the Bankruptcy Law, debtors have the right to file a petition for a declaration of bankruptcy on their own behalf. If the debtor is legally married, their application can only be submitted with the consent of their spouse. Article 4 of the Bankruptcy Law states that this provision is not applicable if the husband and wife do not have unity of property in their marriage.

b. **One or more creditors (Article 2 paragraph (1) of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment obligations)**

According to the explanation provided in Article 2, paragraph (1) of the Bankruptcy Act, the creditors who are eligible to file for a declaration of bankruptcy are those who fall within the categories of preferred, separatist, and concurrent creditors. Creditors who are preferred, specific, or separatist have the option to file for bankruptcy and still maintain their priority and collateral rights for the property they have against the debtor's assets.

c. Prosecutor's Office of the Republic of Indonesia (Article 2 paragraph (2) of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment obligations)

If the conditions for submitting a bankruptcy petition are met and no party has filed for bankruptcy, the Prosecutor's Office has the option to request a declaration of bankruptcy based on public interest. According to Article 2 paragraph (2) of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations, "public interest" refers to the interests of the nation, state, and wider community, for example:[74]

1) The debtor runs away;
2) The debtor embezzles part of the assets;
3) The debtor has debts to State-Owned Enterprises (BUMN) or other business entities that collect funds from the public;
4) The debtor has debts originating from the collection of funds from the wider community;
5) The debtor does not have good intentions or is uncooperative in resolving the outstanding debts and receivables; or
6) In other cases, according to the prosecutor's office, it is in the public interest.

The procedures involved in filing for bankruptcy are the same as those involved in a bankruptcy application filed by a debtor or creditor; however, the prosecutor's office is permitted to file for bankruptcy without using the services of an advocate.

[74] Article 2 paragraph (2) of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations.

d. Financial Services Authority (OJK)

According to Article 6 of Law Number 21 of 2011 on the Financial Services Authority, the regulatory and supervisory duties are outlined in OJK, which carries out the task of regulating and supervising as follows:

1) Financial services activities in the banking sector;
2) Financial services activities in the Capital Market sector; and
3) Financial service activities in the insurance sector, pension funds, financing institutions, and other financial service institutions.

With the implementation of the Law on the Financial Services Authority, the responsibility for submitting a bankruptcy declaration in the banking sector, which was previously under the jurisdiction of Bank Indonesia, now falls under the jurisdiction of the Financial Services Authority. Similarly, the submission of a bankruptcy declaration in the Capital Market and Insurance sectors, Pension Funds, Financing Institutions, and Other Financial Services Institutions, which was previously the responsibility of the Minister of Finance, now falls under the jurisdiction of the Financial Services Authority.

6. Legal Consequences for Declaration of Bankruptcy

a. Bankruptcy Decisions Can Be Executed First (Immediate Decision)

In principle, the bankruptcy decision can be carried out right away, even if more legal action is still being taken against it. Along with the Supervisory Judge, the curator in charge of managing and settling the bankruptcy can do his job right away. In the meantime, let's say that the legal work makes the bankruptcy decision go away. In that case, everything the curator did before or on the day he got the notice of the cancellation decision will still be valid and binding on the debtor.[75]

Enacting the bankruptcy decision immediately does not have any negative implications for settling assets to pay off creditors' receivables. For instance, let's say that the bankruptcy ruling was executed promptly and that certain creditors have already received payment for their outstanding debts. If the bankruptcy decision is cancelled through a legal remedy, then the debtor is not at a advantage. This is because whether the debtor is in bankruptcy or not, they are still obligated to pay their debts.

b. General Confiscation (Public Attachment, *Gerechtelijk Beslag*)

The debtor's assets that go into the bankruptcy estate are taken by the court, along with anything else that was gained during the

[75] *Ibid.*, p. 162.

bankruptcy. Article 21 of Law Number 37 of 2004 concerning Bankruptcy and Postponement of Obligation, to pay debt says that bankruptcy covers all of the debtor's assets at the time the bankruptcy is declared, as well as everything the debtor got during the bankruptcy. The idea behind general confiscation of a debtor's assets is that the point of bankruptcy is to stop creditors from seizing bankrupt assets and to stop debtors from making deals with bankrupt assets, which causes creditors to lose money. With general confiscation, all kinds of transactions and other legal actions against the bankruptcy estate are put on hold until the curator takes care of the bankruptcy estate.

As a result of the bankruptcy declaration, there may be a general confiscation according to the law, which may not require any specific actions to be taken for the confiscation process. It is important to note that in the event of a debtor being declared bankrupt, a general confiscation may be implemented, which could potentially supersede any existing special confiscations on the debtor's assets.[76]

It is necessary to understand that the rules regarding the exclusion of assets from the bankruptcy estate apply specifically to individuals rather than legal entities. It appears that the exemption for the bankruptcy estate cannot be utilized in cases where the debtor is a limited liability company. It is important to point out that the salary of

[76] *Ibid.,* p.163.

a director of a limited liability company is considered a bankruptcy estate debt that requires payment to the director.[77]

c. Loss of Authority in Wealth

According to the law, when a debtor goes bankrupt, they lose their right to manage and make decisions regarding their assets that are included in the bankruptcy. The loss of one's free rights is limited to their wealth and not their social status. Debtors who are in a state of bankruptcy do not lose their civil rights or any other rights that they have as citizens, including political and private rights. The ratio legis stipulates that bankruptcy solely pertains to the assets of the debtor. This is because the primary objective of bankruptcy is to allocate the debtor's assets towards settling their debts with their creditors.[78] As a result, other issues that have nothing to do with assets have absolutely no impact on the bankrupt debtor. It is improper if parties' associate bankruptcy with things other than the bankrupt debtor's assets.

d. Engagement after Bankruptcy Decision

All debtor engagements issued after the bankruptcy declaration decision cannot be paid from bankrupt assets any longer, unless the engagement benefits the bankruptcy estate, according to Article 25 of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations. If the bankrupt debtor

[77] *Ibid.*, p. 164.
[78] *Ibid.*, p. 165.

violates that provision, his actions will not be binding on the bankrupt assets unless they bring benefit to them. The issue with this provision arises if the debtor enters an antedate engagement (dated backward), or even if the debtor purposefully invents a fictitious creditor for the bankrupt debtor's advantage. As a result, the curator must exercise caution in performing his duties.

The provision ratio legis states that existing creditors are to receive a distribution of the debtor's assets. The presence of at least two already-owned creditors is one of the requirements for filing for bankruptcy. Therefore, the bankruptcy becomes completely irrelevant if the bankruptcy applicant claims that he is the debtor's creditor, even though the other creditors will still be around in the future.[79]

According to Marjan E. Pane, the curator must categorize the bankrupt debtor's debts into the following categories when conducting an inventory and verification of accounts payable into:[80]

(1) Bankruptcy debt, namely debt that existed at the time the bankruptcy was decided, including debt guaranteed by special collateral or guarantee;

(2) Debts that cannot be verified, namely debts that arise after the bankruptcy decision and therefore cannot be classified as

[79] *Ibid.*, p. 166.

[80] Marjan E. Pane, "Inventarisasi dan Verifikasi dalam Rangka Pemberesan Harta Pailit dalam Pelaksanaannya", in Emmy Yuhassarie (ed.), *Undang-undang Kepailitan dan Perkembangannya*, Pusat Pengkajian Hukum, Jakarta, 2005, p. 280.

bankrupt debts, still have claim rights but are backward in position from bankruptcy debts; and

(3) Assets payable/bankruptcy *boedel*, debts arising after the bankruptcy decision; this debt was created to facilitate managing and settling bankrupt assets. This debt will be repaid from the bankrupt assets/*boedel* without needing to be verified and has priority over the bankrupt debt.

e. Payment of Accounts Receivable Bankrupt debtor

After the bankruptcy decision, the debtor who has gone bankrupt is not allowed to make any payments towards their outstanding debts to the creditors. If this action is taken, it does not absolve the debt. Claims and lawsuits related to assets' rights and obligations cannot be submitted by or to the bankrupt debtor. Instead, they must be submitted to the curator.[81]

If the claim is filed or forwarded by or against the bankrupt debtor, any sentence resulting from the claim will not have any legal effect on the bankrupt assets. Furthermore, in the event of bankruptcy, the only way to pursue a claim for fulfillment of an obligation from the bankrupt debtor's estate is by registering it for verification.[82] If a lawsuit has been filed against the debtor to obtain the fulfillment of obligations from the bankruptcy estate and the case is ongoing, it

[81] Article 26 paragraph (1) and paragraph (2) of Law Number 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations.

[82] Lee Eng Beng, "Insolvency Law", SAL Annual Review, 2003, p. 8.

becomes null and void by law when the bankruptcy declaration decision is pronounced against the debtor.[83]

In case a debtor who has filed for bankruptcy continues to use their debit or credit cards to make transactions involving their assets, it can create legal complications in relation to the bankruptcy proceedings. Regarding the responsibility for the transaction, who is the party responsible for ensuring that the third party fulfills the transaction? It would be illogical for a debtor who has gone bankrupt to continue conducting transactions. On the one hand, it is important to note that the transaction retains legal implications, whether they are direct or indirect, even as the assets of the debtor who has filed for bankruptcy are typically seized. Secondly, to prevent any legal transactions that may be carried out in bad faith by the bankrupt debtor or by third parties who want to take advantage of the legal status of the bankrupt debtor.[84]

f. Previous Court Decisions

When a decision is made to declare bankruptcy, any ongoing court proceedings related to the debtor's assets must be immediately terminated. Since then, no decision has been enforced, whether it involves holding or detaining the debtor. Any confiscations that were

[83] M. Hadi Shubhan, *Op. Cit.*, p. 167.
[84] *Ibid.*

executed prior to the bankruptcy decision will be nullified. If required, the Supervisory Judge will order the termination.[85]

The rationale behind this provision is that when the Commercial Court declares bankruptcy, one of its intended effects is to nullify all court decisions related to the debtor's assets immediately. This bankruptcy decision can terminate a situation even if it has already occurred.

g. Employment Relationship with Bankrupt Company Employees

According to Article 39 Paragraph (1) of Law Number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations, an employee who works for a debtor has the right to terminate their employment relationship. On the other hand, the curator has the authority to terminate his employment by adhering to the approval and provisions of the relevant laws and regulations. It should be noted that the employment relationship can only be terminated with a minimum of 45 days' prior notice.

The Commercial Court is a specialized court that holds absolute jurisdiction over bankruptcy and other related matters. The Commercial Court has the authority to handle various matters that arise due to a bankruptcy declaration, including but not limited to *actio pauliana* lawsuit, renvoi lawsuit, and other lawsuits. This implies that

[85] Article 31 paragraphs (1), (2), and (3) of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations.

the court is not only responsible for deciding the bankruptcy petition, but also for resolving other related issues. The essence of this provision is that bankruptcy should be a timely and essential process. The reason why it is considered integral is that bankruptcy matters often have similarities with other legal issues. By consolidating the process, it becomes possible to prevent contradictory and overlapping verdicts. Bankruptcy is often considered a faster alternative than other lawsuits. It provides a solution for debtors who are unable to pay their debts and wish to avoid seizure of their assets by creditors or embezzlement by the debtor themselves.[86]

It is logical to resolve any disputes related to termination of employment due to bankruptcy through the Supervisory Judge and, if necessary, the Commercial Court. Workers in a company that has gone bankrupt are considered creditors of the assets that are also affected by the bankruptcy. As preferred creditors, the distribution of bankrupt assets to creditors, including workers, is contingent upon fulfilling labour rights.

h. Separatist Creditors and Suspension of Rights (Stay)

The Bankruptcy Law outlines the regulations for the right of stay in Article 56 paragraph (1). According to this provision, a separatist creditor is entitled to a 90-day suspension period to execute the collateral they possess. This provision implies that the holder of

[86] M. Hadi Shubhan, *Op. Cit.*, p. 173.

the security right will sell the collateral object at a reduced price, which is lower than the market price, in order to fulfill the interests of the creditor who holds the guarantee. This will result in losses for the bankruptcy estate. Suppose it is suspended for 90 days in the meantime. In that case, the curator will have the opportunity to obtain a reasonable or even the best price while acting under the supervision of the Supervisory Judge. In the context of bankruptcy, any remaining value from the liquidation of the collateral object will be included in the bankruptcy estate. This arrangement offers legal protection to both the bankrupt debtor and other creditors. Additionally, the creditor holding the collateral object will not suffer any harm.[87]

i. *Actio Pauliana* in Bankruptcy

Actio Pauliana is governed by Articles 41–47 of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations. These laws are based on the Bankruptcy Act. In the Civil Code, creditors file an *actio pauliana*. But in bankruptcy, the curator files an *actio pauliana*, and the curator can only do so with the approval of the supervisory judge.

In bankruptcy, an *actio pauliana* lawsuit requires that both the debtor and the other individual with whom the act was done knew or should have known that the act would cause a loss to the creditor.

[87] *Ibid.*

Actions against *Actio Pauliana* in bankruptcy must meet the following requirements:[88]

1) *Actio Pauliana* is pursuing legal action in the bankruptcy case due to an act that has caused harm to the creditor. This act was carried out within one year prior to the bankruptcy decision. "However, an *actio pauliana* can be filed even if the debtor's actions happened more than a year before he was declared bankrupt, as long as the curator can prove that the debtor knows that his actions will hurt his creditors."
2) *Actio Pauliana* is taking legal action in the bankruptcy. The action is bad for the creditor, and the bankrupt debtor is not required to do it.
3) *Actio Pauliana* sued in bankruptcy for a legal action that detrimentally impacts the creditor, which is an agreement in which the debtor's obligations are much greater than those of the other party.
4) In the bankruptcy case, *actio pauliana* is suing for a legal action that detrimentally impacts the creditor, such as paying for or guaranteeing debts that haven't come due yet, haven't been collected, or can't be collected; or
5) The legal action that *actio pauliana* sued in the bankruptcy was an act that was detrimental to the creditor committed against an

[88] *Ibid.*, p. 176.

affiliated party. Affiliated parties are determined as stipulated in Article 42 of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations..

j. Forced Body (*Gijzeling*)

Gijzeling is a lawful measure taken to assist the curator in managing and settling the bankruptcy estate of a limited liability company. This involves detaining the bankrupt debtor or the directors and commissioners in the case of bankruptcy, as it helps in fulfilling the curator's responsibilities. This agency is primarily intended to assist in resolving bankruptcy cases where the debtor is uncooperative. The regulations pertaining to the act of *gijzeling* in Indonesian bankruptcy law can be found in Articles 93 to 96 of Law Number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations.[89] The purposeful implementation of *gijzeling* in Bankruptcy Law serves the sole purpose of exerting pressure on bankrupt debtors to cooperate in the bankruptcy process.

k. Criminal Provisions

Criminal arrangements in the Criminal Code relating to bankruptcy include the following acts (simple bankruptcy):[90]

[89] *Ibid.*, p. 179.
[90] *Ibid.*, p. 183-184.

1) The debtor does not wish to attend the bankruptcy settlement process or not provide/provide misleading information (Criminal Code Article 226);
2) Acts of the bankrupt debtor that harm the creditor (Criminal Code Article 396);
3) Debtor's act of transferring assets to the detriment of creditors and causing bankruptcy (Article 397 of the Criminal Code);
4) The actions of the company's directors or commissioners that cause losses to the company either before or after the company declares bankruptcy (Article 398 of the Criminal Code);
5) Bankrupt debtors deceiving creditors (Article 400 of the Criminal Code);
6) Fraudulent agreements made between a bankrupt debtor and a creditor while negotiating a bankruptcy settlement (Article 401 Criminal Code);
7) Creditors' rights are diminished because of the bankrupt debtor's actions (Article 402 of the Criminal Code);
8) The directors of a limited liability company are acting in violation of the articles of association;
9) Overspending on luxurious items or activities that exceed the boundaries of everyday expenses;

10) Taking out a loan or obtaining capital with a high interest rate, despite knowing that it will not help with the financial difficulties caused by bankruptcy; and
11) Cannot be shown in full without changes (doodles or writings) as specified in Article 6 of the Commercial Code.

B. Overview of the Personal Guarantor

1. Definition of Personal Guarantor

The guaranteed law includes personal guarantors, who are responsible for ensuring that creditor's receivables are secured against debtors. The regulations for individual debt guarantees are outlined in Book III, Chapter XVII, specifically from Article 1820 to Article 1850 of the Civil Code. The term "personal guarantor" is derived from the Dutch word "*borgtocht*". Some argue that a personal guarantor is a non-material form of guarantee used to distinguish it from material guarantees. According to Sri Soedewi Masjchoen, the definition of a guaranteed individual is: "Guarantees that give rise to a direct relationship with certain individuals can only be maintained against certain debtors, against the debtor's assets in general." [91]

Basically, the fulfillment of an agreement between the debtor and the creditor is carried out by the debtor himself. This can be seen in Article

[91] Masjchoen, Sri Soedewi. *"Hukum jaminan di Indonesia."* 2001, p. 46.

1131 of the Civil Code.[92] "All movable and immovable assets of the debtor, either present or future, shall be regarded as securities for the debtor's personal agreements". However, it can also be given or guaranteed to be fulfilled by a third party, namely an individual or legal entity. This guarantee is called a personal guarantor.

According to Article 1820 of the Civil Code, the provision of a guarantee is an agreement in which a third party agrees, for the benefit of the creditor, to fulfill the obligations of the debtor if he himself fails to fulfill them.[93] The involvement of a formal debt guarantor can occur without being asked in advance by the debtor, even without his knowledge, as if the debt guarantee could have been provided by a third party who does not have any legal relationship with the debtor (Article 1823 of the Civil Code).[94]

The reason for the existence of a guaranteed agreement, among others, is that the insurer has the same economic interests, both directly and indirectly. For example, the guarantor as director of the company, is the largest shareholder, the company personally guarantees the company's debt and the two companies co-guarantee the branch company.[95]

[92] Article 1131 of the Civil Code Concerning Priority of Debts in General.
[93] Article 1820 of the Civil Code Concerning the Nature of a Guarantee.
[94] Article 1823 of the Civil Code Concerning the Nature of a Guarantee.
[95] H. Salim HS *Perkembangan Hukum Jaminan di Indonesia,* Edition 1, Raja Grafindo Persada, Jakarta 2004, p. 219.

2. The Nature and Characteristics of The Personal Guarantor

The nature of the guaranteed agreement is *accessoir* (additional), while the principal agreement is a credit or borrowing agreement between the debtor and the creditor. So, if the main agreement is cancelled, then the guaranteed agreement is also cancelled. If the main agreement is deleted, then the guaranteed agreement is also deleted. However, regarding the nature of this *accessoir*, the Civil Code allows for exceptions. This is stated in Article 1821 of the Civil Code, which states as follows:[96]

1) No guarantee can be provided unless there exists a valid principal contract.
2) However, one can become a guarantor for a contract, notwithstanding that it may be nullified by a demurrer, which relates only to the debtor personally, for instance, in the case of being a minor.

Thus, the guaranteed agreement will remain valid even if the main agreement is cancelled because of being carried out by a minor. In this regard, Subekti stated that this could be accepted with the understanding that if the principal agreement is cancelled in the future, the guaranteed agreement will also be cancelled. Because the underwriting agreement is an accessory agreement.[97] According to article 1822 of the civil Code, it states as follow:[98]

> "A guarantor cannot bind himself to more, nor shall he be subject to more demanding requirements, than those to which the principal debtor has bound himself. A guarantee may also be provided for part of a debt or be subject to less severe conditions. If the guarantee has been provided in respect of more than the debt or

[96] Article 1821 of the Civil Code Concerning the Nature of a Guarantee.

[97] R Subekti Dan R Tjitrosudibio, Kitab Undang-Undang Hukum Perdata, Pradnya Paramita, Jakarta, 1992, p. 182.

[98] Article 1822 of the Civil Code Concerning the Nature of a Guarantee.

subject to more stringent conditions, then it shall not be entirely invalid, but shall be restricted to that which is covered in the principal contract."

In the personal guarantor agreement, the first thing to pay attention to is the relationship between parties who have receivables, or creditors, and parties who are required to pay debts, namely debtors. The role of a personal guarantor only appears when the original debt cannot carry out its responsibilities under the main agreement. The role of the personal guarantor here is to be a person who will replace the original debtor in terms of fulfilling what must be fulfilled by the original debtor.[99] When the debtor cannot fulfill the debt partially or in full, the guarantor will fulfill the debt, which is carried out in part or all based on the amount of debt that must be paid by the debtor.

However, when the creditor carries out a collection on the guarantor, he has the right to ask the creditor to carry out the confiscation and sale of the debtor's assets first and is obliged to show the creditor the assets owned by the debtor. The guarantor is not allowed to show the wealth of the debtor, who has been burdened with other guaranteed rights or is still being disputed in front of the judge.

Based on Article 1832 of the Civil Code, the right of a personal guarantor can exclude if:[100]

1) The guarantor has waived his special rights in terms of requesting that the debtor's goods be confiscated and sold first;

[99] Sri Soedewi, *Op. Cit.*, p. 48.
[100] Article 1832 of the Civil Code Concerning the Nature of a Guarantee.

2) The guarantor has bound himself and the debtor on a half-bearing basis;
3) If the debtor can submit a response that only concerns himself personally;
4) If the debtor is in a state of bankruptcy;
5) If bail is ordered by the judge.

The characteristics of a personal guarantor are:

1) This agreement is assessoir in nature;
2) Rights arising from a contractual personal guarantee agreement;
3) The guarantor has rights and obligations if the debtor defaults;
4) The individual guaranteed agreement goes down to the heirs;
5) The position of creditors is concurrent;
6) Guarantor as the second target;
7) Individual guarantees are non-judgmental.

3. Forms of Guarantee

Guarantees can be classified according to the laws in force in Indonesia and those that apply abroad. A guarantee is a condition for getting credit from the bank. The Act of the Republic of Indonesia Number 7 of 1992 concerning Banking as Amended by Act Number 10 of 1998 regulates credit, namely in Article 8 paragraph (1), in which banks are required to provide credit with confidence based on an in-depth analysis of the intention and ability as well as the ability of the debtor customer to pay off his debt or return the intended financing in accordance with what was agreed.

Sri Soedewi Masjchoen Sofwan, divided guarantees into two types, namely material guarantees and individual guarantees:[101]

[101] H. Salim HS, *Op. Cit.,* p. 24.

1) Material guarantees

Material guarantees or objects, which is guarantees in the form of absolute rights for an object, have the characteristics of having a direct relationship to certain objects, can be maintained against anyone, always follow the object and can be transferred. From the description, it can be stated that the elements listed in the material guarantee, namely:

a. The absolute right to an object;
b. Its characteristics have a direct relationship to certain objects;
c. Can be defended against anyone;
d. Always follow the object;
e. Transferable to other parties.

Material guarantees can be classified into four types, namely:[102]

a) Pledge

According to the Civil Code, Article 1150, Pledge is:[103]

> "A pledge is a right which is obtained by a creditor in a movable asset, which has been provided to him by the debtor or his representative, to secure a debt, and which entitles the creditor priority over the other creditors with regard to the settlement of the debt; with the exception of the costs incurred in the sale of the asset and the costs incurred, after the pledge, for the maintenance of the asset, which shall have priority."

[102] *Ibid.*, p. 24.
[103] Article 1150 of the Civil Code Concerning Pledges.

b) Fiduciary Guarantee

The term fiduciary comes from the Dutch language, namely *fiducie*, which means trust. Article 1 paragraph (1) of the Law No. 42 of 1999 concerning fiduciary states that the meaning of fiduciary guarantees is:[104]

> "Fiduciary is a transfer of ownership of an object on trust with the provision that transferred ownership of the object remains in the control of the owner of the object."

c) Mortgage

According to Article 1162 of the Civil Code, mortgages are:[105]

> "A mortgage is a property right over immovable assets, created for the purpose of providing security for the compliance with an agreement."

d) Mortgage right

Liability is defined as goods that are used as collateral. In Article 1 paragraph (2) of Law no. 4 of 1996, it is mentioned that the definition of mortgage right is as follows:[106]

> "Fiduciary is the right over moving objects both tangible and intangible and immovable objects, in particular buildings that cannot be burdened with mortgages referred to in Law No. 4 of 1996 on Mortgage which remain in control of the giver of the fiduciary, as collateral for the repayment of certain debt, which gives priority to the receiver's debt against other creditors."

[104] Article 1 paragraph (1) of Law No. 42 of 1999 Concerning Fiduciary.
[105] Article 1162 of the Civil Code Concerning Mortgages.
[106] Article 1 paragraph (2) of Law no 4 of 1996 Concerning Fiduciary.

2) Immaterial guarantees

Immaterial guarantees, namely guarantees that give rise to a direct relationship with certain individuals or legal entities, can only be defended against certain debtors, not against the debtor's assets in general.[107] This means that the guarantee is the guarantor. Collateral is a promise made by the guarantor to pay the debtor's debt. The guarantor that provides a limited warranty on the debtor's assets is the party that provides guarantees to the recipient of the guarantee and is responsible for replacing the position or obligations of the guaranteed party with those of the party receiving the guarantee if the guaranteed party cannot fulfill the obligations referred to. The elements of immaterial guarantees are:

a) Having a direct relationship with a certain person;

b) Can only be defended against certain debtors; and

c) Against the debtor's assets in general.

Immaterial Collateral is a third person (*borg*) who will bear the return of the debt if the debtor is unable to return the credit.[108] Immaterial guarantees are divided into personal guarantor and corporate guarantor. A personal guarantor is a guarantor or an insurer who provides guarantees, while a corporate guarantor is a legal entity or company that provides guarantees.

[107] H. Salim HS, *Loc. Cit.*
[108] Purwahid, Patrik, Kashadi, *Hukum Jaminan*. 2008, p.91.

4. Special Right of Personal Guarantor

In carrying out his obligations by law, the guarantor is given certain rights that are of a nature to provide protection for the guarantor. These rights include:[109]

1) The right for the creditor to sue first (*Vorrect van erdere uitwining)*, as stated in Article 1831 of the Civil Code, allows the guarantor's wealth to be used only as a reserve to cover the remaining outstanding debts with the debtor's assets. The guarantor's obligations are limited to deficiencies that cannot be paid by the debtor. Article 1831 of the Civil Code stipulates that the guarantor is not required to pay the creditor unless the debtor is negligent, while the debtor's objects must first be confiscated and sold to pay off the debt. However, in this case, the guarantor cannot use his privileges if he has waived them.
2) The right to request debt settlement (*voorrecht van schuldplitsing*), as contained in Article 1837 of the Civil Code, is only important if there is more than one guarantor, usually the guarantors are asked to release their privileges so that in this case the provisions of Article 1836 of the Civil Code apply, which stipulates that each guarantor is bound for all the debts they guarantee jointly and equally.
3) The right to be released from the guarantee if due to the fault of the creditor, the guarantor cannot replace his mortgage rights or

[109] Sunarmi, *Hukum Kepailitan*, PT Softmedia, Jakarta, 2010, p. 196.

mortgages and special rights owned by the creditor (articles 1848 and 1849 of the Civil Code)

The guarantor of the debt can use against the creditor all the countermeasures that can be used by the main debtor including the debt that is borne itself. However, it is not permissible to file rebuttals that are solely about the person of the debtor. Personal guarantor is given by the debtor not in the form of objects but in the form of a statement by a third party (a guarantor) who has no good interests towards the debtor as well as towards the creditor that the debtor can be trusted to carry out the obligations promised, with the condition that if the debtor does not carry out its obligations, the third party is willing to carry out the obligations of the debtor. So, for the personal guarantor, there are no specific objects that are bound in the agreement because those that are bound in the agreement are the third party's ability to fulfill the debtor's obligations in fulfilling its debts.

5. Civil Relations of Personal Guarantor between Debtors and Creditors

In the debt guarantee agreement, there are no related parties, namely the creditor (the creditor here is domiciled as a lender), the main debtor is a borrower, and a third person, called the guarantor, promises to pay a debt if the main debtor cannot. The requirements for becoming a debt guarantor in accordance with Article 1827 of the Civil Code are: a person who can carry out legal actions, as is the case with agreements in general;

this guarantee will go to the heirs (Article 1826 in conjunction with Article 1318 of the Civil Code).

In a guaranteed agreement, there are two different but closely related agreements, namely the main guaranteed agreement and the underwriting agreement. The main creditor and debtor are part of the main agreement. The main debtor is the party who is obliged to fulfill the agreement that has been made and he must be responsible for his obligations with all his assets in anti-wealth that can be forcibly sold or executed to be taken as debt settlement, whereas in the agreement, the guarantees involved are creditors and third parties, here third parties also serve as debtors.[110]

The legal relationship between creditors and guarantor is a guarantor has voluntarily bound him as a debtor to creditors for the same performance, therefore in accordance with Article 1820 of the Civil Code, after the main debtor defaults, the creditor has two debtors who are equally liable for all of their debts. [111]

Debt guarantees are agreements made by third parties with creditors. As a form of agreement, debt guarantees must be made in accordance with the provisions contained in Article 1320 of the Civil

[110] Indriyani, Atik. "Aspek Hukum Personal Guaranty." *Jurnal Hukum PRIORIS* 1.1, 2006, p. 20.

[111] J, Satrio, *Hukum jaminan, hak-hak jaminan pribadi penanggungan (borgtocht), dan perikatan tanggung-menanggung*, PT. Citra Aditya Bakti, 1996, p.42.

Code, which states that an agreement must satisfy the following four conditions:[112]

1) there must be consent of the individuals who are bound thereby;
2) there must be capacity to conclude an agreement;
3) there must be a specific subject;
4) there must be an admissible cause.

The parties involved in guarantees for settlement of debts in bankruptcy include:

1) Bankruptcy Petitioner

The bankruptcy petitioner is the party that takes the initiative to submit a bankruptcy petition to the court. The party authorized to apply for a declaration of bankruptcy is regulated in Article 2 of Law No. 37 of 2004, namely:

a) Creditors, one person or more;
b) The debtor himself (the application can only be submitted with the husband or wife's consent);
c) Prosecutor's Office for the public interest;
d) Financial Services Authority (OJK), if the debtor is an Insurance Company, Bank, Capital Market Reinsurance, SOEs operate for the public interest.

2) Bankruptcy Respondent

The party to whom the respondent goes bankrupt is the debtor being petitioned for bankruptcy by the authorized applicant party, where the debtor has two or more creditors and has not paid the least of a debt that is past due and collectible.[113]

[112] Article 1320 of the Civil Code Concerning the Conditions that are Required for the Validity of Agreements.

[113] Aria, Suyudi, et al., *Kepailitan di Negeri Pailit*. 2004, p. 43.

In terms of guarantees, there are two agreements that are different but very closely related. That agreement is the principal agreement that is guaranteed and the agreement of guarantee. The nature of the guaranteed agreement is "*accecoir*" (optional). This means a guaranteed agreement is dependent on the main agreement, where the subject matter is the main agreement or credit agreement between debtor and creditor.[114]

The main agreement regulates the debtor's position as a debtor who has an obligation to pay off his debts. Whereas in the guaranteed agreement, even though it is separate and *accecoir*, the guaranteed agreement regulates the relationship between the debtor and a third party (the guarantor).

3) Guarantee party as a third party (Guarantor)

The guarantor is better known as *Borgtocht*. The *borg* or third-party relationship is regulated in an additional agreement. Even though the *borg* is a third party, the *borg* has voluntarily bound himself as a debtor or guarantor to creditors to achieve the same as the debtor.

This achievement is carried out by the guarantor if the debtor cannot fulfill his obligations to pay off his debts to creditors or default on the principal agreement. The guaranteed giver is domiciled as a debtor who based on the guaranteed agreement is responsible for all

[114] H. Salim HS, *Op. Cit.*, p. 219.

of his assets. In addition, guarantees are regulated in Articles 1820 to 1850 of the Civil Code and in Articles 141, 164, and 165 of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations.

6. The end of Guarantee

According to Gunawan Widjaja, the things that cause the end of a personal guarantee are as follows:[115]

1) Removing or ending the main agreement

As already explained, that personal guarantee is an accessory agreement, namely the agreement that follows the main agreement. If the principal agreement is cancelled or terminated, according to the law, the personal guarantor agreement will also end. The principal agreement may end due to several reasons, namely:

a) The principal agreement has been paid off by the debtor;

b) The principal agreement is declared null and void (*nietig verklaard*) for the reason that the debtor is not authorized to enter into an agreement. This is in accordance with the provisions of Article 1821 of the Civil Code, which states that there is no guarantee agreement if there is no valid agreement;

[115] Gunawan. Widjaja, *Penanggungan utang dan perikatan tanggung menanggung*, 2005, p. 169.

c) There is a homologation agreement between creditors and debtors when the debtor is declared bankrupt. With official approval (homologation accord) in the payment of debts in bankruptcy, means the termination of the main agreement and automatically eliminates the guarantee provided by the guarantor.

2) Matters that cause the end of a personal guarantee or the cancellation of a guarantee.

Debt regulated in Article 1845 of the Civil Code occurs for the same reasons as the termination of the agreement, which is stated in Article 1381 of the Civil Code. Based on the explanation in Article 1845, The guaranteed agreement can also be deleted even if the main agreement still exists, namely:

a) Because the creditor himself waived the obligation guarantor, the creditor voluntarily releases the guarantor of the burden as guarantor;

b) If a circumstance occurs that results in the union of the positions of guarantor and debtor in one person, this occurs when someone has a mix of their own debts (*schuld vermeging*);

c) This guarantor agreement ends if it has pay to creditors; even if the object is paid, it does not belong to the debtor and is repossessed by a third party (Article 1849 Civil Code);

d) The guarantor can demand that the debtor carry out payment of debts and demand the release of the guarantor from the personal

guaranteed agreement. This claim was filed by the guarantor if the creditor gave permission to the debtor to postpone debt payments (Article 1850 of the Civil Code). The granting of permission by the creditor to the debtor for debt repayment does not mean that the personal guaranteed agreement is completely nullified. The creditor only gives the guarantor the right to demand release from the personal guaranteed agreement or to demand that the debtor fulfill the performance.

C. Bankruptcy and Personal Guarantor in the Perspective of Islamic Law

1. Bankruptcy in the Perspective of Islamic Law

According to Article 1 Point 29 of the Compilation of Sharia Economic Law (KHES), a debt (*dain*) is an obligation that is stated or can be expressed in a monetary amount, whether directly or indirectly, in Indonesian currency or other currencies. In this KHES, debt is defined in the same way as it is in bankruptcy law. Verse 282 of Surah Al-Baqarah in the Qur'an explains:

يَـٰٓأَيُّهَا ٱلَّذِينَ ءَامَنُوٓاْ إِذَا تَدَايَنتُم بِدَيْنٍ إِلَىٰٓ أَجَلٖ مُّسَمّٗى فَٱكْتُبُوهُۚ وَلْيَكْتُب بَّيْنَكُمْ كَاتِبُۢ بِٱلْعَدْلِۖ وَلَا يَأْبَ كَاتِبٌ أَن يَكْتُبَ كَمَا عَلَّمَهُ ٱللَّهُۚ فَلْيَكْتُبْ وَلْيُمْلِلِ ٱلَّذِى عَلَيْهِ ٱلْحَقُّ وَلْيَتَّقِ ٱللَّهَ رَبَّهُۥ وَلَا يَبْخَسْ مِنْهُ شَيْـًٔاۚ فَإِن كَانَ ٱلَّذِى عَلَيْهِ ٱلْحَقُّ سَفِيهًا أَوْ ضَعِيفًا أَوْ لَا يَسْتَطِيعُ أَن يُمِلَّ هُوَ فَلْيُمْلِلْ وَلِيُّهُۥ بِٱلْعَدْلِۚ وَٱسْتَشْهِدُواْ شَهِيدَيْنِ مِن رِّجَالِكُمْۖ فَإِن لَّمْ يَكُونَا رَجُلَيْنِ فَرَجُلٞ وَٱمْرَأَتَانِ مِمَّن تَرْضَوْنَ مِنَ ٱلشُّهَدَآءِ أَن تَضِلَّ إِحْدَىٰهُمَا فَتُذَكِّرَ إِحْدَىٰهُمَا ٱلْأُخْرَىٰۚ وَلَا يَأْبَ ٱلشُّهَدَآءُ إِذَا مَا دُعُواْۚ وَلَا تَسْـَٔمُوٓاْ أَن تَكْتُبُوهُ صَغِيرًا أَوْ كَبِيرًا إِلَىٰٓ أَجَلِهِۦۚ ذَٰلِكُمْ أَقْسَطُ عِندَ ٱللَّهِ وَأَقْوَمُ لِلشَّهَـٰدَةِ وَأَدْنَىٰٓ أَلَّا

تَرْتَابُوٓاْ ۖ إِلَّآ أَن تَكُونَ تِجَٰرَةً حَاضِرَةً تُدِيرُونَهَا بَيْنَكُمْ فَلَيْسَ عَلَيْكُمْ جُنَاحٌ أَلَّا تَكْتُبُوهَا ۗ وَأَشْهِدُوٓاْ إِذَا تَبَايَعْتُمْ ۚ وَلَا يُضَآرَّ كَاتِبٌ وَلَا شَهِيدٌ ۚ وَإِن تَفْعَلُواْ فَإِنَّهُۥ فُسُوقٌۢ بِكُمْ ۗ وَٱتَّقُواْ ٱللَّهَ ۖ وَيُعَلِّمُكُمُ ٱللَّهُ ۗ وَٱللَّهُ بِكُلِّ شَىْءٍ عَلِيمٌ ٢٨٢

It means:

"O believers! When you contract a loan for a fixed period of time, commit it to writing. Let the scribe maintain justice between the parties. The scribe should not refuse to write as Allah has taught them to write. They will write what the debtor dictates, bearing Allah in mind and not defrauding the debt. If the debtor is incompetent, weak, or unable to dictate, let their guardian dictate for them with justice. Call upon two of your men to witness. If two men cannot be found, then one man and two women of your choice will witness so if one of the women forgets the other may remind her. The witnesses must not refuse when they are summoned. You must not be against writing "contracts" for a fixed period whether the sum is small or great. This is more just "for you" in the sight of Allah, and more convenient to establish evidence and remove doubts. However, if you conduct an immediate transaction among yourselves, then there is no need for you to record it but call upon witnesses when a deal is finalized. Let no harm come to the scribe or witnesses. If you do, then you have gravely exceeded "your limits". Be mindful of Allah, for Allah ´is the One Who` teaches you. And Allah has "perfect" knowledge of all things."

Based on the explanation of Qur'an Surah Al-Baqarah verse 282, it orders Muslims to determine the time limit for debts, write down debts,

and present two male witnesses or one male witness and two female witnesses.[116]

Taflis, according to Ibn Rusyd, is the term used in Islamic law to describe situations in which debtors are unable to pay their debts because they have a large debt load relative to their available assets or have no assets at all.[117] According to Islamic law, bankruptcy is defined as *iflas* (*taflis*), which is the lack of property. A person who has been declared bankrupt by the court is referred to as a *muflis*, and the judge forbids the *muflis* from pursuing legal action against his assets to protect the interests of his creditors.[118]

The legal basis of *taflis* is based on the words of the Prophet Muhammad. Prophet Muhammad SAW described Mu'az bin Jabal as a person who was in debt and unable to pay his debts. Then the Prophet Muhammad paid off the debt of Mu'az bin Jabal with the rest of his property. However, the debtor did not fully accept the loan he gave, and the Prophet Muhammad said, "Nothing can be given to you other than that." (Hadith History of Darul Qutni and al-Hakim).[119]

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[116] Liza Dzulhijjah, Fahmi Fatwa Rosyadi Satria Hamdani, Asep Hakim Zakiran, "Pandemi Covid-19 sebagai Upaya Pencegahan Kepailitan dalam Perspektif Hukum Positif dan Hukum Islam", Journal of Civilization and Islamic Law, Vol. 4, No. 2, 2021.

[117] Ibnu Rusyd, *Bidayatul Mujtahid,* (Andalusia: Darul Fikri, Vol. 2, p. 213), as quoted in Dian Asriani Lubis, "Kepailitan Menurut Ibnu Rusyd dan Perbandingannya dengan Hukum Kepailitan Indonesia," Undergraduate Thesis, Universitas Islam Negeri Sultan Syarif Kasim, Pekanbaru, 2011, p. 33.

[118] Ridwan, "Studi Komperatif terhadap Kepailitan Perusahaan Asuransi Syariah Menurut Hukum Islam dan Undang-undang No. 37 Tahun 2004 tentang Kepailitan dan Penundaan Kewajiban Pembayaran Utang", Legal Scientific Journal, Vol. 2, No. 4, 2022, p. 3.

[119] *Ibid.,* p. 4.

The other hadiths that explain bankruptcy (*taflis*) say, "Whoever finds his goods actually in the hands of a person who is bankrupt, then he is more entitled to the goods than anyone else." According to the hadith, if a person (the debtor) has a lot of debt and is unable to pay it, the judge may order that control over the debtor's property be given to another party to pay off the debt. If the debtor's assets fall short of covering his obligations, a prorated distribution of all his assets will be made.

Imam Abu Hanifah says that the bankrupt debtor is still regarded as capable of taking legal actions unrelated to his assets because he has not been declared to be a person under guardianship *(mahjur 'alaih*). Imam Abu Yusuf and Imam Muhammad bin al-Hasan ash-Syaibani say that a person who has been declared bankrupt by a judge is not considered to be capable of taking legal action against his property. Imam Abu Hanifah disagrees with them.[120]

2. Personal Guarantor in the Perspective of Islamic Law

Guarantees in Islam are often referred to as *kafālah* and some synonyms for the word include *hamalah* (burden), *adh-dhammu* (collect), *damina* (bear) and *za'amah* (dependent). Etymologically, according to Ibnu'Abidin, it is the same as *al-dammu* which means to maintain or

[120] *Ibid.*, p. 5-6.

guarantee. Based on the word of Allah SWT, the definition of kafālah can be seen in the letter of Ali Imran, verse 37:[121]

فَتَقَبَّلَهَا رَبُّهَا بِقَبُوْلٍ حَسَنٍ وَّاَنْۢبَتَهَا نَبَاتًا حَسَنًاۙ وَّكَفَّلَهَا زَكَرِيَّا ۗ كُلَّمَا دَخَلَ عَلَيْهَا زَكَرِيَّا الْمِحْرَابَۙ وَجَدَ عِنْدَهَا رِزْقًا ۚ قَالَ يٰمَرْيَمُ اَنّٰى لَكِ هٰذَا ۗ قَالَتْ هُوَ مِنْ عِنْدِ اللّٰهِ ۗ اِنَّ اللّٰهَ يَرْزُقُ مَنْ يَّشَاۤءُ بِغَيْرِ حِسَاب

It means:

"So, her Lord accepted her graciously and blessed her with a pleasant upbringing-entrusting her to the care of Zachariah. Whenever Zachariah visited her in the sanctuary, he found her supplied with provisions. He exclaimed, "O Mary! Where did this come from?" She replied, "It is from Allah. Surely Allah provides for whoever He wills without limit."

The Malikiyah, Syafi'iyah and Hanbaliyah circles define *kafālah* as a guarantee given by someone to another person who has the responsibility to fulfill the right to pay debts. Thus, the payment of debt becomes the responsibility of the guarantor.[122] *Al-kafālah* is a guarantee given by the guarantor (*kāfil*) to a third party to be able to meet the second party or the dependent. In another sense, *kafālah* also means transferring the responsibility of someone who is guaranteed by holding on to the responsibility of another person as a guarantor.[123]

[121] (Q.S Ali Imran:37)

[122] Imam Mustofa, *Fiqih Mu'amalah Kontemporer*, Raja Grafindo Persada, Jakarta, 2016, p. 220.

[123] Dimyauddin Djuwaini, *Pengantar Fiqh Muamalah*, Pustaka Pelajar, Yogyakarta, 2015, p. 247.

In the Ijma of the Ulama and the Muslims, it is agreed that *kafālah* is permissible, because the existence of a personal guaranteed contract like this needed by society. The existence of a *kafālah* is very helpful in alleviating the burden on people who are bound by debts and can even help free debtors from their debt obligations. For creditors, the existence of *kafālah* will create comfort because the loaned assets are guaranteed settlement of accounts receivable.[124]

Kafālah or a guarantee for assets, is a form of *kafālah* that requires the guarantor to carry out guarantees related to assets, which in this case are related to debt, where a *kāfil* (personal guarantor) has a commitment to pay off debts that should be borne by other parties. *Kāfil* is a person who has the obligation to do *makfūl bihi* (which is covered). *Kāfil* is obligated to be a preacher and wise man because he is the one who will act in all matters of his wealth and has the willingness to be a *kafālah.*

[124] Imam Mustofa, *Op.Cit.*, p. 22.

CHAPTER III
THE LEGAL CONSIDERATIONS OF JUDGES IN DECLARING BANKRUPTCY AGAINST A PERSONAL GUARANTOR DUE TO DEBTOR DEFAULT

A. The Legal Considerations of Judges in Declaring Bankruptcy Against a Personal Guarantor Due to Debtor Default

Considerations of Judges that guide the decision-making process when choosing to pursue bankruptcy against personal guarantor requires a comprehensive analysis of the pertinent legal regulations, namely Article 1831 and Article 1832 Number 1 of the Civil Code. These regulations not only shape the decision but also underscore the significance of due process and fairness in debt recovery scenarios.

Article 1831 of the Civil Code establishes a fundamental principle: a personal guarantor cannot be declared bankrupt without the prior declaration of bankruptcy for the debtor. This provision upholds the debtor's rights and safeguards them against potentially premature or unjust bankruptcy proceedings initiated against the guarantor. The logic behind this rule is straightforward it ensures that the guarantor's liability for the debt only becomes enforceable if the debtor proves incapable of fulfilling their obligations. Therefore, the creditor's right to sue the guarantor arises only if from the liquidation of the debtor's assets, there remains an outstanding debt that the debtor cannot repay. This provision promotes fairness and protects the guarantor's interests by aligning their liability with the debtor's default. It

also has similarities with the Supreme Court ruling in State Bank of India vs. V. Ramakrishnan & Anr10 that the debtor and the guarantor of this debtor are two separate entities. If the debtor is going through bankruptcy proceedings, it does not follow that the guarantor is going through the same thing. Section 14 of the Insolvency and Bankruptcy Code in India, which deals with moratoriums, has no application to the personal guarantors of the principal debtor.[125]

In contrast with Article 1832 Number 1 of the Civil Code introduces an exception to this general principle. It permits the filing of a bankruptcy application against a guarantor without the simultaneous initiation of bankruptcy proceedings against the debtor, but there's a crucial condition this exception applies only if the guarantor voluntarily waives their privileges to demand that the debtor's goods be confiscated and sold first. In essence, this regulation acknowledges that the guarantor's actions can influence the sequence of bankruptcy proceedings. By renouncing their right to seek the immediate sale of the debtor's assets, the guarantor effectively opens the door to the possibility of bankruptcy proceedings being directed against both debtor and guarantor.

The underlying rationale behind these regulations is to strike a balance between protecting the rights of both the debtor and the guarantor, as well as the interests of the creditor. It underscores the importance of a fair and

[125] State Bank of India vs. V. Ramakrishnan & Anr, CIVIL APPEAL NO. 3595 OF 2018, https://ibbi.gov.in/webadmin/pdf/order/2018/Aug/11958_2018_Judgement_14-Aug-2018_2018-08-14%2022:04:34.pdf, accessed on July 16, 2023.

systematic approach to debt recovery. The sequence of bankruptcy proceedings is not arbitrary; rather, it's intricately linked to the actions and choices of the guarantor and debtor. Legal professionals, creditors, and debtors must carefully consider these regulations to make well-informed decisions, ensuring that debt recovery processes are equitable and just for all parties involved.

The other considerations based on Article 2 paragraph (1) of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations, the condition for bankruptcy is a debtor who has two or more creditors and does not pay his debts when they are due. So, the main requirement to bankrupt the guarantor is that the applicant must prove that the status of the guarantor has changed to that of the debtor, because only the debtor can be bankrupt. After that, the applicant must prove that the debtor has two or more creditors and has not paid his dues and collectible; once it is proven, the debtor can be declared bankrupt.

Filing a bankruptcy petition against a guarantor is quite commonplace. In practice, the Commercial Court has received and decided or ruled down bankruptcy decisions from various bankruptcy applications addressed both to corporate guarantor and personal guarantor. In American law, on the other hand, a personal guarantor plays a significant role in the context of insolvency and bankruptcy regulated by the US Bankruptcy Code or Title 11 of the United States Code. Despite not being specifically addressed, the role of

personal guarantor is to be liable for the obligations of the debtor.[126] Had the debtor not been able to fulfill it, the creditor could seek satisfaction from the personal guarantor. The same goes if the personal guarantor can't be fulfilled; the creditor could pursue them as well. With that being said, the role of personal guarantor in Indonesian law is similar to other countries' laws however, cultural context and the treatment of such cases may vary based on specific circumstances.

In the process, typically within a 15-day timeframe, the supervising judge, curator, and creditors convene to collectively assess data related to the bankrupt assets and the total number of creditors along with their respective claims. If, during this meeting, it is determined that the bankrupt assets are insufficient to settle the debtor's debts to the creditors based on the debt reconciliation, the wealth of a personal guarantor not burdened by other obligations or collateral rights may be included in the bankrupt assets as a source of repayment for the debtor's debts to the creditors.[127]

There are opinions of several experts and related jurisprudence on the legal standing of the application for bankruptcy against the guarantor, based on the opinion of Elijana (High Court Judge at the Supreme Court of the Republic of Indonesia) as follows:[128]

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[126] Robert Rasmussen. Guarantees and Section 548(a)(2) of the Bankruptcy Code. *University of Chicago Law Review, 52,* 1985, p. 195.

[127] Panjaitan, Issac Davids, et al, "Pertanggungjawaban penjamin/guarantor (personal/corporate guarante) dalam perkara kepailitan." *Jurnal Hukum POSITUM Vol.5, No.2*, P. 58.

[128] Elijana S, "*Proses Mengajukan Permohonan Pailit Terhadap Guarantor dan Holding Company*", Penyelesaian Utang-Piutang, p. 402.

> "That can be bankrupt is a debtor. A guarantor is a debtor if the debtor is negligent or defaults, so a guarantor may go bankrupt, so the problem is when can a guarantor be filed for bankruptcy?"

Elijana stated that for a guarantor who does not waive his privileges or special rights, the creditor must sue the main debtor first, after the main debtor's assets are confiscated and auctioned, but there is not enough debt to pay off all of his debts, so there is still unpaid debt or it has been proven that the main debtor does not have any assets anymore, or the main debtor has been declared bankrupt by another creditor. Only then can the creditor collect the debt of the new debtor, and then collect the main debt from the guarantor. If the guarantor after being billed does not want to pay, then a bankruptcy application can be filed. For creditors the applicant must be able to prove that:

1) The applicant's creditor has billed or sued the main debtor in advance before it turns out, but:
   a. The main debtor has no assets at all;
   b. The main debtor's assets are not enough to pay off the debt;
   c. The main debtor is in bankruptcy.
2) A guarantor who guaranteed a debtor, has more than 1 (one) creditor.
3) That one of the debts has matured and can be collected.

If the guarantor has waived its privileges, especially for a guarantor who has stated that he is jointly and responsible with the main debtor for the main debtor's debts to the creditor, the creditor can directly apply for bankruptcy against the guarantor by submitting as evidence:

1) Credit agreement letter;

2) Letter of guaranteed agreement where the guarantor has waived his privileges and declares jointly and responsible with the main debtor;
3) The guarantor of the bankrupt respondent has debts to other creditors;
4) One of these debts has matured and can be collected, but guarantor as a party that is responsible for the debt with main debtor, remains unpaid.

So, it is crucial to understand that both personal guarantors and corporate guarantors can face bankruptcy proceedings, but the process must adhere to specific criteria and requirements for a successful declaration of bankruptcy against the guarantor. In any situation, careful consideration and compliance with the applicable regulations are essential to ensure that the application for a declaration of bankruptcy against the guarantor is approved.

Then, in the opinion of Denny Kailimang:[129]

> "As a debtor, the guarantor may go bankrupt provided that the guarantor has more than 1 (one) creditor, meaning that apart from having obligations to pay debts to creditors (the bankruptcy applicant) also has debts to other creditors and one of the debts has matured and can be collected."

Then, in the opinion of Yahya Harahap:[130]

> "Borg or Guarantor according to Article 1820 of the Civil Code, are not debtors. But only someone who binds himself to fulfill the agreement if the debtor himself does not fulfill it. In such an engagement position both technically and substantively, the guarantor does not turn into a debtor. Its position legally has been purely institutionalized in the form of Borgtocht. There is no legal basis for prosecuting and placing a guarantor in the state of bankruptcy in principle, the nature of Borgtocht, only places a guarantor to bear payments to be carried out by the debtor, therefore the actual

[129] Denny Kailimang, *Problematik yang Dihadapi Debitor/Kreditor Berkaitan dengan Personal Guarantee atau Coorporate Guarantee Sehubungan dengan Gugatan Kepailitan, Penyelesaian Utang-Piutang*, p. 412.

[130] Yahya Harahap, "Masalah Pailit Dikaitkan dengan Guarantor,*"* Journal, Evidence T-3 in case No 037/Pailit/2001/PN.Niaga/JKT.PST.

> responsibility for paying the debt remains with the debtor. When the Guarantor is in a state of incapacity, his position as guarantor must be terminated and replaced with a new guarantor."

Based on these opinions, it can be concluded that it turns out that experts also have different opinions regarding the issue of whether a guarantor can be bankrupt. The status of a guarantor can change to that of a debtor if in the guarantor agreement (*borgtocht*), the guarantor has expressly waived his privileges and the main debtor is unable to fulfill the agreement, the guarantor is thus a debtor so that he can apply for a declaration of bankruptcy to the Commercial Court.[131] However, I do not agree with Yahya Harahap's opinion because the guarantor is responsible for payments for the settlement of the debtor's guaranteed debt, thus, debt arises for the guarantor if the debtor defaults. Therefore, the guarantor is also a debtor.

Several Jurisprudence of the Supreme Court of the Republic of Indonesia, as a basis for judicial consideration, essentially state that any guarantor who has waived their privileges can be directly demanded payment by the main debtor when the main debtor defaults as if the guarantor were the main debtor themselves. These jurisprudences include:

Jurisprudence of the Supreme Court of the Republic of Indonesia No. 39 K/N/1999, dated November 2, 1999, in the bankruptcy case between PT Deemte Sakti Indo and PT Bank Kesawan. The Supreme Court's panel of judges opined, among other things:[132]

[131] Disriani Latifah, *Loc.,Cit.*
[132] Jurisprudence of the Supreme Court No. 39 K/N/1999.

> "That the Respondent as the guarantor has waived their privileges, the Creditor can directly demand the Respondent to fulfill their obligations. Since the Respondent did not meet their obligations willingly, the Creditor/Applicant requests that the Respondent be declared bankrupt, and as correctly and appropriately considered by the Commercial Court, the Respondent has met the requirements for bankruptcy."

Jurisprudence of the Supreme Court of the Republic of Indonesia No. 43 K/N/1999, dated December 31, 1999, in the bankruptcy case between (1) Bank Artha Graha and (2) PT Bank Pan Indonesia, Tbk. (PT Bank Panin, Tbk.) against (1) Cheng Basuki and (2) Aven Siswoyo, provided its considerations, as follows:[133]

> "That with the guarantee agreement No. 50 and the security agreement No. 51 (evidence P2 and P3) which, among other things, state that the Appellants, as guarantors, waive all rights granted by law to a guarantor, it means that the Appellants, as guarantors, are replacing the position of the Debtor (PT Tensindo) in fulfilling the Debtor's obligations to the Applicants (the Applicants of Cassation), so the Appellants (Appellants of Cassation) can be categorized as debtors."

Jurisprudence of the Supreme Court of the Republic of Indonesia No. 010/K/N/2000, dated April 5, 2000, determined:[134]

> "In cases involving a guarantor who has waived their privileges granted by the law, the Creditor can choose whether to collect the debt from the original debtor or from the guarantor."

Jurisprudence of the Supreme Court of the Republic of Indonesia No. 035 K/N/2005 in the case between PT Bahana Pembinaan Usaha Indonesia and PT Bhineka Multi Corporation established considering that, against

[133] Jurisprudence of the Supreme Court No. 43 K/N/1999.
[134] Jurisprudence of the Supreme Court No. 010/K/N/2000.

guarantors who have waived their privileges, the Supreme Court, in its decisions, among other things:[135]

1. Decision No. 39 K/N/1999, the Supreme Court opined, in essence, that the Respondent as the Guarantor had waived their privileges, so the Creditor could directly demand the Respondent to fulfill their obligations.[136]
2. Decision No. 43 K/N/1999, the Supreme Court opined that, in essence: With the guaranteed agreement, which includes the guarantor waiving all rights granted by the law to a guarantor, it means the guarantor is replacing the debtor's position with respect to the creditor, so the guarantor can be categorized as a debtor.[137]

Based on the provided jurisprudences and legal principles, it can be concluded that when a guarantor, whether personal or corporate, has willingly waived their legal privileges or rights, they can be held directly liable for the repayment of the debt if the primary debtor defaults. This means that the creditor has the legal standing to demand payment from the guarantor as if they were the primary debtor themselves.

Based on the grammatical interpretation of the provisions in Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations, a guarantor cannot be declared bankrupt before the debtor's

[135] Jurisprudence of the Supreme Court No. 035 K/N/2005.
[136] Supreme Court Decision No. 39 K/N/1999.
[137] Supreme Court Decision No. 43 K/N/1999.

assets are first confiscated and sold to pay off the debt. This is in line with the provisions of Article 1831 of the Civil Code, stated that:[138]

> "The guarantor shall not be obliged to pay the creditor unless the debtor fails to settle his debt; and, in this regard, the debtor shall be dispossessed of his assets in advance in order to settle the debt."

The provisions of Article 1831 of the Civil Code also require that the guarantor can only be required to pay a debt shortfall that cannot be repaid from the proceeds from the sale of the debtor's assets. Thus, based on the provisions of Article 1831 of the Civil Code, a guarantor cannot be declared bankrupt without previously declaring the debtor bankrupt. The creditor's right to sue the guarantor is only available if after the liquidation of the debtor's assets, there is still a remaining debt that has not been paid off.

Based on the provisions of Article 1832 point 4 of the Civil Code, the guarantor cannot demand that the debtor's assets be confiscated and sold in advance to pay off the debt if he is in a state of bankruptcy. Thus, the obligation to pay from the guarantor becomes part of the bankrupt's assets as soon as the debtor is declared bankrupt by the court. However, the provisions of Article 1832 point 4 of the Civil Code do not cause the guarantor to become bankrupt.

In line with the provisions of Article 1832 point 1 of the Civil Code, an application for a declaration of bankruptcy against the guarantor can be filed without filing a bankruptcy application after the debtor is declared

[138] Article 1831 of the Civil Code Concerning the Consequences of the Guarantee Between the Creditor and the Guarantor.

bankrupt only if the guarantor has relinquished his privileges to demand that the debtor's goods or assets be confiscated and sold in accordance with Article 1832 of the Civil Code.

In line with the provisions of Article 1832 numbers 2, 3, 4 and 5 of the Civil Code, toward the guarantor, a request for a declaration of bankruptcy may be submitted, apart from having waived its privileges as referred to in Article 1832 Number 1 of the Civil Code as stated above, as follows:[139]

2) Article 1832 point 2:

> "If he has severally bound himself to the principal debtor; in which case the consequences of the same contract shall be regulated in accordance with the basic principles which have been established with respect to several liability debts."

3) Article 1832 point 3:

> "If the debtor can submit a demurrer which is only relevant to him personally."

4) Article 1832 point 4:

> "if the debtor becomes bankrupt or insolvent."

5) Article 1832 point 5:

> "in the case of a guarantee ordered by the court."

The provisions of Article 1832 Numbers 1 to 5 of the Civil Code have been explained: the guarantor is deemed to have waived the privileges granted by Article 1831 of the Civil Code if the first time being prosecuted in front of judges, he does not ask the creditor to first seize and sell the debtor's assets

[139] Article 1832 of the Civil Code Concerning the Consequences of the Guarantee between the Creditor and the Guarantor.

according to the procedure stated in Articles 1833 to 1855 of the Civil Code. In addition to the release due to the law, Article 1832 number 1 of the Civil Code also allows creditors to request that when making a debt guarantee agreement, it is stated that the guarantor, by signing the guaranteed agreement, waives his privileges under Article 1831 of the Civil Code. With the relinquishment of these privileges by the guarantor in the debt guarantee agreement made by the creditor with the guarantor, it means that the creditor can directly ask or sue the guarantor to immediately fulfill the debtor's obligations when the debtor defaults.[140]

If the provisions of Article 1832 of the Civil Code are not fulfilled, then the provisions of Article 1831 of the Civil Code apply, so an application for a declaration of bankruptcy may not be submitted without also submitting a bankruptcy application to the debtor. In fact, the guarantor cannot be applied for a declaration of bankruptcy before it was proven that the proceeds from the sale of assets prove that the debtor who is declared bankrupt still has outstanding debts that have not been repaid, in some cases, the guarantor may ask for them.

According to Article 2 paragraph (1) of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations, the condition for bankruptcy is a debtor, namely a debtor who has two or more creditors and does not pay his debts when they are due. So the main requirement if want to bankrupt the guarantor is that the applicant must prove

[140] Gunawan Widjaja, *Op., Cit.* p. 160-161.

that the status of the guarantor has changed to become a debtor, because only debtors can be bankrupt, after that the applicant must prove that the guarantor who has become the debtor has two or more creditors and does not pay its debts that are due and can be collected, after it is proven, then the guarantor who has become the debtor can be declared bankrupt.

Then there are other considerations of judges related for a declaration of bankruptcy against the personal guarantor, including whether the application for a declaration of bankruptcy against the guarantor must be submitted simultaneously with the application for a declaration of bankruptcy against the debtor. So, it should be emphasized that it is not a requirement to submit the application for a bankruptcy statement against the guarantor together with the debtor. If the provisions of Article 1832 of the Civil Code are not fulfilled, so that the provisions of Article 1831 of the Civil Code apply, then an application for a declaration of bankruptcy may not be filed without also applying for a declaration of bankruptcy against the debtor. The guarantor cannot even be applied for a declaration of bankruptcy before it is proven that, from the proceeds from the sale of the assets of the debtor who was declared bankrupt, there is still a remaining debt that has not been repaid, which can be requested by creditor to guarantor.

It is necessary to pay close attention to the responsibility of the guarantor in connection with the provisions of Article 165 of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations. According to Article 168 of Law Number 37 of 2004 concerning

Bankruptcy and Suspension of Debt Payment Obligations, even though there has been reconciliation, the creditors still have rights against the guarantors. Furthermore, Article 165 of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations determines that the rights that can be exercised over the goods of third parties remain with the creditors as if there had been no settlement.

In other words, the occurrence of reconciliation between the debtor and his creditors does not eliminate the responsibility of the guarantor. This article should not be interpreted to mean that even if a reconciliation has been made, the creditors can submit a request to the guarantor to pay off the guaranteed debtor, which in fact has been agreed by the creditors to be rescheduled or restructured based on a reconciliation agreement. In other words, no, it cannot be justified that on the one hand there has been an amicable settlement between the debtor and his creditors while at the same time the creditors are submitting their rights to the guarantor to pay the debtor's debts that have been rescheduled or restructured.

That article must mean that the guarantee is not cancelled by the existence of a reconciliation agreement, so therefore the guarantor continues to guarantee or bear the debts that have been rescheduled or restructured. The liability of the guarantor only arises if the debtor defaults because he cannot fulfill the terms of the reconciliation agreement. The cancellation of guarantees can only occur if in the reconciliation agreement, it is expressly agreed to release the guarantor from his obligations.

There are several models of personal guarantor bankruptcy applications, including the bankruptcy application to the debtor first, followed by the bankruptcy application to the personal guarantor. However, Article 168 of Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations is not regulated regarding the various models of bankruptcy applications themselves. This is due to the requirement of Article 1831 of the Civil Code that a debtor must first be declared bankrupt before a guarantor can be declared bankrupt. The creditor's right to sue the guarantor or guarantor is only available if after the liquidation of the debtor's assets, there is still a remaining debt that has not been paid off. However, filing an application for a declaration of bankruptcy against a guarantor can be submitted without filing a bankruptcy application to the debtor only if the guarantor has waived his privileges to demand that the debtor's goods or assets be confiscated and sold in advance, and this has been regulated in Article 1832 Number 1 of the Civil Code.

An example of a debtor's bankruptcy application first and then a bankruptcy petition against a personal guarantor is in Case Number 25/Pailit/2009/PN.Niaga.Jkt.Pst. In this case, PT Fit-U Garment Industry submitted its own bankruptcy application, and the Panel of Judges granted the request so that PT Fit-U was declared bankrupt with all its legal consequences. However, the repayment was far from the value of the principal debt, so Citibank again collected PT Fit-U's debt from the guarantor (Danny Lukita). Decision No. 13/Pailit/2010/PN.Niaga.Jkt.Pst. stated that

Danny Lukita was proven to be the guarantor. With that position, Danny Lukita waived his privileges under Articles 1430, 1431, 1821, 1831, 1833, 1837, 1843, 1847, and 1848 of the Civil Code.[141] The consequence of relinquishing these privileges makes Citibank as creditor and Danny Lukita become debtor, as referred to in Article 1 paragraphs (2) and (3) of Law No. 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations.

Case related to personal guarantor that have been examined and decided by the Panel of Judges, namely decision Number: 8/Pdt.Sus-Pailit/2018/PN Niaga/SBY, PT Intan Baruprana Finance Tbk, as the petitioner 1 in bankruptcy case, and PT Intraco Penta Prima Service, as the petitioner 2 in bankruptcy case, hereinafter referred to as the petitioners, are opposing CV Kalimass Jaya Utama as the respondent 1 in bankruptcy case, and H Amran SE, as the Active Shareholder and Personal Guarantor of the debt for CV Kalimas Jaya Utama, hereinafter referred to as the respondent 2 in bankruptcy case.

The Panel of Judges granted the bankruptcy petition filed by PT. Intan Baruprana Finance Tbk and PT Intraco Penta Prima Service, as petitioners, and declared H. Amran, SE (Personal Guarantor) of CV Kalimass Jaya Utama, as the respondent, bankrupt with all the associated legal consequences. The primary debtor, CV Kalimass Jaya Utama, was found to

[141] Mon, "Penjamin PT Fit-U Pailit, Hukumonline", 2010 accessed on June 21, 2023 http://www.hukumonline.com/berita/baca/lt4bdc2202aaff5/penjamin-pt-fitu-pailit.

be in breach, and H. Amran SE, was unable to fulfill his obligations as a personal guarantor. Based on evidence P1-P15, specifically the overdue deed numbered 050B/1BF-ARC/SK/IV/18 dated April 30, 2018, it was established that the total debt owed to the petitioners by the respondents until April 30, 2018, amounted to Rp 32,613,135,942.78 (Thirty-Two Billion Six Hundred Thirteen Million One Hundred Thirty-Five Thousand Nine Hundred Forty-Two, Seventy-Eight Rupiah).

In this decision, it was stated that H. Amran SE was declared bankrupt with all the legal consequences, in accordance with the provisions of Article 2 paragraph (1) of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations. H. Amran SE had been confirmed as the Personal Guarantor of CV Kalimass Jaya Utama, where he had committed to being the personal guarantor in a guaranteed agreement. In this agreement, it was proven that H. Amran SE, as the personal guarantor, dated June 24, 2016, in accordance with Financing Lease Agreement Number 016/PSP/VV16, between H. Amran SE as the guarantor and the client as the beneficiary, waived his privileges under Articles 1430, 1431, 1821, 1831, 1833, 1837, 1843, 1847, and 1848 of the Civil Code. Therefore, H. Amran SE legal position which was previously a personal guarantor has now changed to debtor to the petitioners.

The consideration of having at least two creditors has indeed been met. This requirement is supported by the trial evidence presented during the bankruptcy case, where PT. Intan Baruprana Finance Tbk, the first petitioner,

and PT. Intraco Penta Prima Service, the second petitioner, are both recognized as creditors. This conclusion is strongly supported by the evidence labelled as P1-P15, which has been reviewed and considered by the Panel of Judges. The Panel of Judges' decision that the existence of 2 (two) or more creditors has been fulfilled.

The other considerations that have been met are the presence of at least 1 (one) debt that is past due and collectible. This is based on the debt of CV Kalimass Jaya Utama and H. Amran SE, which amounts to Rp 32,613,135,942.78 (Thirty-Two Billion Six Hundred Thirteen Million One Hundred Thirty-Five Thousand Nine Hundred Forty-Two, Seventy-Eight Rupiah), excluding interest and late fees. Furthermore, Then the debt can also be proven in a simple manner in accordance with the provisions of Article 8 paragraph (4) Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations.

B. The personal Guarantor's Liability when Declared Bankrupt due to The Debtor's Default

In the world of banking, the provision of debt by creditors (banks) to a debtor is in anticipation of the creditor's if in the future the debtor breaks his promise or defaults, then usually the bank will ask the debtor or customer to provide a guarantee for his debt. However, it is almost certain that for the loan given, the Bank always asks for a personal or corporate guarantor in addition to the Material Guarantee. This becomes one of the most important

considerations for creditors in providing debt or banks in providing credit, namely the existence of guarantees provided by the debtor for their obligations. The existence of a guarantor to pay obligations that cannot be fulfilled by debtors is very beneficial because this can reduce the risk of loss. The personal guarantor has a position as an accessory agreement between the creditor and a third party (the guarantor).

A personal guarantor doesn't exist only in Indonesian law. Italian firms favour guarantees in making their loan interest payments, so most of the bank loan is secured by a guarantee to avoid losses. Further, loans secured with a personal guarantor are even higher than unsecured ones. In Italian law, the role of a personal guarantor is similar to that in Indonesian law. They become responsible for repaying the debt on behalf of the debtor, and if the debtor fails to fulfill their obligations, their personal assets could be obtained to satisfy the debts.[142] According to Article 1944 of the Italian Civic Code, a personal guarantor could be sued by the creditor or even the debtor with a special clause of renunciation.[143]

In certain legal systems, corporate insolvency law originated from individual bankruptcy laws and has transformed into a separate and unique set of regulations. In England, bankruptcy laws were initially adapted to address the insolvency of corporate entities until a separate body of corporate insolvency law was established. Presently, English insolvency law comprises

[142] Giorgio Calcagnini, et al., The impact of guarantees on bank loan interest rates, *Applied Financial Economics*, 24:6, 2014, p. 397-412.

[143] Pietro Bembo, Warranties and Guarantees in Italian Law, *International Litigation, ADR, and Contracts*, 2012.

two distinct systems: "bankruptcy" for individuals and "insolvency" for legal entities or corporations.[144] In France and other Napoleonic jurisdictions, insolvency laws are categorized into two separate systems based on whether the debtor is a "merchant" or "non-merchant." Merchants, which include corporate entities and individual entrepreneurs, are subject to a specific "business law" insolvency regime, whereas non-merchants, like consumers, are governed by a distinct regime. In certain countries, a considerable portion of businesses are run by individuals or families and may not be formally incorporated. Even if they are incorporated, banks may request personal guarantor from the shareholders of the company when extending corporate loans to reduce the risk of non-payment.

In case the debtor does not pay his debt at maturity then the creditor can demand the execution of the object that has been pledged by the debtor to pay off the debt. Whereas in a personal guarantor or *borgtocht*, the guarantee given by the debtor is not in the form of objects but in the form of a statement by a third party (guarantor) who has no interest in either the debtor or the creditor that the debtor can be trusted to carry out the obligations agreed upon with the condition that if the debtor does not carry out his obligations, the third party is willing to carry out the debtor's obligations.[145] With a personal guarantor, the creditor can sue the guarantor to pay the debtor's debt if the debtor is negligent or unable to pay the debt. And regarding the

[144] Francis Wallace, Warranties and Guarantees in English Law, *International Litigation, ADR, and Contracts.* 2012.

[145] M.Yahya Harahap, *Segi-Segi Hukum Perjanjian*, Alumni, Bandung, 1982, p.315.

provision of a guarantor, which is usually requested by banks in granting bank loans, with Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations, a guarantor who provides as a personal guarantor can be applied for to be declared bankrupt. So far, both banks and businessmen have not realized that a personal guarantor can have far-reaching legal consequences if he does not carry out his obligations. The consequence is that the guarantor (either a personal or corporate guarantor) may be declared bankrupt. Many bankers feel that the personal guarantor only provides the moral bond of the guarantor. This is not true, because if we look at Article 24 paragraph (1) of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations, stated:[146]

> "The bankrupt debtor by law loses the right to control and manage his assets, which are included in the bankruptcy estate from the date the bankruptcy decision was pronounced."

Seeing the provisions of Article 24 paragraph (1) of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations above, a guarantor who is declared bankrupt by a court can no longer do business for and on behalf of himself. In the Civil Code, guarantees are regulated in Article 1820 of the Civil Code up to Article 1850 of the Civil Code. From the provisions in the Civil Code, it can be concluded that a guarantor is also a debtor. The guarantor is also a debtor who is obliged to pay off the debtor's debt to the creditor if he does not pay the debt that is due

[146] Article 24 paragraph (1) of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations.

and/or collectible. The definition of debt based on Article 1 Number 6 of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations, is an obligation that can be expressed in an amount of money in both Indonesian and foreign currency, either directly or that will arise in the future or is contingent, arising from agreements or laws, and which must be fulfilled by the debtor, and if it is not fulfilled, it entitles the creditor to obtain fulfillment from the debtor's assets. Then, what is meant by "debt that has fallen due and is collectible" is the obligation to pay a debt that has matured, either because it has been agreed, because of the acceleration of the collection time as agreed, because of the imposition of sanctions or fines by the competent authority or because of a decision of a court, arbitrator, or arbitral tribunal.[147]

Based on Article 1 paragraph (1) and Article 2 paragraph (1) of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations, if the condition to be bankrupt is a debtor, then the guarantor is a debtor, so the guarantor can file for bankruptcy. A guarantor is obliged to pay the debtor's debt to the creditor when the debtor is negligent or defaults, the guarantor will become the debtor or is obliged to pay after the debtor's debt is borne by the default and the property belonging to the main debtor who is guaranteed has been confiscated and auctioned first but the proceeds are not enough to pay the debt, or the main debtor is negligent or the default

[147] Elucidation of Article 2 Paragraph (1) of Law Number 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations.

does not own any assets. Based on these provisions, the guarantor is not obliged to pay the creditor unless the debtor fails to pay.

This guarantor can only be said to have a role in the case of a bankruptcy application if the debtor defaults, or in other words, is unable to pay 1 (one) or more debts that must be paid immediately or are due and collectible. So, it can be concluded from this information that the guarantor must fulfill the obligations that the debtor has left. The role of the personal guarantor is that of a third party who voluntarily binds himself to the creditor to be able to convince the creditor that the debtor will be able to pay off his debts, even though the debtor has been declared bankrupt or is currently bankrupt.

A personal guarantor guarantees the debtor's debt, and if the debtor defaults on the creditor, then the personal guarantor becomes the debtor. Because the guarantor is a debtor, the guarantor can file a bankruptcy statement based on Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations.[148] In the case of bankruptcy, the guarantor is the debtor under obligation to guarantee payment by the principal debtor.[149] The debtor is obliged to pay off the debtor's due and collectible debts. Because the guarantor is a debtor, the guarantor can be declared bankrupt under Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations. If the principle of *concursus*

[148] Sutan Remy Sjahdeini, *Op.Cit.* p.98.

[149] Imran Nating, *Tanggung Jawab Kurator dalam Pengurusan dan Pemberesan Harta Pailit*, Raja Grafindo Persada, Jakarta, 2004, p. 33.

creditorum is not fulfilled as required by Article 2 Paragraph (1) of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations, the guarantor cannot be applied for a declaration of bankruptcy.

Then, another issue arises, which pertains to the obligations of a personal guarantor in bankruptcy proceeding. The obligations of a personal guarantor are regulated in the Civil Code. In Article 1338 of the Civil Code permits parties to freely make agreements on their behalf, personal guarantors operate within specific constraints that govern their responsibilities and obligations in a guaranteed agreement. These constraints establish the boundaries of their actions. One fundamental constraint is that personal guarantors are accountable exclusively to the creditor. In other words, their commitment cannot be utilized for the benefit of anyone else. Their primary role is to provide guarantee to the creditor that in the event the primary debtor fails to meet their obligations, the guarantor will step in to ensure that those obligations are fulfilled.

Additionally, personal guarantors can't take over or cancel what the primary debtor must do. If the debtor has already paid off their debt to the creditor, the personal guarantee no longer applies. It only comes into play when the debtor can't meet their commitments. Also, if the personal guarantor wants to change the credit agreement between the creditor and the debtor or take back their guarantee, they need the creditor's permission, unless the guaranteed agreement says otherwise. In general, personal guarantors must follow their responsibilities and obligations, and any changes or cancellations

depend on what's written in the guaranteed agreement or if there's a good legal reason for it. The other limitations of a Personal Guarantor are a third party who provides a guarantee for a debtor's debt to a creditor. In the context of civil law, a personal guarantor has several obligations that need to be considered:

1. Direct Obligation to the Creditor: A personal guarantor has a direct obligation to the creditor and must pay the debtor's debt to the creditor if the debtor cannot do so;
2. The guarantee provided by a personal guarantor cannot exceed the debt obligations agreed upon in the principal agreement as regulated in Article 1822 of Civil Code. The guarantee can also be executed only for a portion of the debtor's debt or under specific conditions;
3. A personal guarantor can waive privileges granted by Article 1832 Civil Code: This includes waive right to demand the seizure and sale of the debtor's assets to pay off the debt;
4. If the debtor cannot fulfill their obligations to the creditor, the guarantor may be declared bankrupt. However, a bankruptcy application for the guarantor can only be filed if the conditions for a bankruptcy application are met as regulated in article 1831-1832 of Civil Code.

The obligations related to an individual acting as a personal guarantor for a debt primarily stem from the rules and conditions meticulously outlined in the agreement letter established between the debtor and the creditor. This agreement letter essentially functions as the contract that clearly defines the

boundaries and responsibilities of the personal guarantor in relation to the specific debt in question. It sets out the extent of the guarantor's duty and the specific situations when the personal guarantor's commitment becomes applicable for all the consequences.

Within the terms of this agreement letter, specific clauses detail the direct responsibilities of the personal guarantor to the creditor. This often state that the personal guarantor has a direct and immediate obligation to the creditor, meaning they must step in to pay off the debtor's outstanding debt if the debtor cannot do so. Moreover, the agreement letter precisely governs the limits of the personal guarantor's guarantee, ensuring that it doesn't exceed the agreed-upon debt obligations. Additionally, the letter may address situations where the guarantee can be enforced, which might be limited to specific portions of the debtor's debt or subject to certain predefined conditions.

A distinction arises when comparing the obligations of the debtor and the personal guarantor in bankruptcy. Their roles diverge in the context of a guaranteed agreement. According to Article 2 paragraph (1) of Law Number 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations, bankruptcy applies to debtors with two or more creditors who fail to meet their debt obligations when due. To initiate bankruptcy proceedings against a guarantor, it's essential to demonstrate a transformation in their status from guarantor to debtor, as only debtors can be declared bankrupt. The status of guarantor can change to become a debtor if in the guarantor agreement

(*borgtocht*), the guarantor has expressly waived his privileges and the main debtor is unable to fulfill the agreement. The guarantor in such a position is a debtor so that he can be filed for bankruptcy at the Commercial Court.

Personal guarantor liability when declared bankrupt, his assets become part of the bankruptcy estate and are managed by a curator under the supervision of a bankruptcy judge as regulated in article 15 Paragraph (1) of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations. The personal guarantor loses the right to manage and dispose of their assets once the bankruptcy order is issued, as outlined in Article 24 paragraph (1) of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations. The curator's role is to manage and sell these assets to pay off the debtor's (guarantor) debts promptly. Furthermore, the court may be asked to cancel any legal actions that harm the interests of the creditors for the benefit of the bankruptcy estate, ensuring that the debtor's (guarantor) assets are used to pay back the debts.

After bankruptcy declaration, the guarantor must hand over all assets to the curator for management and debt settlement. The debtor (guarantor) loses control over their assets, as stated in Article 24 paragraph (1) of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations, with the curator responsible for managing and selling the assets to settle the debts. Full asset disclosure is necessary, and the debtor with his personal guarantor who declared bankrupt must attend meetings with the curator and creditors to discuss bankruptcy proceedings. This may involve

providing a statement of affairs detailing assets, liabilities, and creditors and undergoing an examination under oath. It's important to note that obligations may continue after bankruptcy, such as paying off outstanding debts and following court orders. Failure to meet these obligations can result in legal consequences.

When a personal guarantor goes bankrupt, we encounter a specific issue related to how the general seizure process is applied to them. This concerns whether all the personal guarantor's assets will be seized in this process or only the ones they guaranteed according to the agreement. In the event a guarantor has filed for bankruptcy, in accordance with Article 2, paragraph (1) of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations, the status of the personal guarantor must change into a debtor.

Now, let's consider how the general seizure process unfolds. The general seizure in bankruptcy is defined in Article 1 paragraph (1) of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations. It encompasses the entirety of the wealth and assets of the bankrupt debtor at the time when the bankruptcy declaration is made. Furthermore, Article 31 of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations, stated that in bankruptcy cases, all seizures of the bankrupt's assets are terminated, and the execution of the court's decision regarding the debtor's assets must be immediately halted.

However, in this case, a personal guarantor possesses special rights governed by Article 1831 of the Civil Code, which stipulates that a personal guarantor has the privilege to demand that the debtor's assets be seized and sold first to settle the debt. If the proceeds from the sale of the debtor's assets are insufficient to cover the debtor's debt, then it is the assets of the guarantor that will be used to fulfill the remaining obligation. In the bankruptcy process, this could raise questions. After a general seizure has been made on the debtor's assets, if there remains an outstanding debt, the personal guarantor is obliged to settle this remaining debt. This leads to the question of whether the personal guarantor will be declared bankrupt based on their entire wealth or only in relation to the debt guaranteed by the personal guarantor.

In Article 1831 of the Civil Code, a personal guarantor only guarantees the remaining debt that cannot be paid by the debtor. However, if the personal guarantor defaults in settling the remaining debt, they can be declared bankrupt, and their status changes to the debtor in bankruptcy, as referred to in Article 24 paragraph (1) of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations, by law, the personal guarantor will lose their rights to manage and administer their assets, which are included in the bankruptcy estate, from the date the bankruptcy declaration is pronounced. With the issuance of the bankruptcy declaration, a general seizure in bankruptcy is initiated. All assets of an individual who has been declared bankrupt will be administered and settled by a curator under the supervision of a Supervisory Judge. Therefore, based on the provisions

mentioned above, it can be concluded that a personal guarantor loses all their rights in managing their whole assets.

However, Article 1822 of the Civil Code states that a debt guarantee cannot exceed the burden of the debtor's obligation. This can be conflicting if a personal guarantor has been declared bankrupt based on Article 24 paragraph (1) of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations. In certain cases, where the agreement made by the personal guarantor only covers the debt they specifically guaranteed according to the agreement's terms, a general seizure can be carried out within the total assets of what the personal guarantor guaranteed to the creditor, even if the personal guarantor has privileges. This is in accordance with the principle of *lex specialis derogat legi generali*, which may apply in this situation. This means that a special law overrides a general law.

The distinction between Article 1831 and Article 1832 Number 1 of the Civil Code lies in the application of Article 24 paragraph (1) of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations, which encompasses all assets collectively owned by the personal guarantor. The key difference between these two articles, as previously explained, is that Article 1831 of the Civil Code confers a specific privilege upon the personal guarantor, allowing them not to initially pay the debt but to await payment from the debtor. In case of a shortfall, the personal guarantor then assumes the obligation to pay. If the personal guarantor defaults by

failing to settle the remaining debt, their bankruptcy declaration follows that of the debtor. This differs from Article 1832 Number 1, where if the personal guarantor has waived their special right, especially has stated in the agreement that the guarantor is jointly and responsible with the main debtor for all debtor's debts to the creditor. Consequently, that a personal guarantor loses all their rights in managing their whole assets as regulates in Article 24 paragraph (1) of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations. It can be concluded that both scenarios can result in the personal guarantor's bankruptcy, but they vary in terms of the timing of the bankruptcy filing and the right to be seized before pursuing the personal guarantor.

Further discussion on the topic above, Bankruptcy and Suspension of Debt Payment (PKPU) are two different matters in law. In bankruptcy, the debtor's assets will be used to pay off all their matched debts. Bankruptcy is a decision when the debtor is declared unable to fulfill their obligations to the creditors. Bankruptcy is the general seizure of all the debtor's assets, managed and liquidated by the curator under the supervision of a supervising judge. On the other hand, in suspension of debt payment, the debtor's assets are managed to generate funds that can be used to pay off the debtor's debts. Suspension of debt payment is an attempt at a settlement offered by the debtor to resolve these debts and avoid being declared bankrupt. Suspension of debt payment is a process of delaying the debtor's payments to the creditors. However, the requirements for filing Suspension of debt payment and bankruptcy are

essentially the same, which include having two or more creditors, debts that are already due and collectible, and being able to prove them in a straightforward manner. The fundamental thing to know is that the purpose of suspension of debt payment is to provide the debtor with an opportunity to restructure their debts, with the aim of enabling them to continue making debt payments.[150]

Then the liability personal guarantor cannot be included in a suspension of debt payment because the very purpose of personal guarantor is to guarantee the debtor's debt, and they must continue to fulfill their obligation to bear the debtor's debt. This contrasts with bankruptcy, where personal guarantors also have their assets settled.[151] So, in conclusion, the personal guarantor, even if the debtor goes bankrupt or undergoes suspension of debt payment, personal guarantor must still fulfill their obligation to guarantee the debt. It is only when there is a homologation that their assets are seized as a guarantee for the unpaid debts of the debtor. The debtor can be filed for suspension of debt payment, but the personal guarantor may be declared bankrupt or sued in a civil case.

[150] Gunawan Widjaja and Kartini Mulyadi, *Op., Cit.* p. 3.

[151] Hamalatul Qur'ani, "Pandangan Ahli Soal Penarikan Guarantor Sebagai Termohon PKPU", 2019, https://www.hukumonline.com/berita/a/pandangan-ahli-soal-penarikan-guarantor-sebagai-termohon-pkpu/. accessed on October 23, 2023.

CHAPTER IV

CLOSING

A. Conclusion

From the discussion that has been described above, it can be taken as a conclusion that answers the problems above, as follows:

1. Judge consideration in initiating bankruptcy proceedings against a personal guarantor due to a debtor's default, key factors come into play. The judge assesses the validity of the guaranty agreement under relevant legal provisions, including Articles 1831 and 1832 of the Civil Code, and the guarantor's accountability for the debt. Other considerations include whether the guarantor's status becomes that of a debtor as per the law, the involvement of multiple creditors, and the maturity of at least one debt for collection. Additionally, the judge evaluates if the guarantor has waived special rights and declared joint responsibility with the debtor, which could trigger their bankruptcy. These factors are crucial in the judge's decision-making regarding personal guarantor bankruptcy proceedings.
2. The personal guarantor's liability when declared bankrupt due to the debtor's default is a crucial aspect in bankruptcy situations. They hold the responsibility of guaranteeing the debtor's actions when the debtor fails to fulfill their obligations. In cases where the debtor cannot meet these obligations, the personal guarantor commits to ensuring that all such obligations are met according to the applicable terms when the debtor

defaults on their obligations to the creditor. However, this situation entails inherent risks for the personal guarantor. If they find themselves unable to fulfill these obligations, they may face the possibility of being petitioned for bankruptcy. In practical bankruptcy scenarios, a personal guarantor can be legally declared bankrupt, resulting in the seizure of all their assets to settle the debts owed to the creditor.

B. Recommendation

1. Judges should verify valid agreements, assess whether the guarantor becomes a debtor, consider multiple creditors or outstanding debts, review any waived rights, and evaluate the guarantor's ability to repay. These steps aid judges in making informed decisions in personal guarantor bankruptcy cases.
2. Personal guarantors are obligated to fulfill their agreed-upon responsibilities to either the debtor or the creditor. This obligation allows personal guarantors to effectively serve as a third party and meet their future obligations. To declare a personal guarantor bankrupt, it's essential to establish a clear distinction between the amount for which the personal guarantor is accountable and the debt of the debtor.

REFERENCES

BOOKS

Abdulkadir Muhammad, *Hukum Perdata Indonesia*, PT Citra Aditya Bakti, Bandung, 2010.

Algra, *Inleiding tot Het Nederlands Privaatrecht*, Tjeenk Willink, Groningen, 1974.

Andy Hartanto, *Hukum Jaminan dan Kepailitan*, Laksbang Justitia, Surabaya, 2015.

Aria, Suyudi, (ed.), *Kepailitan di Negeri Pailit*. 2004.

Bahder Johan Nasution, *Metode Penelitian Ilmu Hukum*, Bandung: Mandar Maju, 2008.

Denny Kailimang, *Problematik yang Dihadapi Debitor/Kreditor Berkaitan dengan Personal Guarantee atau Coorporate Guarantee Sehubungan dengan Gugatan Kepailitan, Penyelesaian Utang-Piutang*, PT Bina Cipta, 2005.

Dimyauddin Djuwaini, *Pengantar Fiqh Muamalah*, Pustaka Pelajar, Yogyakarta, 2015.

Elizabeth Warren, *Bankruptcy Policy*, in et al. Bankruptcy St. Paul, West Publishing Co., Minnesota, 1993.

Gunawan Widjaja and Kartini Mulyadi, *Pedoman Menangangani Perkara Kepailitan, PT RajaGrafindo Persada*, Jakarta, 2003.

_____, *Penanggungan utang dan perikatan tanggung menanggung*, 2005.

H. Salim HS *Perkembangan Hukum Jaminan di Indonesia*, Edition 1, Raja Grafindo Persada, Jakarta, 2004.

Herry Campbell Black, *Black's Law Dictionary*, West Publishing Co., St. Paul Minnesota, 1974.

Imam Mustofa, *Fiqih Mu'amalah Kontemporer*, RajaGrafindo Persada, Jakarta, 2016.

Imran Nating, *Tanggung Jawab Kurator dalam Pengurusan dan Pemberesan Harta Pailit*, Raja Grafindo Persada, Jakarta, 2004.

J, Satrio, *Hukum jaminan, hak-hak jaminan pribadi penanggungan (borgtocht), dan perikatan tanggung-menanggung*, PT. Citra Aditya Bakti, 1996.

_____, *Hukum Perikatan, Perikatan yang Lahir dari Undang-undang*, First Edition, Citra Aditya Bakti, Bandung, 1993.

Jerry Hoff, *Indonesian Bankruptcy Law*, Tatanusa, Jakarta, 1999.

Karen Gross, *Failure and Forgiveness: Rebalancing the Bankruptcy System*, Yale University Press, New Haven-Connecticut, 1997.

Kartini Muljadi, *Pengertian dan Prinsip-Prinsip Umum Hukum Kepailitan*, Makalah, Jakarta, 2001.

Louis E. Levinthal, *The Early History of Bankruptcy law*, in Jordan, et.al., Bankruptcy, Foundation Press, New York, 1999.

M. Bahsan, *Hukum Jaminan dan Jaminan Kredit Perbankan Indonesia*, PT RajaGrafindo Persada, Jakarta, 2012.

M. Hadi Shubhan, *Hukum Kepailitan: Prinsip, Norma, dan Praktik di Peradilan*, Seven Edition, Kencana, Jakarta, 2021.

M.Yahya Harahap, *Segi-Segi Hukum Perjanjian*, Alumni, Bandung, 1982.

Mahadi, *Falsafah Hukum: Suatu Pengantar*, Alumni, Bandung, 2003.

Ned Waxman, *Bankruptcy*, Gilbert Law Summaries, Harcourt Brace Legal and Profesional Publication Inc., Chicago, 1992.

Peter Mahmud Marzuki, *Penulisan Hukum*, Kencana Pranada Media Grup, Jakarta, 2005.

Purwahid, Patrik, Kashadi, *Hukum Jaminan*. 2008.

R Subekti and R Tjitrosudibio, *Terjemahan Kitab Undang-Undang Hukum Perdata*, Pradnya Paramita, Jakarta, 1992.

Rahayu Hartini, *Hukum Komersial*, Vol. 1, UMMPress, 2018.

Sri Soedewi, *Hukum Jaminan di Indonesia Pokok-Pokok Hukum Jaminan dan Jaminan Perorangan*, Liberty Offset, Yogyakarta, 2007.

_____. *Hukum jaminan di Indonesia.* 2001.

Sunarmi, *Hukum Kepailitan*, PT Softmedia, Jakarta, 2010.

Supianto, *Hukum Jaminan Fidusia – Prinsip Publisitas pada Jaminan Fidusia*, Garudhawaca, Yogyakarta, 2015.

Sutan Remi Syahdeini, *Hukum Kepailitan Memahami Undang-Undang No. 37 Tahun 2004 Tentang Kepailitan*, Grafiti, Jakarta, 2010.

Thomas Suyatno, (ed.), *Dasar-Dasar Perkreditan*, PT Gramedia Pustaka Utama, Jakarta, 2007.

Titik Tejaningsih, *Perlindungan Hukum Terhadap Kreditor Separatis dalam Pengurusan dan Pemberesan Harta Pailit*, First Edition, FH UII Press, Yogyakarta, 2016.

Zainal Asikin, *Hukum Kepailitan dan Penundaan Pembayaran Utang di Indonesia*, PT Raja Grafindo Persada, Jakarta, 2001.

JOURNALS

Lenny Nadriana. "Perlindungan Hukum terhadap Harta Ahli Waris dari Pewaris Penjamin Akta Personal Guarantee di Perusahaan Pailit", *Jurnal Bina Mulia Hukum* 2.1, 2017.

Ricardo Simanjuntak, "Esensi Pembuktian Sederhana dalam Kepailitan", in Emmy Yuhassarie (ed.), Undang-undang Kepailitan dan Perkembangannya, Pusat Kajian Hukum, Jakarta, 2005.

Radin in his book "The Nature of Bankruptcy", as quoted by Titik Tejaningsih, Perlindungan Hukum terhadap Kreditor Separatis dalam Pengurusan dan Pemberesan Harta Pailit, First Edition, FH UII Press, Yogyakarta, 2016.

Kartini Muljadi, "Kreditor Preferen dan Kreditor Separatis dalam Kepailitan", in Emmy Yuhassarie (ed.), Undang-undang Kepailitan dan Perkembangannya, Pusat Pengkajian Hukum, Jakarta, 2005.

Kartini Muljadi, "Actio Pauliana dan Pokok-Pokok tentang Pengadilan Niaga", in Rudhy A. Lontoh et.al., Penyelesaian Utang Piutang melalui Pailit atau Penundaan Kewajiban Pembayaran Utang, Alumni, Bandung, 2001.

Jodi Gardner, "Bankruptcy Reform in Singapore: What Can We Learn?", Research Policy Report, Centre for Banking & Finance Law, Faculty of Law, National University of Singapore, 2016.

Fred B.G. Tumbuan, "Mencermati Makna Debitor, Kredit, dan Utang Berkaitan dengan Kepailitan", in Emmy Yuhassarie, Undang-undang Kepailitan dan Perkembangannya, Pusat Pengkajian Hukum, Jakarta, 2005.

Emmy Yuhassarie, "Pemikiran Kembali Hukum Kepailitan Indonesia", in Emmy Yuhassarie (ed.), Undang-undang Kepailitan dan Perkembangannya, Pusat Pengkajian Hukum, Jakarta, 2005.

Douglas G. Baired, “A World Without Bankruptcy”, in Jagdeep S. Bhandari and Lawrence A. Weiss (ed.), Corporate Bankruptcy: Economic and Legal Perspectives, Cambridge University Press, New York, 1996.

Hikmahanto Juwana, “Relevansi Hukum Kepailitan dalam Transaksi Bisnis Internsional”, in Emmy Yuhassarie (ed.), Kepailitan dan Transfer Aset Secara Melawan Hukum, Pusat Pengkajian Hukum, Jakarta, 2005.

Rahmat Bastian, “Prinsip Hukum Kepailitan Lintas Yuridiksi”, in Emmy Yuhassarie Yuhassarie (ed.), Kepailitan dan Transfer Aset Secara Melawan Hukum, Pusat Pengkajian Hukum, Jakarta, 2005.

Tri Harnowo, “Kreditor Preferen dan Separatis”, in Emmy Yuhassarie, *Undang-undang Kepailitan dan Perkembangannya: Proseding Rangkaian Lokakarya Terbatas Masalah-masalah Kepailitan dan Wawasan Hukum Bisnis Lainnya Tahun 2004*, Pusat Pengkajian Hukum, Jakarta, 2005.

Marjan E. Pane, “Inventarisasi dan Verifikasi dalam Rangka Pemberesan Harta Pailit dalam Pelaksanaannya”, in Emmy Yuhassarie (ed.), *Undang-undang Kepailitan dan Perkembangannya*, Pusat Pengkajian Hukum, Jakarta, 2005.

Lee Eng Beng, “Insolvency Law”, SAL Annual Review, 2003.

Setiawan, “Ordonansi Kepailitan Serta Aplikasi Kini”, in Rudy A. Lontoh (ed.), *Menyelesaikan Utang Piutang melalui Pailit atau Penundaan Kewajiban Pembayaran Utang*, Alumni, Bandung, 2001.

Liza Dzulhijjah, Fahmi Fatwa Rosyadi Satria Hamdani, Asep Hakim Zakiran, “Pandemi Covid-19 sebagai Upaya Pencegahan Kepailitan dalam Perspektif Hukum Positif dan Hukum Islam”, *Journal of Civilization and Islamic Law*, Vol. 4, No. 2, 2021.

Ibnu Rusyd, Bidayatul Mujtahid, (Andalusia: Darul Fikri, Vol. 2, p. 213), as quoted in Dian Asriani Lubis, “Kepailitan Menurut Ibnu Rusyd dan Perbandingannya dengan Hukum Kepailitan Indonesia,” Undergraduate Thesis, Universitas Islam Negeri Sultan Syarif Kasim, Pekanbaru, 2011.

Ridwan, “Studi Komperatif terhadap Kepailitan Perusahaan Asuransi Syariah Menurut Hukum Islam dan Undang-undang No. 37 Tahun 2004 tentang Kepailitan dan Penundaan Kewajiban Pembayaran Utang”, *Legal Scientific Journal*, Vol. 2, No. 4, 2022.

Elijana S, “Proses Mengajukan Permohonan Pailit Terhadap Guarantor dan Holding Company”, Penyelesaian Utang-Piutang, 2001.

Yahya Harahap, “Masalah Pailit Dikaitkan dengan Guarantor,” *Journal*, Evidence T-3 in case No 037/Pailit/2001/PN.Niaga/JKT.PST.

Giorgio Calcagnini. et al., The impact of guarantees on bank loan interest rates, *Applied Financial Economics*, 24:6, 2014.

Panjaitan, Issac Davids, et al, "Pertanggungjawaban penjamin/guarantor (personal/corporate guarante) dalam perkara kepailitan." Jurnal Hukum POSITUM Vol.5, No.2.

Pietro Bembo, Warranties and Guarantees in Italian Law, *International Litigation, ADR, and Contracts*, 2012.

Francis Wallace, Warranties and Guarantees in English Law, *International Litigation, ADR, and Contracts*. 2012.

Catherine Bridge, *Law in Transition*, EBRD, 2013.

Robert Rasmussen. Guarantees and Section 548(a)(2) of the Bankruptcy Code. University of Chicago Law Review, 52, 1985.

LAWS

Indonesian Civil Code.

Law No. 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations.

Law of Republic of Indonesia Number 42 of 1999 concerning fiduciary.

The Commercial Court's Decision Number 8/Pdt.Sus-Pailit/2018/PN Niaga/SBY.

The Commercial Court's Decision Number 25/Pailit/2009/PN.NIAGA.JKT.PST.

The Commercial Court's Decision Number 13/Pailit/2010/PN.NIAGA.JKT.PST.

Jurisprudence of the Supreme Court No. 39 K/N/1999.

Jurisprudence of the Supreme Court No. 43 K/N/1999.

Jurisprudence of the Supreme No. 010/K/N/2000.

Jurisprudence of the Supreme No. 035 K/N/2005.

Supreme Court Decision No. 39 K/N/1999.

Supreme Court Decision No. 43 K/N/1999.

THESIS

Endah Wulandari. ”Perlindungan Hukum Bagi Bank Dalam Mencegah Kerugian Akibat Kredit Bermasalah Dengan Jaminan Personal Guarantee”. Postgraduate Thesis, Faculty of Law Universitas Brawijaya, Malang, 2017.

Khamarul Hadi, “Analisis Terhadap Kepailitan Penjamin Pribadi (Borgtocht) Dalam Perkara Kepailitan Nomor 09/PAILIT/2005/PN. NIAGA. JKT. PST”. Undergraduate Thesis, Universitas Riau, Riau, 2013.

Dian Asriani Lubis, “Kepailitan Menurut Ibnu Rusyd dan Perbandingannya dengan Hukum Kepailitan Indonesia,” Undergraduate Thesis, Universitas Islam Negeri Sultan Syarif Kasim, Pekanbaru, 2011.

INTERNET

Disriani Latifah, “Kedudukan Guarantor Dalam Kepailitan”, 2009, https://staff.blog.ui.ac.id/disriani.latifah/2009/06/09/kedudukan-_guarantor dalam-kepailitan/.

Mon, “Penjamin PT Fit-U Pailit, Hukumonline”, 2010, https://www.hukumonline.com/berita/baca/lt4bdc2202aaff5/penjamin-pt-fitu-pailit.

State Bank of India vs. V. Ramakrishnan & Anr, 2018, https://ibbi.gov.in/webadmin/pdf/order/2018/Aug/11958_2018_Judgement 14-Aug-2018_2018-08-14%2022:04:34.pdf.

Hamalatul Qur'ani, “Pandangan Ahli Soal Penarikan Guarantor Sebagai Termohon PKPU”, 2019, https://www.hukumonline.com/berita/a/pandangan-ahli-soal-penarikan-guarantor-sebagai-termohon-pkpu/.

ATTACHMENT

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