

# RETHINKING SIMPLE EVIDENCE IN BANKRUPTCY PETITIONS FOR LEGAL CERTAINTY

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## Article Info

**Received:** 8 March 2019 | **Received in Revised Form:** 23 August 2019 | **Accepted:** 27 August 2019

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## Abstract

*This study analyzes the theories, norms, and practice of simple evidence which have become the requirements for bankruptcy petition applications. The proof applied in the procedural law of the bankruptcy petition and the Suspension of Debt Repayment Obligation, or PKPU, was simple. The existence of the simple evidence requirement actually lent the bankruptcy petition a complication and a legal uncertainty. Therefore, the norm of simple evidence needs to be reconstructed. That burden was fulfilled in the bankruptcy petition and PKPU application by two (2) requirements, namely, unpaid debt that had matured and was collectible, and the presence of at least two creditors. Research results found that the Bankruptcy Law required simple evidence. That said, the law did not definitively set limits on such evidence, which left the norm obscured. In practice, the judges had rejected bankruptcy petitions with insubstantial evidence. In addition, disparities appeared in complex decisions with regard to the petition requirements. The courts decided that the cases were not so simple. Conversely, there were also simple cases adjudicated by the court to be not simple and whose bankruptcy petitions were overruled.*

**Keywords:** bankruptcy, simple evidence, debt, creditor.

## Abstrak

*Penelitian ini menganalisis teori, norma, dan praktik pembuktian sederhana yang telah menjadi persyaratan untuk permohonan petisi kebangkrutan. Bukti yang diterapkan dalam hukum acara dari permohonan kebangkrutan dan Penangguhan Kewajiban Pembayaran Utang, atau PKPU. Adanya persyaratan bukti yang sederhana sebenarnya membuat petisi kebangkrutan menjadi komplikasi dan ketidakpastian hukum. Oleh karena itu, norma bukti sederhana perlu direkonstruksi. Beban itu dipenuhi dalam permohonan kebangkrutan dan permohonan PKPU dengan dua (2) persyaratan, yaitu, utang yang belum dibayar yang telah jatuh tempo dan dapat ditagih, dan kehadiran setidaknya dua kreditor. Hasil penelitian menemukan bahwa UU Kepailitan membutuhkan bukti sederhana. Yang mengatakan bahwa Undang-Undang tidak secara definitif menetapkan batas-batas pada bukti semacam itu, yang membuat norma dikaburkan. Dalam praktiknya, para hakim telah menolak petisi kebangkrutan dengan bukti tidak penting. Selain itu, perbedaan muncul dalam keputusan yang rumit sehubungan dengan persyaratan petisi. Pengadilan memutuskan bahwa kasusnya tidak sesederhana itu. Sebaliknya, ada juga kasus-kasus sederhana yang diputuskan oleh pengadilan untuk tidak sederhana dan yang permohonan kebangkrutannya ditolak.*

**Kata kunci:** kepailitan, pembuktian sederhana, utang, kreditor.

## I. INTRODUCTION

Indonesian bankruptcy requirements, as regulated by Law Number 37 of 2004 on Bankruptcy and the Suspension of Debt Repayment Obligation, or PKPU (hereafter referred to as Bankruptcy Law), include first, the presence of two or more creditors, and second, the existence of at least one past due and collectible debt unpaid in full. This provision is firmly regulated in Article 2, paragraph (1) of the Bankruptcy Law. In addition, the general explanation of Bankruptcy Law states that the primary conditions for declaration of bankruptcy are that a debtor has at least two (2) creditors and has failed to pay off at least one past due debts.

However, the provision for simple evidence (Pembuktian Sederhana) actually complicates bankruptcy requirements. Article 8, paragraph (4) of the Bankruptcy Law states that a bankruptcy petition application must be granted if it is supported by the facts or circumstances pertaining to simple evidence, such that it fulfills the requirements referred to in Article 2, Paragraph (1). The Article further elaborates on the purpose of simple evidence. It states that “facts or circumstances that are simply proven” consist of two or more creditors and an unpaid past due debt. However, the difference in the debt amount owed does not prevent the decision from being rendered. The explanation of the norms defining simple evidence seems to be so insufficient that it can be considered to be vague, which might lead to legal uncertainty and even abusive. This legal uncertainty complicates bankruptcy petition applications since simple evidence requires creditors to prove the availability of visible evidence (*prima facie*), which is frequently prohibitive for applicants.

In commercial court practice, there have been cases where reasonably simple evidence has been rejected as insufficient. Take, for instance, the case of a self-bankruptcy petition application filed by PT J and J Garment Indonesia, as described in the verdict of Commercial Court of Central Jakarta Number 41/Pdt.Sus/Pailit/2013/PN.NIAGA.JKT.PST., dated August 21, 2013, in conjunction with Supreme Court verdict number 515 K/Pdt.Sus-Pailit/2013. The petition was for the company itself, but the panel of judges believed that it failed to meet the requirements of Article 8, Paragraph (4) of the Bankruptcy Law. Another case involved a bankruptcy petition filed by the Hong Kong Bank to PT Dok & Perkapalan Kodja Bahari (Persero) (PT DPKB). The panel of judges of the Commercial Court, through its decision Number 32/Pailit/2000/PN.Niaga/Jkt.Pst, dated June 14, 2000, and confirmed by the Cassation Court of the Supreme Court through its decision Number 21 K/N/2000 dated August 1, 2000, rejected the bankruptcy on the grounds that the evidence was not sufficiently simple.

Other cases have hinged on quite complicated evidence yet were considered simple and were approved in commercial court. For example, a PKPU petition filed by PT Dewata Royal International (PT DRI), proposed by Bank Mandiri as the creditor, ended in bankruptcy. Upon the PKPU application, the Commercial Court of Surabaya District Court granted the petition, rendering PT DRI to the status of the Suspension of Debt Repayment Obligation, or PKPU, as in verdict number 04/PKPU/2009/PN.Niaga.Sby. Since there was no reconciliation achieved during the PKPU, the court declared PT DRI to be bankrupt.

Evidence becomes an essential aspect of the judicial process in bankruptcy petitions filed in district commercial courts. This is because, in civil cases, including bankruptcy, the party required to conduct the verification is the one who suggests a particular case, instead of the panel of judges. The judges will instruct the relevant parties, both creditor and debtor, to submit evidence strengthening their arguments

presented at trial. In addition, the judges will burden the parties with verification. Therefore, in bankruptcy cases, as well as civil cases in general, formal evidence is highly crucial for judges to render their decisions. In other words, the judges are highly bound to the available evidence. This situation is slightly different from criminal court, which also requires the judges' belief in the facts instead of mere availability of evidence.

From that perspective, this paper will analyze the following research questions what is meant by simple evidence requirements in a petition for bankruptcy under Indonesian Bankruptcy Law? And can a system of simple evidence still be maintained in the Indonesian Bankruptcy Law system? To answer these questions, I will follow a normative legal research methodology, employing a statute approach, a conceptual approach, and a case approach. The legal objects studied were amassed from authoritative legal material, i.e., legislation and court decisions, as well as secondary legal sources, such as relevant papers and scientific studies. The author intended to conduct theoretical-normative and praxis studies of the principles and norms/settings of simple evidence in Indonesian Bankruptcy Law, as well as the practice of introducing simple evidence in bankruptcy court. As the primary factors in the determination of the legal basis of bankruptcy in Indonesia, various laws and regulations, as well as the decisions of the commercial court and the Supreme Court, are the subjects of the current research. Thus, both inductive and deductive reasoning were utilized for this study.

## II. ESSENCE AND REQUIREMENTS FOR THE DEBTOR'S BANKRUPTCY

### A. The Essence of Bankruptcy

Bankruptcy nomenclature initially illustrates a situation in which a debtor is unable to pay off a claim owed to a creditor. In this case, the law guarantees that all of a debtor's assets as a matter of law will be used to repay the debt. This general warranty is regulated in the Civil Code, namely in Articles 1131 and 1132. Article 1131 of the Civil Code states that all of a debtor's movable and immovable property, plus existing and future assets, become the collateral of their individual obligations. Article 1131 of the Civil Code is the standard manifestation of the *paritas creditorium* principle. Article 1132 of the same code determines that the assets become a joint warranty for all creditors among whom the proceeds from the assets sale are divided, based on the ratio of each party, unless there are valid reasons for a particular creditor to take precedence. Article 1132 of the Civil Code is the standard manifestation of the *pari passu prorata parte* principle.

The state of being unable to pay usually results from financial setbacks to the debtor's affairs while their assets are not liquid or sufficient to pay off the debts. Bankruptcy is a court decision that results in the general confiscation of the debtor's entire assets, both existing and future. It is the curator, under the direction of the supervisory judge, who carries out bankruptcy petition applications and settlements with the principal objective of utilizing the proceeds from the sale of the assets to pay the debtor's obligations proportionally (*prorata parte*) and in accordance with the structure of the creditor.

Algra defined bankruptcy as "*Faillissement is een gerechtelijk beslag op het gehele vermogen van een schuldenaar ten behoeve van zijn gezamenlijke schuldeiser*"<sup>1</sup>

<sup>1</sup> N. E. Algra, *Inleiding tot Het Nederlands Privaatrecht* (Groningen: Tjeenk Willink, 1974), p. 425.

("Bankruptcy is a general confiscation of all assets of a debtor to pay off his debts to the creditor"). Henry Campbell Black, in his *Black's Law Dictionary*, explained that "Bankrupt is the state or condition of one who is unable to pay his debts as they are, or become, due."<sup>2</sup> A little more comprehensively, Jerry Hoff, a Dutch lawyer, describes bankruptcy as follows: "Bankruptcy is a general statutory attachment encompassing all the assets of the debtor. The bankruptcy only covers the assets, leaving the personal status of an individual unaffected; he is not placed under guardianship. A company also continues to exist after the declaration of bankruptcy. During the bankruptcy proceedings, acts with regard to the bankruptcy estate can only be performed by the receiver, but other acts remain part of the domain of the debtor's corporate organs."<sup>3</sup>

Generally, people often misunderstand bankruptcy nomenclature. Some consider a bankruptcy verdict to be a criminal act and as such, despicable, something to be avoided. Under an a priori assumption, bankruptcy is considered a failure caused by the debtor's error in running their business, which led to their inability to pay the debt. Consequently, they often identify bankruptcy as an accumulation of debts or embezzlement of rights that should be paid to the creditors. Kartono<sup>4</sup> claimed that bankruptcy did not undermine his dignity as a human being, but, whenever he tried to obtain credit, he felt what it means to have been declared bankrupt. In other words, bankruptcy affects his creditworthiness in the sense that it creates an adverse impact on his ability to obtain credit.

Bankruptcy is a commercial solution to the problem of accounts receivable debts threatening a debtor unable to pay off their creditors.<sup>5</sup> It makes it possible to file for a status stipulation of a self-bankruptcy petition (voluntary petition for self-bankruptcy). It also becomes possible for the court to declare the debtor bankrupt if evidence is later found supporting the debtor's inability to repay past due and collectible debts (involuntary petition for bankruptcy).

The bankruptcy institution is expected to function as an alternative institution to more effectively, efficiently, and proportionately settle debtor obligations to creditors. Harold F. Lusk described the bankruptcy functions as follows:<sup>6</sup>

*The purpose of the bankruptcy act is (1) to protect creditors from one another, (2) to protect creditors from their debtors, and (3) to protect the honest debtor from his creditors. To accomplish these objectives, the debtor is required to make full disclosure of all his property and to surrender it to the trustee. Provisions are made for examination of the debtor and for punishment of the debtor who refuses to make an honest disclosure and surrender of his property. The trustee of the bankrupt's estate administers, liquidates, and distributes the proceeds of the estate to creditors. Provisions are made for determination of creditors' rights, the recovery of preferential payments, and the disallowance of preferential liens and encumbrances. If the bankrupt has been honest in his business transactions and in his bankruptcy proceedings, he is granted a discharge.*

Bankruptcy is a further implementation of the *paritas creditorium* principle regulated in Article 1131 of the Civil Code and the *pari passu prorata parte* principle

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<sup>2</sup> Henry Campbell Black, *Black's Law Dictionary* (St. Paul Minnesota: West Publishing Co., 1999), p. 134.

<sup>3</sup> Jerry Hoff, *Indonesia Bankruptcy Law* (Jakarta: Tatanusa, 1999), p. 11.

<sup>4</sup> Kartono, *Kepailitan dan Pengunduran Pembayaran* (Jakarta: Pradnya Paramita, 1982), p. 42.

<sup>5</sup> M. Hadi Shubhan, *Hukum Kepailitan: Prinsip, Norma, dan Praktik Di Peradilan* (Jakarta: Prenada Media Group, 2015), p. 2.

<sup>6</sup> Harold F. Lusk, *Business Law: Principles and Cases* (Homewood Illinois: Richard D Irwin Inc., 1986), pp. 1076-1077.

stipulated in Article 1132 of the Civil Code and is included in the property law regime (*vermogensrecht*). The *paritas creditorium* principle means that the debtor will own the entire assets, whether movable or immovable, or existing or future property, bound to the settlement of the debtor's liabilities. The *pari passu prorata parte* principle means that the assets constitute a joint warranty for the creditors and the proceeds must be distributed proportionally among them unless there is reasonable cause for a particular party to take precedence.

If a debtor has just one creditor and does not pay the debts voluntarily or is unable to pay, then the creditor has the right to sue civilly in the relevant district court. All the debtor's assets will become the source of the repayment, utilizing the net proceeds. If a debtor has multiple creditors and the assets are insufficient to pay them all, the creditors can compete in various ways, whether via legal procedures or not, to get the bill paid in advance. The latter creditors might lose the chance for repayment if the assets have already been confiscated entirely by earlier creditors, which is utterly unfair and might inflict financial loss on both parties. For these reasons, a bankruptcy institution arises with an objective to regulate fair payment procedures of creditors' bills.

Peter J.M. Declercq stressed that bankruptcy merely means that debtors do not pay their debts, without stating whether they are unable to pay, or simply do not want to pay, although they can. In further detail, Declercq<sup>7</sup> stated that "*A bankruptcy petition has to state facts and circumstances that constitute prima facie evidence that the debtor has ceased to pay its debts. This is considered to be the case if there are at least two creditors, one of who has a claim which is due and payable and which the debtor cannot pay, refuses to pay, or simply does not pay.*"

## B. Bankruptcy Requirements

The Bankruptcy Law strongly holds that bankruptcy is a debt collection institution, as stated in Article 1, Paragraph (1) and Article 2, Paragraph (1) of the Bankruptcy Law. There are only two cumulative conditions whereby a debtor can be declared bankrupt: the debtor has unpaid, past due, collectible debts and two or more creditors. Beyond these, the Law does not offer further conditions, such as the minimum amount of individual debt or an insolvency situation in which the debtor's assets are worth far less than the debts held (liabilities). These are measured using insolvency tests. The debt collection principle in the Indonesian Bankruptcy Law aims more at facilitating the process of bankruptcy applications, since bankruptcy functions as a means of collecting assets and managing creditors for the payment distribution according to the provisions.

Simplifying bankruptcy conditions is a new paradigm in modern bankruptcy. Classical bankruptcy theory often requires the existence of a debtor's insolvency, in which the amount of the debtor's liability is far greater than their assets. Alan Schwartz asserted that Bankruptcy Law was first devised to solve the problems of debtors with multiple creditors (collective execution) and insufficient assets.<sup>8</sup> The Indonesian Bankruptcy Law system does not adhere to the concept of insolvency

<sup>7</sup> Peter J. M. Declercq, *Netherlands Insolvency Law, The Netherlands Bankruptcy Act and The Most Important Legal Concept (The Hague: T.M.C. Asser Press 2002)*, p. 63.

<sup>8</sup> Alan Schwartz, "A Normative Theory of Business Bankruptcy," *Virginia Law Review Vol. 91 No. 119* (2005), p. 1200.

in filing a bankruptcy petition since it does not require an insolvency test. The elimination of the insolvency test drastically facilitates and accelerates the filing of bankruptcy petitions.

A debt used as a basis for bankruptcy filing must be proven to fulfill the following conditions:

1. It is a past due debt;
2. It is a collectible debt;
3. It is a debt unpaid in full.

A past due debt is a debt not paid in full beyond the maturity date in accordance with the agreement of both parties, or other conditions that allow for debt collection even prior to maturity. It is possible to bill an unmatured debt by means of an “acceleration clause” or an acceleration of maturity and default clause. Setiawan distinguished the acceleration clause from the default clause as granting the creditor the right to hasten the debt maturity date if the creditor claims to be, themselves, insecure. Therefore, the acceleration clause is broader than the default clause.<sup>9</sup> The creditor thus has the right to accelerate the maturity date of the debts in anticipation a default, meaning that something has happened or the debtor cannot fulfil the debt agreement. Furthermore, Setiawan suggested that the right to use the acceleration clause is predicated on good faith, meaning that the creditor has reasonable evidence of impending default, even if not in the form of a court decision.<sup>10</sup>

A collectible debt arising aside from a natural obligation (*natuurlijke verbintenis*), whose settlement is unable to be prosecuted, cannot be used as a condition for filing for bankruptcy. Fred B.G. Tumbuan stated that a natural obligation is a debt that, by statutory provisions, cannot be sued, either (i) *ab initio* (from the beginning), such as with gambling debts (Article 1788 of the Civil Code) or (ii) thereafter, as the result of expiration (Article 1967 of the Civil Code).<sup>11</sup>

The Bankruptcy Law in Indonesia adheres to a broader view of the debt principle and does not limit the amount of debt, as found in the bankruptcy systems of Singapore and Hong Kong, among others. This condition can be viewed as a weakness of the Bankruptcy Law in Indonesia. The juridical argument is that, if the law does not set the minimum value of debt as the basis for filing bankruptcy applications, there will be a deviation from the nature of bankruptcy: from a rapid liquidation of the debtor’s financial condition, which does not allow him to pay his creditors so as to prevent unlawful execution by them, to a mere debt collection tool. In addition, the absence of restrictions on the minimum amount of debt might inflict a financial loss for creditors who hold far greater debt on the debtor.

Somewhat more comprehensively, the construction of the Bankruptcy Law is inseparable from the role of the drafters of the amendments of the Indonesian Bankruptcy Act. Jerry Hoff, the Dutch lawyer, is one of the drafters of the amendments to the Bankruptcy Law. He is specifically employed by the IMF to formulate such debt principles with the aim of further facilitating the process of bankrupting debtors

<sup>9</sup> Setiawan, “Komentar Atas Putusan Pengadilan Niaga No. 13/2004 j.o. Mahkamah Agung No. 8/ 2004” in *Analisa Putusan Kepailitan Pada Pengadilan Niaga Jakarta*, edited by Valerie Selvie Sinaga, (Jakarta: The Faculty of Law of Atma Jaya Catholic University, 2005), p. 124.

<sup>10</sup> *Ibid.*

<sup>11</sup> Fred B. G. Tumbuan, “Mencermati Makna Debitor, Kreditor dan Utang Berkaitan Dengan Kepailitan” in *Undang-Undang Kepailitan dan Perkembangannya*, edited by Emmy Yuhassarie, (Jakarta: Pusat Pengkajian Hukum, 2002), pp. 20-21.



without linking the nature of bankruptcy. Hoff objected that criticizing limits on the minimum amount of debt was incomprehensible. Hoff stated: *"I do not really understand this criticism. The reason is there is no logical ground for discrimination whatsoever between creditors in filing bankruptcy petitions. Non-discrimination is one of the leading principles of the Bankruptcy Law."*<sup>12</sup>

I cannot entirely agree with Hoff. The limitation of the minimum amount of debt has nothing to do with discrimination, and, even if it did, it is not regulated by law. The limitation actually provides protection for creditors who hold the majority of a debt as well as legal protection against their debtors. Thus, it is imaginable that the risk of having a debt amounting to only one million rupiahs can be used as a basis for proposing bankruptcy petition for a giant company with trillions of Rupiah in assets. As a legal comparison, limiting the minimum amount of debt, such as those in Singapore and Hong Kong, is quite prevalent.

Furthermore, the second requirement of a bankruptcy petition is the presence of at least two (2) creditors. In bankruptcy, creditors are classified into three types, namely:

1. Separatist creditor;
2. Preference creditor;
3. Congruent creditor.

The division of creditor into the three classifications above is different from the general civil code regime, in which a creditor is only differentiated into preferential and concurrent creditors. A preferential creditor in the general civil code might include a creditor who holds collateral property rights and one whose debt payments must be prioritized as a matter of law. However, the preferential creditor in bankruptcy only refers to one whose debt payments must be prioritized, such as privilege holders, retention rights holders, and so on. Meanwhile, creditors who hold the collateral property rights are classified as separatist creditors in Bankruptcy Law.

The three types are legally recognized. In Dutch Bankruptcy Law, there is no doubt about the rights of separatist and preference creditors to file for bankruptcy petitions (HR June 18, 1982, NJ/Netherlands Jurisprudence 1983, 1). This opinion was also stated by Abdul Hakim Garuda Nusantara, who cited Polak's opinion that these creditors did not lose their authority to file for bankruptcy petitions when a debtor is unable to pay their debts.<sup>13</sup>

It is not only the concurrent creditor who has several interests at stake, but also creditors holding collateral property rights, often called separatist creditors, and creditors whose debt payments must be prioritized according to legal provisos. Those latter grantors are referred to in Bankruptcy Law as preferred creditors. Separatist creditors hold the collateral property rights and are permitted to execute them as if there were no bankruptcy. However, separatist creditors still have interests in the form of remaining debts that are not sufficiently fulfilled by the execution of the collateral property rights, along with interests of the debtors' business continuity.

The above classification of creditors into three types can be found in the Bankruptcy Law of Indonesia. Normatively, the assessment of the creditor's scope in the bankruptcy is described in Article 1, Paragraph (1) of Law Number 4 of 1998,

<sup>12</sup> Hoff, *op.cit.*, p. 27.

<sup>13</sup> Djohansjah, "Kreditor Preferen dan Separatis" in *Undang-Undang Kepailitan dan Perkembangannya*, edited by Emmy Yuhassarie, (Jakarta: Pusat Pengkajian Hukum, 2004), p. 138.

which states that: “A debtor who has two or more creditors and is unable to pay at least one past due and collectible debt can be declared bankrupt by the decision of the competent court as referred to in Article 2, both on its own request, or upon the request of one or more creditors.”

The provisions of this article only state that one of the conditions for submitting bankruptcy applications is the presence of two or more creditors, including all creditors in Bankruptcy Law. The law does not set any limit that the creditor stated in the bankruptcy requirements or authorized to file a bankruptcy petition are only the concurrent creditors. Instead, Article 1, Paragraph (1) of the 1998 Bankruptcy Law speaks for all types of creditors—without any consideration as to whether they be concurrent, separatist, or preferred—who have the same right to file for a bankruptcy petition as their debtor.

Similarly, Law Number 37 of 2004 regulates the same thing. In Article 2 Paragraph (1) of 2004 of Bankruptcy Law, it is stated that a debtor who has two or more creditors and is incapable of paying off at least one past due and collectible debt can be declared as bankrupt by a court decision, both on his own request and on one or more requests of the creditors. In this article, the meaning creditors also refers to all creditors, whether they are separatist, preferred, or concurrent creditors.

Sutan Remy Sjahdeini offers a contrary opinion, stating that the creditor referred to in Article 1, Paragraph (1) of Law Number 4 of 1998, in relation to creditors who are entitled to file for bankruptcy petitions, are only concurrent creditors.<sup>14</sup> Remy opined that a separatist creditor or a creditor holding collateral property rights does not have an interest in submitting a bankruptcy petition statement, since the separatist creditor has a secured source of repayment in the form of collateral assets burdened with collateral rights.<sup>15</sup> Remy further argued that, if a separatist creditor feels that the source of repayment is not secure enough, because the value of the collateral rights held is lower than the receivable value, and if a separatist creditor wants to obtain the repayment from bankrupt assets, the separatist creditor must first release the separatist’s rights, so that the status is replaced with concurrent creditors.<sup>16</sup> That said, Remy’s opinion is actually invalid because it contradicts the *paritas creditorium* principle, the *pari passu prorata parte* principle, and the structured creditor principle.

The new amendment to the Bankruptcy Act Law Number 37 of 2004 proclaims more explicitly the *structured prorata* principle, especially concerning the meaning of creditors in relation to the right to file for bankruptcy petitions against the debtor. Article 1, Number 2 of the Bankruptcy Law states that a creditor is a person with receivables arising from an agreement or law that can be collected before the court. In Article 2, Paragraph (1), a debtor with two or more creditors, who is incapable of paying off at least one past due and collectible debt, can be declared bankrupt by a court decision, both on his own request and that of ***one or more creditors*** (my italics). In the explanation of Article 2, Paragraph (1) of the Bankruptcy Law, it is more emphatically stated that “what is meant by ‘creditors’ in this paragraph are *all* creditors, whether concurrent, separatist, or preferred. In particular, the separatist creditor and preferred creditor are capable of submitting a bankruptcy petition statement without losing their collateral rights of property on the debtor’s assets and

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<sup>14</sup> Sutan Remy Sjahdeini, *Hukum Kepailitan: Memahami Faillissementsverordening Juncto Undang-Undang No. 4 Tahun 1998* (Jakarta: Grafiti, 2002), pp. 66-67.

<sup>15</sup> *Ibid.*, p. 67.

<sup>16</sup> *Ibid.*



their right to take precedence over the payment process. When there is a syndicate of creditors, each one is considered “the creditor,” as referred to in Article 1, Number 2.”

Kartini Muljadi also opined<sup>17</sup> that, accordingly, the creditors in Article 1, Paragraph (1) of the Bankruptcy Law include concurrent creditors, those with privileges, and those with collateral rights. In this case:

1. Congruent creditor;
2. Creditors with privileges as referred to Article 1139 and Article 1149 of the Civil Code (without losing the rights granted by law to hold the debtor’s assets); and
3. Creditors with collateral rights, in the form of pledges, mortgages, rights to crops, and fiduciary guarantees (without losing the right to sell and obtain advance repayments of debtor assets, which are collaterally guaranteed and sold).

At any time, they hold the right to:

1. Submit a bankruptcy petition for a debtor who does not fulfill his/her debts or obligations in the form of paying off a certain amount of money on the maturity date; and/or
2. Be listed as the second creditor in any bankruptcy petition submitted for a debtor who has fulfilled his/her debts or obligations in the form of paying off a certain amount of money on the maturity date.

The norms contained in the Bankruptcy Law are a reaffirmation of the *paritas creditorium* principle, *pari passu prorata parte* principle, and *structured prorata* principle, and as well as the opinion of the Bankruptcy Law planner who expressly declared that separatist and preferred creditors retained the right to file for bankruptcy petitions without losing their collateral rights.

Another point to remember is that, in bankruptcy, it is the creditor that must meet the *paritas creditorium* principle, not the debtor. Therefore, a debtor who owes several debts to one creditor does not fulfill this principle. On the contrary, the debtor with only one debt agreement that is owned by several creditors, fulfills the principle. One debt agreement held by several creditors is commonly referred to as a syndicated loan and the creditor is called loan syndication. Therefore, the debtor with one debt agreement, but one that is syndicated, has fulfilled the *paritas creditorium* principle. Each creditor in the syndicated loan is an independent entity authorized to file for a bankruptcy petition against the debtor.

In addition to the two material requirements of bankruptcy petitions noted above, the Bankruptcy Law adds one more requirement, namely the simple evidence requirement. That means that, in a bankruptcy petition, the applicant must be able to prove in court the minimum requirement of one unpaid past due and collectible debt and the minimum of two creditors.

### III. THE PRINCIPLE OF SIMPLE EVIDENCE IN BANKRUPTCY

The procedure law of bankruptcy petitions has a strategic importance in civil court. We know that procedure or formal law aims to maintain and preserve material law. Therefore, verification law formally regulates how to conduct verification

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<sup>17</sup> Kartini Muljadi, “Kreditor Preferen dan Kreditor Separatis dalam Kepailitan” in *Undang-Undang Kepailitan dan Perkembangannya* Emmy Yuhassarie, (Jakarta: Pusat Pengkajian Hukum, 2004), pp. 174-175.

contained in civil procedures. Meanwhile, materially, the verification law regulates whether or not a verification can be approved by certain evidence in the trial, while also regulating the validity of the evidence.

Retnowulan Sutantio stated that evidence is required in a case pertaining to a dispute before the court (*juridicto contentiosa*) and in petition cases that result in a decision (*juridicto volunteer*). In a civil process, one of the judges' duties is to investigate whether a legal relationship on which the claim is based genuinely pertains or not. This legal relationship must be proven if the plaintiff wants to prevail. If the plaintiff fails to prove the arguments to which their claim is grounded, the claim will be rejected. Alternatively, if the plaintiff manages to conduct a valid verification, the claim will be granted.<sup>18</sup> Thus, it can be concluded that what will be considered a verdict by the judge in a civil trial is very much determined within the verification process.

According to the HIR and RBG systems, judges are closely bound by evidence regulated by law, meaning that judges may only declare decisions based on evidence. The evidence is the materials used to verify a civil claim. There are five (5) types of evidence in civil cases, as referred to in Article 164 HIR/284RBG/1866BW, namely: written evidence, witness statement, suspicion, confession, and oath evidence.

In addition to the general law of civil procedure, bankruptcy petitions refer to rules stipulated in Bankruptcy Law. In matters not regulated by Bankruptcy Law, the applicable statute(s) fall under the law of civil procedure as applied in public civil judicature, using the HIR/RBG systems. This fact is confirmed in Article 299 of the Bankruptcy Law, which declared that, in addition to matters regulated by this Act, the applicable procedure law would be the Code of Civil Procedure. Related to the verification law, it also refers to matters regulated by the Bankruptcy Law.

Verification law regarding bankruptcy petitions has been stipulated in the Bankruptcy Law so that the general Code of Civil Procedure is ruled out. The Procedure Law of Bankruptcy, specifically the verification law, has special characteristics compared to the general Code of Civil Procedure, in that, in addition to time limits, it also includes simple evidence. Article 8, Paragraph (4) of the Bankruptcy Law states that a bankruptcy petition application must be granted if it is supported by the facts or circumstances required in Article 2, Paragraph (1). The explanation of Article 8, Paragraph (4) of the Bankruptcy Law further elaborates that the facts or circumstances that are simply proven are those showing two or more creditors and an unpaid past due and collectible debt. However, the difference in the amount of debt owed by the creditor and the debtor should not prevent the rendering of the bankruptcy statement.

The norms of Article 8, Paragraph (4) of the Bankruptcy Law and the explanation of Article 8, Paragraph (4) are vague, since a definite limit on what is meant by simple proof is not provided. Furthermore, the concept of simple evidence is undetermined by the general code of civil procedure, so that the application of simple evidence becomes somewhat problematic.

According to Kartini Mulyadi and Gunawan Widjaja, simple evidence is the simple verification of:

1. The existence of a past due debt used to file for bankruptcy;

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<sup>18</sup> Retnowulan Sutantio and Iskandar Oeripkartawinata, *Hukum Acara Perdata Dalam Teori dan Praktek (Bandung: Alumni, 1983)*, p. 53.

## 2. The presence of two or more creditors of debtors filing for bankruptcy.<sup>19</sup>

The Supreme Court expressed a different opinion at the National Working Meeting (*Rakernas*) held in September 2002. The aim was to provide a limit on simple verification where a case examination of a bankruptcy petition did not identify any exceptions, e.g., the evidence of plaintiff's reply, defendant's plea, the conclusions, as well as party claims. Therefore, evidence in bankruptcy cases is unilateral and not a party. The obligation summoning written in Article 8 Paragraph (1) of the Bankruptcy Law does not mean it is "summoning" the debtor to submit a plaintiff's reply, defendant's rejoinder, or conclusion. Rather, it requires that the debtor hear the arguments of the applicant (creditor) or that the examination with exceptions, plaintiff's reply, defendant's rejoinder, and conclusions in the process in the General Court are not applied in the bankruptcy process. The interpretation of simple evidence provided by the Supreme Court is more directed to the procedure law, while the Bankruptcy Law is more directed to the verification process.

The verification emphasizes, in a simple manner, the fact that there are two or more creditors and that there is an unpaid past due and collectible debt. The content of this article is closely related to the requirements for declaration of bankruptcy as stipulated in Article 2, Paragraph (1) of the Bankruptcy Law, which proclaims that a debtor who has two or more creditors and is incapable of paying off at least one past due and collectible debt can be declared bankrupt by a court decision, both upon his own request and that of one or more creditors.

Simple evidence here means a bankruptcy petition must be visible (*prima facie*) or clearly proven to meet the bankruptcy petition requirements. If the applicant is not capable of proving that the requirements had been fulfilled, the bankruptcy petition will be rejected. The visible evidence (*prima facie*) is far narrower than ordinary evidence. That means that the existence of the simple evidence requirements narrows the applicant's space to prove the fulfillment of the bankruptcy requirements. In other words, this simple evidence actually complicates the bankruptcy petitions to be granted.

There are many bankruptcy petitions rejected due to their falling outside the scope of simple evidence. The existence of these simple verification requirements is counterproductive in the law of bankruptcy petition procedure. Therefore, the norm requiring simple evidence needs to be reconstructed from the bankruptcy petition procedure. The verification of the bankruptcy petition reverted to the host of the verification law that applies to the procedure law of general civil code. Indeed, there is nothing to distinguish between the evidence of bankruptcy petition and that of a default or unlawful lawsuit (*onrechtmatige daad*). Both are interrelated. A bankruptcy starts from a debtor's default or unlawful act against the payment of performance. This is due to the fact that the definition of debt in bankruptcy is exactly the same as in the general civil code, where bankruptcy is a result of the existing debt in general civil code that is not paid by the debtor.

The next question is whether ordinary evidence complicates bankruptcy petitions. In fact, the contrary is true, since it is simple evidence that complicates bankruptcy petitions. For instance, when an applicant claims the existence of a debt, the simple evidence requires visible proof, as, for example, the recognition of the debtor or the existence of an authentic, indisputable deed. If the debt is complicated because

<sup>19</sup> Kartini Mulyadi dan Gunawan Widjaja, *Pedoman Menangani Perkara Kepailitan (Jakarta: Raja Grafindo Persada, 2004)*, p. 141.

several aspects require further verification, then the petition cannot be continued and is rejected. Conversely, if there were no simple evidence requirement, the further verification of the evidence proving the existence of debt could be continued, and the debt judged sufficient to file for bankruptcy petitions, such that the judge would finally grant the petition.

The next issue is whether ordinary evidence will prolong the bankruptcy petitions. The answer is no, of course not, since further verification may only require two or three trials. The judge certainly has the authority to reject the examination of witnesses who are less relevant to the bankruptcy petition, so that the verification procedure of witnesses can be restrained. On the other hand, the examination of documents does not require a long trial because they can be read simultaneously with the examination of witnesses. That is, before examining witness statements, the parties could add pieces of evidence in the form of the documents. Thus, ordinary evidence does not require a long time. Generally, a prolonged trial under the code of civil procedure results not from the length of the verification process but from other matters, such as the existence of plaintiff's reply, defendant's rejoinder, as well as the trial postponement, which takes a long time until the next trial agenda.

Based on those grounds, deconstructing the simple evidence system of the Procedure Law of Bankruptcy petition would add to legal certainty and make bankruptcy petitions more active. This is because, first, the Bankruptcy Law does not explain in detail what is meant by simple evidence and the scope of what is included as simple evidence. Second, the existence of simple evidence provides too much discretionary room for the judges, causing disparity in decisions in its application. Third, simple evidence leads to frequent rejections of bankruptcy petitions on the grounds that the evidence is not simple, thus becoming counterproductive for bankruptcy petitions and creating legal uncertainty.

#### IV. THE PRACTICE OF SIMPLE EVIDENCE IN COMMERCIAL COURT

In this case study, three (3) cases related to simple evidence in commercial court will be examined. In the first and second cases, the court overruled the bankruptcy petitions on the grounds that they were not simple, even though the cases were eventually adjudged to be the opposite. Furthermore, in the first case, the debtor himself submitted the bankruptcy petition, whereas the third case was actually quite complex and even preceded by a PMH civil suit. In the end, the judge accepted the bankruptcy petition filed by the creditor and ruled that the case was simple.

##### A. Lawsuit

**The first case involved a self-bankruptcy petition by PT J and J Garment Indonesia. The company's business had initially gone well, as the company consistently met its obligations to suppliers, labor, and banks, as well as the Directorate General of Taxes.**

However, early in 2013, the company's financial status started to be hampered by management problems. The cessation of incoming orders made it impossible to continue running the company.

PT J and J Garment Indonesia had several unpaid debt obligations, among them salaries to 922 workers, totaling Rp. 3 billion, and arrears to 59 companies, all of them

past due.

Given the condition of the company, on July 10, 2013, the Directors and Shareholders made a Shareholder Decision outside the Circular Resolution. Based on Article 91 of the Limited Liability Company Law No. 40, of 2007, their decision carried the same legal force as that of the General Meeting of Shareholders prepared in Rusman's Notary Deed, SH. Number: 23, dated July 10, 2013, at which the Shareholders and the Board of Directors had agreed to file a bankruptcy petition to the Commercial Court of the Central Jakarta District Court.

Upon acceptance of the bankruptcy petition, the Panel of Judges of the Commercial Court of Central Jakarta District Court, through its decision Number 41/Pdt.Sus/Pailit/2013/PN.NIAGA.JKT.PST, dated August 21, 2013, overruled the self-bankruptcy petition of PT J and J Garment Indonesia. The judges' consideration was that the proof was not simple since the implementation of labor rights had not been fulfilled along with the type and size of the rights that still cause disputes.

Based on the decision of the Commercial Court at the Central Jakarta District Court that rejected the bankruptcy petition, PT J and J Garment Indonesia filed cassation to the Supreme Court. The Judges of the Cassation Court, in its decision Number 515 K/Rev.Sus-Pailit/2013, rejected the appeal and upheld the Verdict of the Commercial Court. The consideration of the cassation judges was that the evidence of the disputed case was not simple due to the debts of the Cassation Applicant in connection with their latest balance sheet, of which there had been no audit carried out by public accountants. In addition, the number of labor payments required a calculation which was not simple.

The second example lay in the case of The Hongkong Chinese Bank Ltd versus PT Dok & Perkapalan Kodja Bahari. The Hongkong Chinese Bank Ltd (Hongkong Chinese Bank/HCB) proposed a bankruptcy petition to PT Dok & Perkapalan Kodja Bahari (Persero) (PT DPKB) owing to PT PPKB's failure to pay its past due and collectible debts in connection with the issuance of promissory notes. HCB was the creditor of DPKB based on four (4) Promissory Notes issued by DPKB (Serial numbers 089/Keu-DKB/VII/1997, 090/Keu-DKB/VII/1997, 091/Keu-DKB/VII/1997, each worth USD 1,000,000 (one million US dollars), and the serial number of 092/Keu-DKB/VII/1997, worth USD 500,000 (five hundred thousand United States Dollars). The total amounted to USD 3,500,000 (three million five hundred thousand United States Dollars). All promissory notes owned by the HCB were legally issued by the PDKB on July 16, 1997. In accordance with notes, the PDKB had agreed to carry out the payment without any conditions, protests for non-payment, and payment cost to PT Asia Kapitalindo Finance or the appointed party (order) as the holder of the promissory notes at the maturity date on January 16, 1998. HCB had conducted the promulgation of the promissory notes to the PDKB and, at the same time, collected payments on the maturity date on January 16, 1998, but the PDKB still failed to pay the promissory notes even though, as stipulated therein, the PDKB obligations had become past due and collectible. In addition to HCB, PDKB also held debts to Cho Hung Leasing & Finance. Finally, HKB filed a bankruptcy petition for PT Dok & Kodari Bahari in the Commercial Court since the debts had not been paid.

Upon the bankruptcy petition of Hongkong Bank toward PT Dok & Perkapalan Kodja Bahari (Persero) (PT DPKB), the Commercial Court judges, in verdict number 32/Pailit/2000/PN.Niaga/Jkt.Pst, dated June 2000, overruled the bankruptcy petition. **Legal Consideration S-80/MK.016/1997, dated February 04, 1997, concerning**

**Prohibition for Respondents to issue new Commercial Papers. The debt arising from the issuance of four (4) pieces of the promissory notes remained a problem and** was still uncertain. Additionally, determining the promissory notes' validity also required a verification process that was not as simple as specified in Article 6 Paragraph (3) of Law No. 4 of 1998, since it obliged the respondent to undergo a complete verification involving many parties through the law of civil procedure that was tried in the general court (district court). If the examination and settlement process of filing for a bankruptcy petition advanced to the commercial court without first stating whether the promissory notes were a legally valid basis for the petition, the process would be disproportionate and unfair. This was grounded by the possibility of potential errors or omissions of the company's board of directors that could, in turn, become personal responsibility, as stipulated in the provisions of Article 85 of Law No. 1 of 1995 on Limited Liability Companies. That would become a burden to and overall responsibility of the company should it be declared bankrupt, inflicting a significant financial loss to the company.

Upon the verdict of the panel of commercial judges, HKB proposed a cassation to the Supreme Court. The panel of Judges of the Cassation Court, in its decision Number 21 K/N/2000 dated August 1, 2000, ultimately rejected the cassation, overruling the bankruptcy petition against PT Dok & Perkapalan Kodja Bahari (Persero).

The third example was the case of the PKPU petition filed by PT Dewata Royal International (PT DRI), proposed by Bank Mandiri as the creditor, which ended in bankruptcy. This case began with a dispute over a credit agreement between PT DRI and the bank, caused by the differences in interpreting the implementation of the parties' credit agreement. PT DRI believed that the agreement was expressed in Rupiah and there had been an overpayment of credit installments, leaving no more debts to be paid to Bank Mandiri. Meanwhile, Bank Mandiri assumed that the credit agreement was conducted in \$US, so that there was still a huge deficit of payments.

On the dispute over the implementation of the credit agreement, PT DRI filed a civil lawsuit against Unlawful Acts against Bank Mandiri in the South Jakarta District Court with the case register Number 1340/Pdt.G/2009/PN.Jkt.Sel. During the trial, Bank Mandiri submitted a PKPU application to PT DRI in the Commercial Court in Surabaya District Court. The Commercial Court of Surabaya District Court granted the PKPU petition, placing PT DRI under the status of Suspension of Debt Repayment Obligation or PKPU, in verdict number 04/PKPU/2009/PN.Niaga.Sby. Since there was no reconciliation achieved during the PKPU, the court declared PT DRI bankrupt.

The judges' consideration to grant the PKPU petition was that this application had fulfilled the requirements for the existence of unpaid debt and a minimum of two creditors. Additionally, this case was considered to fulfill simple evidence because there was already authentic evidence, such as a credit agreement and a binding deed for liability and personal warranty. The decision to declare PT DRI bankrupt was supported by the judges' consideration that, during the PKPU, the debtor (PT DRI) did not offer any reconciliation, so that the PKPU ended up without achieving any settlement and PT DRI was declared as bankrupt.

## **B. Case Analysis**

The analysis found that both bankruptcy petitions, the one filed by PT J and J Garment Indonesia and the other by The Hongkong Chinese Bank Ltd for PT Dok &



Perkapalan Kodja Bahari, were overruled by the panel of judges. Both revocations, at the first level in the Commercial Court and at the cassation level at the Supreme Court, were based on the grounds that the provided evidence was considered to be not simple. Regarding the first self-bankruptcy petition filed by PT J and J Garment Indonesia, the commercial court judges believed that the evidence of the disputed case was not simple because the implementation of labor rights had not been fulfilled or were unpaid along with the type and size of the rights that still caused disputes. The judges at the cassation level found that the evidence of the disputed case was not simple since the debts of the cassation/bankruptcy applicant were connected to its latest balance sheet, on which there had not been an audit carried out by public accountants. In addition, the number of labor payments required a meticulous calculation.

Meanwhile, in the case of the bankruptcy petition filed by The Hongkong Chinese Bank Ltd to PT Dok & Perkapalan Kodja Bahari, the commercial court judges believed that the verification of the debts was not simple because the debts emerging from the four (4) promissory notes remained an indefinite problem. To declare the validity of the promissory notes, a verification process was required which was not as simple as specified in Article 6, Paragraph (3) of Law No. 4 of 1998. The complication came about as the bankruptcy applicant was obliged to undergo a complete verification involving multiple parties through the law of civil procedure tried in the general court (district court).

In the first case, that of the self-bankruptcy petition filed by PT J and J Garment Indonesia, the problem was actually indisputable, in that the debtor had filed for bankruptcy for having unpaid debts to 922 workers and no less than 59 companies. However, the judges at both the Commercial Court and the Supreme Court level overruled the bankruptcy petition. The court should have granted the bankruptcy petition because the requirements, i.e., the presence of unpaid past due and collectible debts and a minimum of two creditors, had clearly been fulfilled. The judges' excuse to overrule was that the quantity of the debt, especially to workers, remained unclear. This decision was definitely unjustified because the amount of the debt would be verified at the debt matching meeting after the debtor being declared bankrupt. It was also affirmed in the explanation of Article 8, Paragraph (4) of the Bankruptcy Law that the difference in the debt amount owed by the bankruptcy applicants and the bankruptcy petitioners did not prevent a decision of bankruptcy declaration.

In the second case, where The Hongkong Chinese Bank Ltd filed a bankruptcy application against PT. Doc. & Shipping of Kodja Bahari, the judges rejected the petition because the verification of the disputed case was not simple, given the issuance of four (4) promissory notes. The judges found this fact problematic and uncertain and thus determined that the promissory notes' validity required a non-simple verification process.

By contrast, in the third case, which was complicated by the interpretation and implementation of the agreement, the judge stated that the case was actually simple and therefore granted the PKPU petition. The complexities of the case were evidenced by the existence of a tort lawsuit in the South Jakarta District Court that occurred long before the PKPU petition. The interpretation of the credit agreement was complicated because the currency discussed in the credit agreement was US dollars, while the disbursement was carried out in rupiahs. Moreover, the agreement occurred in 1996, prior to the 2008 global financial crisis, and the implementation of credit installments

occurred afterwards, when the US dollar exchange rate had increased up to five times.

Bankruptcy petitions are often not considered simple for civil claims, especially when related to the *exceptio non-adimpleti contractus* principle, namely an exception or defense stating that the debtor did not implement the agreement precisely and adequately because the creditor did not themselves adhere to the same conduct. If capable of proving their assertion, the debtor cannot be held responsible for abandoning the agreement. This also happened in the third case where the debtor proposed a tort lawsuit against the creditor in the South Jakarta District Court. Supposedly, this PKPU request did not fulfill the simple evidence requirements.

## V. CONCLUSION

Procedure law regarding bankruptcy petitions in commercial court uses simple evidence. The *ratio legis* (the reason or principle behind a law) of simple evidence in a bankruptcy petition carries an exceptional legal consequence that risks bankrupting debtors and potentially causing them the loss of authority to manage their assets. This situation remains effective as a matter of law, although legal cassation efforts and reviews may be carried out. The use of simple evidence is intended to avoid errors in the bankruptcy statements of debtors.

Although determining the verification requirement in the procedure law of a bankruptcy petition using simple evidence, Bankruptcy Law neither explains the meaning of simple evidence nor places limitations on it, causing a vague norm of this simple evidence. In the doctrine of Bankruptcy Law, there is a concept that simple evidence is a *prima facie* (based on first sight) verification, indicating the presence of evidence fulfilling the minimum requirements for bankruptcy petitions.

In practice, simple evidence often inhibits bankruptcy petitions since the judges frequently overrule them on the grounds that the evidence is not simple. Simple evidence complicates bankruptcy petitions since it is granted only when bankruptcy requirements are simple. Proving simplicity, however, is undoubtedly difficult for applicants. Therefore, it is necessary to deconstruct the requirements for simple evidence of bankruptcy petitions, to allow ordinary evidence in bankruptcy petitions and Suspension of Debt Repayment Obligation, or PKPU petitions.

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