



ISSN Print 2615-5648  
ISSN Online 2615-174X

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## The Problem of Filing for Bankruptcy in Indonesian Law: Should the Insolvency Test Mechanism be Applied?

| Article   | Abstract   |
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## INTRODUCTION

Economic development is a crucial milestone for any country. Currently, the global economy is gradually recovering from the “Perfect Storm” or the 5C crises Covid-19,<sup>1</sup> the Russia-Ukraine Conflict, Climate Change, Commodity Prices,<sup>2</sup> and the Cost of Living.<sup>3</sup> The rapid economic

- <sup>1</sup> Sholahuddin Al-Fatih, Asrul Ibrahim Nur, and Nilasari Nilasari, “Workers Layoffs Caused from the COVID-19 Pandemic in Indonesia and the European Union,” *Jurnal Kajian Pembaruan Hukum* 3, no. 1 (2023): 1–26, <https://doi.org/10.19184/jkph.v3i1.33378>.
- <sup>2</sup> I. Gede Agus Kurniawan, Lourenco de Deus Mau Lulo, and Fradhana Putra Disantara, “IUS Constituendum Of Expert Advisor In Commodity Futures Trading: A Legal Certainty,” *Jurnal IUS Kajian Hukum Dan Keadilan* 11, no. 1 (April 4, 2023): 31–45, <https://doi.org/10.29303/ius.v11i1.1170>.
- <sup>3</sup> Chandra Julihandono, “Perfect Storm Ekonomi Dan PHK Di Indonesia,” *Detikfinance*, 2022, <https://finance.detik.com/berita-ekonomi-bisnis/d-6405836/perfect-storm-ekonomi-dan-phk-di-indonesia>.

development has not only influenced the realms of economy, business, and investment but has also paved the way for the evolution of economic law, particularly bankruptcy law.<sup>4</sup> In the business world, debt relationships between debtors and creditors are common.<sup>5</sup> However, debtors often fail to meet their obligations without being affected by force majeure (*overmacht*).<sup>6</sup> Munir Fuady defines bankruptcy in two ways: when a debtor is unable to meet financial obligations at maturity, such as in business, or when the debtor's liabilities exceed their assets at a specific point in time.<sup>7</sup> Consequently, filing for bankruptcy often becomes the necessary path to resolve debt disputes between debtors and creditors.

In Indonesia, bankruptcy law has undergone several transformations. It began with the issuance of *Faillissements-Verordenen Staatsblad* 1905 Number 217 in conjunction with *Staatsblad* 1906 Number 348 (hereafter referred to as *Faillissements-Verordenen*), which was enacted on November 1, 1906. This was followed by Government Regulation in Lieu of Law No. 1 of 1998 concerning Bankruptcy ("Government Regulation in Lieu of Law No. 1/1998"), which was subsequently established as Law Number 4 of 1998 concerning Bankruptcy ("Law No. 4/1998"). The most recent and currently applicable legislation is Law No. 37 of 2004 concerning Bankruptcy and Suspension of Obligations for Payment of Debt ("Law No. 37/2004").

Presently, the progress of filing for bankruptcy in Indonesia is governed by Article 2, paragraph (1) of Law No. 37/2004,<sup>8</sup> which stipulates two conditions for filing: First, there must be a debt that is past due and cannot be repaid; and Second, there must be at least two creditors.<sup>9</sup> Furthermore, Article 8, paragraph (4) of Law No. 37 of 2004 mandates that a bankruptcy filing must be granted if there are facts that can be proven straightforwardly, as outlined in Article 2, paragraph (1) of Law No. 37/2004.<sup>10</sup>

Considering this, the requirements for filing for bankruptcy in Indonesia appear to be quite lenient compared to those in other countries.<sup>11</sup> This leniency can significantly impact debtors

<sup>4</sup> Putri Ariqah dan Siti Anisah, "Arrangement of Bankruptcy Debt Repayment Toward Employees in Indonesia and Germany," *Indonesia Private Law Review* 3, no. 1 (2022): 53–68, <https://doi.org/10.25041/iplr.v3i1.2598>, p. 54.

<sup>5</sup> Bryan Mugito, "How Concurrent Creditors Are Treated in Company's Bankruptcy: A Comparison Into Indonesia and Singapore," *The Lawpreneurship Journal* 1, no. 2 (2021): 158–75, <https://doi.org/10.21632/tlj.1.2.158-175>, p. 160.

<sup>6</sup> Arzetta Zahra Metthania and Siti Nurul Intan Sari Dalimunthe, "Legal Protection for Parties in Sale and Purchase Transactions of Virtual Objects," *Volksgeist: Jurnal Ilmu Hukum Dan Konstitusi* 5, no. 2 (2022): 267–77, <https://doi.org/10.24090/volksgeist.v5i2.7066>.

<sup>7</sup> Tivana Arbiani Candini dan Reisar Alka, "Insolvensi Tes Sebagai Dasar Permohonan Pailit Dalam Hukum Kepailitan Di Indonesia," *Gloria Justitia* 2, no. 2 (2022): 181–93, <https://doi.org/10.25170/gloriajustitia.v2i2.3900>, p. 184.

<sup>8</sup> Rahayu Hartini, "The Ambiguity of Dismissal of Notary over Bankruptcy in Indonesia," *Legality : Jurnal Ilmiah Hukum* 29, no. 2 (2021): 269–85, <https://doi.org/10.22219/ljih.v29i2.15677>. which have free will to carry out legal actions. According to the Law on Notarial Positions, a Notary is dishonorably dismissed when (s

<sup>9</sup> M. Hadi Shubhan, "Legal Protection of Solvent Companies from Bankruptcy Abuse in Indonesian Legal System," *Academic Journal of Interdisciplinary Studies* 9, no. 2 (2020): 142–48, <https://doi.org/10.36941/ajis-2020-0031>.

<sup>10</sup> Theresia Anita Christiani, "Legal Analysis of Bankruptcy in the Perspective of Legal Purposes," *Jurnal Pembaharuan Hukum* 8, no. 1 (2021): 73–85, <https://doi.org/10.26532/jph.v8i1.11562>.

<sup>11</sup> Before imposing bankruptcy, judges ordered the insolvency test in several countries, such as Netherlands, Germany, United States, and United Kingdom. Rizka Rahmawati, "Comparison of Laws For Settling Debt Remaining Bankruptcy Between Indonesian and Dutch Countries," *NOTARIIL Jurnal Kenotariatan* 4, no. 1 (2019): 18–26, <https://doi.org/10.22225/jn.4.1.895.18-26>.

who are solvent and act in good faith but are embroiled in bankruptcy disputes with creditors.<sup>12</sup> Additionally, some debtors exploit the bankruptcy process to evade their obligations to consumers and creditors.<sup>13</sup> This situation also adversely affects third parties, such as consumers and workers.<sup>14</sup> Despite the Constitutional Court Decision Number 67/PUU-XI/2013 mandating the prioritization of workers' wages in the event of a company bankruptcy, the livelihoods of these workers remain at risk.<sup>15</sup>

A deeper analysis reveals that efforts to regulate bankruptcy should be founded on certain principles, one of which is the principle of going concern.<sup>16</sup> However, the current stipulations in Article 2, paragraph (1) of Law No. 37/2004, which outline the two conditions for filing bankruptcy, conflict with this principle. The principle of going concern emphasizes that any decision related to bankruptcy should consider the potential for the debtor's business or business entity to continue operating.<sup>17</sup> The ease with which a business entity or debtor can be declared bankrupt can negatively impact a country's economy and deter investors from investing.<sup>18</sup> As the old maxim states, "*cum adsun testimonia rerum, quid opud est verbis*" (when evidence or facts have been provided, words are unnecessary). The number of bankruptcy filings has increased significantly, with 637 cases in 2020 and 732 cases of Suspension of Obligations for Payment of Debt and Bankruptcy.<sup>19</sup>

Given the issues with Indonesia's bankruptcy procedure, it is necessary to revise the norms for filing for bankruptcy to align with the principle of going concern. The insolvency test serves as a policy to evaluate debtors before the court issues a bankruptcy ruling. This policy was initially

<sup>12</sup> Isis Ikhwanasyah and Lambok Marisi Jakobus Sidabutar, "The Implementation of Insolvency Test on Debtors' Bankruptcy in Performing the Principle of Justice," *Jurnal Media Hukum* 26, no. 2 (2019): 240–51, <https://doi.org/10.18196/jmh.20190137>.

<sup>13</sup> Aida Nur Hasanah, "Perlindungan Hukum Bagi Kreditur Pada Gugatan Actio Pauliana," *Politica: Jurnal Hukum Tata Negara Dan Politik Islam* 9, no. 2 (August 8, 2022): 26–37, <https://doi.org/10.32505/politica.v9i2.4574>; Ryo Crysna Ramli Koro, "Protection for Housing Loan Consumers in Building Insurance toward the Risk of Natural Disaster Loss during the Construction Process," *Volksgeist: Jurnal Ilmu Hukum Dan Konstitusi*, December 21, 2022, 279–95, <https://doi.org/10.24090/volksgeist.v5i2.6842>.

<sup>14</sup> Błażej Prusak et al., "The Impact of Bankruptcy Regimes on Entrepreneurship and Innovation. Is There Any Relationship?," *International Entrepreneurship and Management Journal* 18, no. 1 (2022): 473–98, <https://doi.org/10.1007/s11365-021-00773-3>.

<sup>15</sup> Ni Putu Trisna Dewi and I. Nyoman Putu Budiarta, "Perlindungan Hukum Terhadap Pekerja dalam Hal Perusahaan Mengalami Ke Aida Nur Hasanah, "Perlindungan Hukum Bagi Kreditur Pada Gugatan Actio Pauliana," *Politica: Jurnal Hukum Tata Negara Dan Politik Islam* pailitan dan Penundaan Kewajiban Pembayaran Utang," *Jurnal Interpretasi Hukum* 3, no. 1 (2022): 159–63, <https://doi.org/10.22225/juinhum.3.1.4737.159-163>.

<sup>16</sup> The principle of going concern is a principle that emphasizes that the debtor's business can survive and operate in the future. Elisatris Gultom and Huta Disyon, "The Implementation of the Going Concern Principle in Bankruptcy and The Suspension of Payment to Protect the Economic Rights of the Parties," *Padjajaran Jurnal Ilmu Hukum* 9, no. 3 (2022): 343–64, <https://doi.org/10.22304/pjih.v9n3.a3.secondary>, and tertiary legal materials. The study was analytical descriptive because the author described the going concern principle by referring to the Law Number 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations (the Bankruptcy Law).

<sup>17</sup> Maruli Simalango, "Inkonsistensi Persyaratan Permohonan Pailit Dihubungkan Dengan Asas Kelangsungan Usaha (Going Concern) Dalam Undang-Undang No. 37 Tahun 2004 Tentang Kepailitan Dan Penundaan Kewajiban Pembayaran Utang," *Syiar Hukum : Jurnal Ilmu Hukum* 15, no. 1 (2017): 53–64, <https://doi.org/10.29313/sh.v15i1.2144>.

<sup>18</sup> Ashadi L. Diab et al., "Safeguarding Consumers: The Role of Industry and Trade Office in Countering Monopolistic Practices and Ensuring Business Protection," *Volksgeist: Jurnal Ilmu Hukum Dan Konstitusi*, December 31, 2023, 299–312, <https://doi.org/10.24090/volksgeist.v6i2.9065>.

<sup>19</sup> Vendy Yhulia Susanto, "Sepanjang Tahun 2021, Jumlah Perkara PKPU Meningkat," *Kontan.co.id*, 2022, <https://nasional.kontan.co.id/news/sepanjang-tahun-2021-jumlah-perkara-pkpu-meningkat>.

regulated in Article 1, paragraph (1) of the *Faillissements-Verordening*, which mandated an insolvency test.<sup>20</sup> However, during the 1998 monetary crisis, several legislative changes occurred. The issuance of Government Regulation in Lieu of Law No. 1 of 1998, which was later replaced by Law No. 4/1998 and subsequently by Law No. 37/2004, removed the requirement for an insolvency test.

Although the insolvency test is currently in a legal vacuum (*leemten in het recht*), some court decisions have used similar legal considerations in bankruptcy trials. Research conducted by Randi Ikhlas Sardoni, which analyzes Commercial Court Decision No. 10/Bankruptcy/PN.Jakpus/2000 (PT Dharmala Sakti Sejahtera vs. PT Asuransi Jiwa Manulife Indonesia, “AJMI”) and Commercial Court Decision No. 13/Bankruptcy/2004/PN. Niaga (Mr. Lee Bon Siong vs. Prudential Life Assurance, “PLA”),<sup>21</sup> concluded that the companies declared bankrupt were still solvent. However, both Commercial Court decisions were overturned by the Supreme Court. Considering these cases, the author also examined other decisions with similar circumstances, specifically analyzing Supreme Court Decision No. 075 K/PDT. SUS/2007.

In Supreme Court Decision Number 075 K/PDT.SUS/2007, PT. DIRGANTARA INDONESIA (PERSERO) and PT. ASSET MANAGEMENT COMPANY (PERSERO) were the petitioners for cassation against respondents HERYONO, NUGROHO, and SAYUDI. The case began with a bankruptcy petition filed by the respondents before the Commercial Court at the Central Jakarta District Court, seeking to declare PT. DIRGANTARA INDONESIA (PERSERO) bankrupt. One of the key points in the cassation appeal was that the bankruptcy decision against PT. DIRGANTARA INDONESIA (PERSERO) did not consider the principles outlined in Law 37/2004, particularly the principle of going concern. It was argued that *judex facti* violated this principle since PT. DIRGANTARA INDONESIA (PERSERO), the cassation petitioner, had assets valued at IDR 4 trillion, which was significantly higher than the amount stated in the bankruptcy petition. This indicated that PT. DIRGANTARA INDONESIA (PERSERO) was still solvent. Consequently, the Supreme Court granted the cassation request filed by PT. INDONESIAN DIRGANTARA (PERSERO).

The norms and regulations regarding bankruptcy requirements adopted by a country are crucial and significantly impact its economy. Bankruptcy should be considered a last resort (*Ultimum Remedium*) for settling debts that a debtor can no longer repay. Various countries worldwide have implemented insolvency tests in their bankruptcy laws. The Netherlands, Indonesia's legal progenitor, has incorporated insolvency tests in the Dutch Bankruptcy Act, Dutch Limited Liability Companies (*Nederlandse besloten vennootschap*) and *Faillissementswet*. Germany, which follows the civil law system and serves as a legal reference for the Netherlands, has included insolvency tests in the *Insolvenzordnung vom* of October 5, 1994. Furthermore, the insolvency test is also recognized in the common law legal system and has been adopted in the United States (Bankruptcy Reform Act 1978), and the United Kingdom (Bankruptcy Act 1986).

Research on insolvency tests has been conducted by several scholars, including: 1) Luh Ayu Maheswari Prabaningsih and Made Nurmawati in their study titled “Regulation for Insolvency Tests

<sup>20</sup> Gede Aditya Pratama, “Hilangnya Tes Insolvensi Sebagai Syarat Kepailitan Di Indonesia,” *Krtha Bhayangkara* 15, no. 1 (2021): 1–10, <https://doi.org/10.31599/krtha.v15i1.450>, p. 3.

<sup>21</sup> Randi Ikhlas Sardoni, “Instrumen Insolvensi Tes Pada Perkara Kepailitan Di Indonesia” (Depok, Universitas Indonesia, 2011).



in Imposing Bankruptcy Decisions Against Companies.”<sup>22</sup> This research highlights that Indonesia's bankruptcy requirements significantly differ from those of other countries. The ease of filing for bankruptcy has led to many solvent companies declared bankrupt. The study recommends adopting insolvency tests; 2) M. Hadi Shubhan in “Legal Protection of Solvent Companies from Bankruptcy Abuse in Indonesia's Legal System”.<sup>23</sup> This study argues that implementing insolvency tests can protect debtors from creditor abuse; and 3) Isis Ikhwansyah and Lambor Marisi Jakobus Sidabutar in “The Implementation of Insolvency Test on Debtor’s Bankruptcy in Performing the Principle of Justice.”<sup>24</sup> This research suggests that applying insolvency tests in bankruptcy law aligns with the principle of justice based on Pancasila.

Building on previous research on bankruptcy trials, this article introduces a novel perspective by examining the nature and urgency of bankruptcy trials within the framework of Indonesian bankruptcy law. Additionally, it employs a comparative approach to analyze insolvency tests in the Netherlands, Germany, the United States, and the United Kingdom, countries that have established and implemented such tests. This study distinguishes itself from prior research by advocating for the reform of Indonesian bankruptcy law to make the insolvency an absolute requirement before any court can issue a bankruptcy decision. This reform is crucial and timely, presenting a new perspective on bankruptcy law. As the old maxim goes: *inde datae leges ne fortior omnia posset* (laws must be made to prevent the strong from having unlimited power).

## RESEARCH METHODS

This research employed a doctrinal approach to analyze the pertinent legal issues. Doctrinal research, also known as legal research, involves examining primary literature and secondary data by searching for and analyzing regulations and literature relevant to the legal issues under study.<sup>25</sup> The statutory approach was used to analyze regulations related to bankruptcy and insolvency tests applicable in Indonesia. The conceptual approach focused on analyzing legal experts' concepts, theories and opinions regarding the insolvency test. Additionally, a comparative approach was employed to examine insolvency test regulations in the Netherlands, Germany, the United States, and the United Kingdom.

To support this research, secondary data were utilized, consisting of the following: Primary legal materials were used to analyze current bankruptcy regulations and related bankruptcy trials in Indonesia, the Netherlands, Germany, the United States, the United Kingdom, and relevant jurisprudence (i.e., Supreme Court decision). Secondary data included books, journals, and other sources. Tertiary legal materials, such as online news articles, were also used. This research employed a literature review to analyze the secondary data, which were then processed and analyzed using deductive reasoning to describe legal facts and propose solutions to legal problems.

<sup>22</sup> Luh ayu Maheswari Prabaningsih and Made Nurmawati, “Pengaturan Insolvency Test Dalam Penjatuhan Putusan Pailit Terhadap Perusahaan,” *Kertha Semaya : Jurnal Ilmu Hukum* 7, no. 9 (2019): 1–15, <https://doi.org/10.24843/KM.2019.v07.i08.p14>.

<sup>23</sup> Shubhan, “Legal Protection of Solvent Companies from Bankruptcy Abuse in Indonesian Legal System.”

<sup>24</sup> Ikhwansyah and Sidabutar, “The Implementation of Insolvency Test on Debtors’ Bankruptcy in Performing the Principle of Justice.”debtors and other stakeholders.”,”container-title”:”Jurnal Media Hukum”,”DOI”:”10.18196/jmh.20190137”,”ISSN”:”2503-1023”,”issue”:”2”,”language”:”en”,”license”:”Copyright (c

<sup>25</sup> Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana Media Group, 2016).

## ANALYSIS AND DISCUSSION

### *Ius Contitutum Bankruptcy in Indonesia: The Urgency of Implementing the Insolvency Test*

In Indonesian bankruptcy law, the principle of going concern is one of the most crucial principles. The principle emphasizes the capability of business entities to sustain operations over the long term, indicating that liquidation should not be pursued hastily. An auditor's report, as an expert assessment, can substantiate whether a company possesses the ability to endure long-term.<sup>26</sup> According to Black's Law Dictionary, the principle of going concern refers to a company being operated holistically, considering various factors that determine its variability in continuing business activities.

This principle holds significant importance because Indonesian Bankruptcy Law aims to facilitate the bankruptcy process for legal entities primarily through debt collection mechanisms.<sup>27</sup> This intention is reflected in Article 2, Paragraph (1) of Law 37/2004, which stipulates that a debtor may be declared bankrupt if they have two or more creditors with outstanding, due, and collectible debts.<sup>28</sup>

Moreover, Article 8, paragraph (4) of Law 37/2004 reinforces this by stating that a bankruptcy declaration can only be examined if the conditions outlined in Article 2, paragraph (1) are truly met.<sup>29</sup> Consequently, this provision can be detrimental to debtors, as it allows for easy bankruptcy declaration without considering other factors,<sup>30</sup> such as the principle of business continuity. The auditor's report may reveal the potential for the company to survive in the long term, which should be taken into account.<sup>31</sup>

The simplicity of requirements and the absence of special restrictions for filing a bankruptcy application are among the reasons why debtors can be declared bankrupt.<sup>32</sup> This situation affects debtors who are still solvent, disregarding bankruptcy as a last resort for resolving debt issues between creditors and debtors. Consequently, it is detrimental to debtors capable of paying their debts, but who are nonetheless declared bankrupt by the Commercial Court Judge.<sup>33</sup>

<sup>26</sup> Royana Lumban Gaol, Gindo L. Tobing, and Rr Ani Wijayati, "Penerapan Asas Kelangsungan Usaha Atas Debitor Pailit Dalam Perkara Kepailitan," *Jurnal Hukum to-ra* Februari, no. Special Issue (February 27, 2021): 104–16, <https://doi.org/10.33541/JtVol5Iss2pp102>.

<sup>27</sup> Kurnia Toha and Sonyendah Retnaningsih, "Legal Policy Granting Status of Fresh Start to the Individual Bankrupt Debtor in Developing the Bankruptcy Law in Indonesia," *Richtmann Publishing - Academic Journal of Interdisciplinary Studies* 9, no. 2 (2020): 157–61.

<sup>28</sup> Febby Mutiara Nelson and Esther Melinia Sondang, "Striking A Balance Between Legal Certainty, Justice And Utility To End The Clash Between Bankruptcy And Criminal Proceedings In Court Decision No. 11/Pdt.Sus-Gugatan Lain-Lain/2018/PN.Jkt.Pst and No. 3 K/Pdt.Sus-Pailit/2019," *Journal of Indonesian Legal Studies* 6, no. 1 (2021): 185–98, <https://doi.org/10.15294/jils.v6i1.45979>.

<sup>29</sup> Suwinto Johan and Ariawan Ariawan, "Corporate Liability for Creditors' Losses during the Covid-19 Pandemic," *Jurnal Media Hukum* 28, no. 1 (2021): 15–28, <https://doi.org/10.18196/jmh.v28i1.10566>.

<sup>30</sup> Centia Sabrina Nuriskia and Ahmad Yoga Novaliansyah, "The Urgency of Regulations Revision Related to Filing Bankruptcy and Postponing Debt Payment Obligations Amid the COVID-19 Pandemic," *Lex Scientia Law Review* 5, no. 2 (2021): 105–22, <https://doi.org/10.15294/lesrev.v5i2.50383>.

<sup>31</sup> Gaol, Tobing, and Wijayati, "Penerapan Asas Kelangsungan Usaha Atas Debitor Pailit Dalam Perkara Kepailitan."

<sup>32</sup> Abdul Kadir Jaelani et al., "Legal Protection of Employee Wage Rights in Bankrupt Companies: Evidence from China," *Legality : Jurnal Ilmiah Hukum* 31, no. 2 (2023): 202–23, <https://doi.org/10.22219/ljih.v31i2.25874>.

<sup>33</sup> Cintya Sekar Ayu Permatasari and Octa Nadia Mellynda, "Temporary Measures on Bankruptcy: Alternatives to the Moratorium on Act 37/2004 in Resolving Indonesian Bankruptcy During the COVID-19 Pandemic," *Lex Scientia Law Review* 5, no. 2 (2021): 19–40, <https://doi.org/10.15294/lesrev.v5i2.50600>.

Although Article 57, paragraph (1) of Law 37/2004 defines bankruptcy, the law does not incorporate the insolvency test provisions as a criterion for determining a debtor's bankruptcy status. Instead, bankruptcy filings are based solely on the elements outlined in Article 2, paragraph (1) in conjunction with Article 8, paragraph (4) of Law 37/2004.<sup>34</sup> This indicates that Law 37/2004 is exploited as a tool for creditors to recover all their receivables, which contradicts the law's philosophy of providing relief for debtors who can no longer meet their debt obligations.<sup>35</sup>

Sutan Remi Sjahdeini asserts the requirements stipulated in Law 37/2004 are exceedingly lenient.<sup>36</sup> The Constitutional Court has also addressed the issue of bankruptcy requirements regulated in Law 37/2004 through the decisions in court cases number 071/PUU-II/2004 and 001-002/PUU-III/2015. These decisions explain that Article 2, paragraph (1) of Law 37/2004 represents a legislative oversight, as it lacks the “unable to pay” requirement.<sup>37</sup>

The ease of filing for bankruptcy consequently simplifies the process for creditors, allowing them to initiate bankruptcy without needing to prove whether the debtor is still able to pay.<sup>38</sup> The bankruptcy requirements outlined in the Article 2, paragraph (1) Law 37/2004 have a domino effect and logical consequences, including:<sup>39</sup>

#### 1. Debtor Bankruptcy Scenarios

- a. Debtor bankruptcy can be declared when one debt has matured, even if the debt to a second creditor has not yet matured.<sup>40</sup> this situation is inconsistent with the nature and purpose of Law 37/2004, which aims to facilitate the parties involved.
- b. Creditors who do not participate as bankruptcy applicants are often those whose claims are either overdue or not yet due. These creditors, who have no intention of initiating bankruptcy proceedings, are nonetheless compelled to register as bankruptcy creditors based on a single petition from another creditor.
- c. From these provisions, it can be concluded that a bankruptcy application requires only one creditor with a due debt. This is highly detrimental to debtors and to other creditors who are still able to collect their debtors properly.

#### 2. Absence of Minimum Debt Limit

The lack of minimum debt limit for creditors who can file for bankruptcy has significant implications. Creditors with very small claims can initiate bankruptcy proceedings. The absence of a debt threshold in bankruptcy application negatively impacts the debtor's business activities and the liquidity of other creditors whose payments remain timely.

<sup>34</sup> M. Fauzi, “Insolvency within Bankruptcy: The Case in Indonesia,” in *SHS Web of Conferences*, vol. 54 (EDP Sciences, 2018), 1–5, <https://doi.org/10.1051/shsconf/20185406004>.

<sup>35</sup> Candini and Alka, “Insolvensi Tes Sebagai Dasar Permohonan Pailit Dalam Hukum Kepailitan Di Indonesia.”

<sup>36</sup> Sutan Remy Sjahdeini, *Sejarah, Asas, Dan Teori Hukum Kepailitan, Memahami Undang-Undang Nomor 37 Tahun 2004 Tentang Kepailitan Dan Penundaan Kewajiban Pembayaran Utang*, Kedua (Jakarta: Prenadamedia Group, 2016).

<sup>37</sup> See Decision of the Constitutional Court Number 071/PUU-II/2004 and Number 001-002/PUU-III/2005.

<sup>38</sup> Anugrah Muhtarom Pratama et al., “The Regulation of Disorgement in the Indonesia Capital Market: Remaining Concerns and Lessons from US,” *Journal of Indonesian Legal Studies* 7, no. 2 (2022): 585–632, <https://doi.org/10.15294/jils.v7i2.58666>.

<sup>39</sup> Dendi Adisuryo, “Insolvency Test Concerning The Bankruptcy Law Bill,” ADCO Law, 2021, <https://adcolaw.com/blog/insolvency-test-concerning-the-bankruptcy-law-bill-part-2-2/>.

<sup>40</sup> Ronald Saija, “Perlindungan Kreditur Atas Pailit Yang Diajukan Debitur Dalam Proses Peninjauan Kembali Di Pengadilan Niaga,” *SASI* 24, no. 2 (2019): 114–23, <https://doi.org/10.47268/sasi.v24i2.126>.

### 3. Ambiguity in Article 2, Paragraph (1) of Law 37/2004

The wording in Article 2, paragraph (1) of Law 37/2004 which states “...*not paying off debts...*” allows creditors to file for bankruptcy without providing any reason or evidence that the debtor is genuinely unable or unwilling to make payments.

Article 2, paragraph (1) of Law 37/2004 establishes a formal bankruptcy requirement that is highly susceptible to abuse. When combined with simple evidentiary provisions, bankruptcy can be easily granted to applicants who meet these criteria, leading to business instability in Indonesia. This vulnerability is evidenced by the significant increase in bankruptcy filings, with 637 cases in 2020 and 732 cases of Suspension of Obligations for Payment of Debt and Bankruptcy.<sup>41</sup>

Furthermore, Article 8, paragraph (4) of Law 37/2004 also presents several issues in its application:

#### 1. Absence of Definition for Simple Facts and Circumstances

Law 37/2004 does not define what constitutes simple facts and circumstances. This lack of clarity leads to varying interpretations of simple evidence in bankruptcy dispute settlements, causing inconsistencies and conflict among court decisions. The absence of clear guidelines results in inconsistent decisions from the Commercial Court and the Supreme Court regarding the interpretation of simple evidence, creating legal uncertainty in bankruptcy dispute resolutions. The case of PT. Telekomunikasi Seluler Tbk highlights these differences in understanding the simplicity and verification of bankruptcy at the initial trial or *prima facie* stage.

#### 2. Restrictive Interpretation of Judicial Authority

The interpretation of Article 8, paragraph (4) of Law 37/2004 limits judges' authority to objectively interpret cases. The use of the word “must” in this article implies that judges lack the discretion to thoroughly analyze bankruptcy cases as long as the debt is due.<sup>42</sup>

Given the existing problems in Indonesia, it is imperative to improve and implement Law 37/2004, particularly concerning the insolvency test. This test has been effectively utilized by several countries, including the Netherlands, Germany, the United States, and the United Kingdom, as a prerequisite for filing a bankruptcy petition in court.<sup>43</sup>

The insolvency test involves a financial audit conducted by an accountant to evaluate the financial condition of the debtor being filed for bankruptcy. It assesses whether the debtor is in a state of utter incapacity and lacks the financial ability to pay off debts, thereby determining if the debtor can be classified as bankrupt. The audit process includes examining the company's comprehensive bookkeeping documents and an inventory of the debtor's assets, which are then compiled into an insolvency test audit report.<sup>44</sup>

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<sup>41</sup> Susanto, “Sepanjang Tahun 2021, Jumlah Perkara PKPU Meningkat.”

<sup>42</sup> M. Fauzi, “Tersesat Nomina ‘Ventura,’” *Jurnal Yudisial* 12, no. 1 (2019): 121–39, <https://doi.org/10.29123/jy.v12i1.346>.

<sup>43</sup> Pratama, “Hilangnya Tes Insolvensi Sebagai Syarat Kepailitan Di Indonesia.”

<sup>44</sup> Emad Mohammad Al-Amaren, Sultan Ibrahim Aleitin, and Kukuh Tejomurti, “The Mock Application of the Insolvency Law by the Jordanian Courts: Lessons Learnt from Indonesia,” *Hasanuddin Law Review* 8, no. 1 (2022): 30–45, <https://doi.org/10.20956/halrev.v8i1.3330>.



There are numerous problematic bankruptcy cases where the debtor still maintains a good financial condition,<sup>45</sup> highlighting the urgency of implementing insolvency tests in Indonesia. These tests play a crucial role in determining the legitimacy of a debtor's bankruptcy. The advantages of conducting an insolvency test include:

1. Prevention of Misuse by Creditors: Creditors cannot exploit bankruptcy applications or decisions to save their interests at the expense of the debtor, especially if the debtor is financially capable of settling the debts.<sup>46</sup>
2. Protection of Viable Businesses: Debtors with promising business prospects will be safeguarded from unjust bankruptcy decisions, thereby aiding the country's economy, particularly the developing Indonesian economy.
3. Mitigation of Temporary Financial Constraints: Debtors can avoid being deemed bankrupt or incapable of paying their debts due to temporary financial difficulties.
4. Judicial Consideration of Bankruptcy Principles: The implementation of bankruptcy hearings can ensure that judges consider the principles of bankruptcy outlined in Law 37/2004, namely the principles of balance, going concern, justice, and integration.

### **The Existence of Insolvency Tests in Bankruptcy Law in Indonesia: A Comparative Study**

As the old maxim states, “*nullum delictum noela poena sine praevia lege poenali*”, the implementation of insolvency tests in Indonesia's bankruptcy law system remains problematic due to the absence of specific regulations. Currently, bankruptcy filings rely on two elements: the existence of debts that are due and the presence of at least two creditors, as stipulated in Article 2, paragraph (1) of Law 37/2004. This can lead to situations where a company is declared bankrupt despite having sufficient assets to settle its debts.<sup>47</sup>

Implementing the insolvency test not only aligns with the principles of the Commercial Court -- namely, simple, fast, and low-cost trial -- but also upholds the values of justice and business recovery. Moreover, linking the insolvency test to the country's economic growth underscores that filing for bankruptcy should be a last resort (*ultimum remedium*) in resolving bankruptcy disputes.<sup>48</sup>

From a comparative perspective, the insolvency test has been widely adopted in several countries to address bankruptcy issues. A detailed comparison of the insolvency test as an absolute requirement for filing for bankruptcy in the Netherlands, Germany, United States, and United Kingdom is provided below.

<sup>45</sup> Ria Sintha Devi et al., “The Bankruptcy Legal Politics in Indonesia Based on Justice Value,” *Jurnal Akta* 9, no. 1 (2022): 67–78, <https://doi.org/10.30659/akta.v9i1.20842>.

<sup>46</sup> Yapiter Marpi, Pujiyono Pujiyono, and Hari Purwadi, “The Implementation of Actio Pauliana Creditor Law Bankruptcy Boedel Dispute Process to Achieve Substantive Justice,” *Jurnal IUS Kajian Hukum Dan Keadilan* 11, no. 3 (December 26, 2023): 528–38, <https://doi.org/10.29303/ius.v11i3.1305>.

<sup>47</sup> Al-Amaren, Aletein, and Tejomurti, “The Mock Application of the Insolvency Law by the Jordanian Courts.” the year 2020 brought with it the unknown to further complicate the Jordanian economic situation. In order to find a comprehensive solution, the Jordanian legislator used some international references, such as the principles of effective systems of creditors' rights and insolvency issued by the World Bank and the Legislative Guide to the Insolvency Law issued by the United Nations Commission on International Trade Law (UNCITRAL).

<sup>48</sup> Susy Muchtar and Nur Mariana Samosir, “The Effect of Funding Liquidity on Risk Taking Behaviour of Conventional Banks,” *Jurnal Manajemen* 24, no. 1 (2020): 139–57, <https://doi.org/10.24912/jm.v24i1.635>.

## 1. The Netherlands

The historical aspect is one of the main reasons the Netherlands<sup>49</sup> served as an ideal comparison for examining the insolvency test in Indonesia. By using the Netherlands as a benchmark, it becomes easier to assess the progressivity in developing bankruptcy law in Indonesia. The Dutch Bankruptcy Act stipulates the conditions under which a legal entity can be declared bankrupt, allowing a debtor to file for or be brought before the court if they have ceased paying their debts.<sup>50</sup> Although the Dutch Bankruptcy Law primarily addresses the cessation of debt payments, it also mandates creditors must prove in court that the debtor is unable to continue paying their debts or is in a state of bankruptcy.

If a debtor submitted to the court by a bankrupt creditor is proven to be solvent, the debtor cannot be subjected to bankruptcy proceedings. In such cases, creditors may seek ordinary civil law remedies to ensure that debtors, including Limited Liability Companies and other legal entities, fulfill their obligations.<sup>51</sup> The Dutch bankruptcy law also regulates the insolvency test, or liquidation test, to evaluate a company's bankruptcy status. This test is conducted by the management and provides the basis for the judge's decision on whether the company should be declared bankrupt. This procedure is outlined in the Dutch Limited Companies Act, with the testing mechanism specified as follows:

### a. Continuity Test

Management conducts a continuity test to determine whether the company can sustain its business activities. If the company is still profitable and management has positive future expectations, the company can be considered solvent. Additionally, company directors are required to conduct a liquidity test unless the company plans to cease its operations. Management must also ensure that the company shows no signs of being unable to continue its business activities.

### b. Liquidity Test

The management board performs liquidity tests to evaluate the company's financial position, specifically cash holdings and cash flow, to meet its financial obligations. This liquidation test is applicable to companies and does not extend to individuals. If the debtor believes they can continue managing their receivables, they can submit a debt rescheduling scheme for the court's approval. This mechanism is regulated in Articles 284-362 of the *Faillissementswet*. The application process involves preparing review documents as outlined in Article 286 of the *Faillissementswet*, including:<sup>52</sup>

- 1) A list of the debtor's assets, including mortgages and other secured rights, as well as any retention rights that can be exercised over them;

<sup>49</sup> Chairul Fahmi, "The Dutch Colonial Economic's Policy on Natives Land Property of Indonesia," *PETITA: Jurnal Kajian Ilmu Hukum Dan Syariah* 5, no. 2 (2020): 105–20, <https://doi.org/10.22373/petita.v5i2.99>. especially during the Dutch colonization era. After the Netherlands East Indies (NEI

<sup>50</sup> Sumurung P. Simaremare et al., "Reviewing the Comparison of the Legal Bankruptcy System Between Indonesia and the Netherlands," *Turkish Journal of Computer and Mathematics Education (TURCOMAT)* 12, no. 6 (2021): 2290–96, <https://doi.org/10.17762/turcomat.v12i6.4834>.

<sup>51</sup> Erwin Hardeman and Robert Bertrand, "COVID-19 Government Grants, Liquidity Indicators and Going Concern Uncertainty," *Maandblad Voor Accountancy En Bedrijfseconomie* 96, no. 3 (2022): 75–85, <https://doi.org/10.5117/mab.96.77531>.

<sup>52</sup> Ministerie van Binnenlandse Zaken en Koninkrijksrelaties, "Faillissementswet," wet, accessed January 3, 2023, [https://wetten.overheid.nl/BWBR0001860/2023-01-01#TiteldeelIII\\_AfdelingEerste\\_Artikel285](https://wetten.overheid.nl/BWBR0001860/2023-01-01#TiteldeelIII_AfdelingEerste_Artikel285).

- 2) A detailed statement of the debtor's income, under any designation and regardless of acquisition rights, typically received or expected to be received, noting foreseeable changes over the next three years;
- 3) A detailed description of the debtor's fixed costs;
- 4) If the debtor is married or in a registered partnership, the statement must include the relevant data pertaining to the partnership or registered partnership, as mentioned in items c and d;
- 5) A reasoned statement indicating that there is no real possibility of reaching an extrajudicial settlement of the debt, along with available payment options for the applicant, issued by the executive of the municipality where the debtor resides or is registered, as referred to in Section 48(1)(c) of the Law Consumer Credit. Regional Governments may delegate this authority to regional credit banks, as specified in the Financial Supervision Act, to institutions mentioned in Article 48(1)(b) of the Consumer Credit Act, or to individuals, legal entities, or groups appointed under Part 1 (d) of that Article;
- 6) A statement regarding the nature and amount of claims made by the debtor as a guarantor or vice versa as part of the debtor;
- 7) If the debtor has proposed an out-of-court debt repayment plan that has not been accepted, the statement must include the contents of the debt settlement draft, the reasons for its rejection, and how creditor satisfaction could be achieved if the debt settlement were accepted. Additionally, other pertinent information should be provided to offer the most accurate picture of the debtor's financial position and income, as well as the potential for debt restructuring.

## 2. Germany

Germany adheres to the Civil Law legal system,<sup>53</sup> where statutory regulations are systematically codified. This system posits that the law holds binding power because it is embodied within a structured set statutory regulations, aiming to achieve one of the law's primary objectives: legal certainty.<sup>54</sup> Legal certainty is realized when human actions are appropriately regulated by laws and regulations.<sup>55</sup> Indonesia adopted this system *mutatis mutandis* during the Dutch colonial period, making German a suitable subject for comparison when examining statutory regulations between the two countries.<sup>56</sup>

The regulations concerning the insolvency test in Germany are stipulated in Article 16 of the *Insolvenzordnung vom 5 October 1994*, which states, “*Die Eröffnung des Insolvenzverfahrens setzt*

<sup>53</sup> Nge Nge Aung, “The Basis of Constitutional Adjudication in Germany,” *Fiat Justisia: Jurnal Ilmu Hukum* 16, no. 1 (2022): 47–64, <https://doi.org/10.25041/fiatjustisia.v16no1.2419>.

<sup>54</sup> Lita Tyesta Addy Listya Wardhani, Muhammad Dzikirullah H Noho, and Aga Natalis, “The Adoption of Various Legal Systems in Indonesia: An Effort to Initiate the Prismatic Mixed Legal Systems,” *Cogent Social Sciences* 8, no. 1 (2022): 1–21, <https://doi.org/10.1080/23311886.2022.2104710>.

<sup>55</sup> Zainal Arifin Mochtar and Eddy O. S. Hiariej, *Dasar-Dasar Ilmu Hukum - Memahami Kaidah, Teori, Asas, Dan Filsafat Hukum* (Jakarta: Red & White Publishing, 2021).

<sup>56</sup> Robin Hofmann, “Formalism versus Pragmatism – A Comparative Legal and Empirical Analysis of the German and Dutch Criminal Justice Systems with Regard to Effectiveness and Efficiency,” *Maastricht Journal of European and Comparative Law* 28, no. 4 (2021): 452–78, <https://doi.org/10.1177/1023263X211005983>.

*voraus, daß ein Eröffnungsgrund gegeben ist,”* which means that the initiation of bankruptcy proceedings requires a valid reason.<sup>57</sup> Some of these reasons include:

- a. Payment obligations that are past due or imminent (Articles 17 and 18 of the *Insolvenzordnung vom*).
- b. Excessive debt held by the debtor (Article 19 of the *Insolvenzordnung vom*). This implies that the debtor lacks assets to fulfill financial obligations to creditors, unless the debtor's company remains operational for the next 12 months. Additionally, claims related to the return of shareholder loans or economically feasible legal actions regarding loans, approved by both creditors and debtors, are considered subordinate to claims specified in Article 39 (1) of the *Insolvenzordnung vom* as per Article 39 (2). Preceding bankruptcy numbers one through five in the process are not considered valid for initiating bankruptcy proceedings.
- c. Another reason for initiating bankruptcy proceedings arises before the Bankruptcy Court forms a temporary committee of creditors, as outlined in Article 21 (2) point 1a of the *Insolvenzordnung vom*. This is applicable if the debtor has met at least two of the following three criteria in the previous financial year (*vide* Article 22a of the *Insolvenzordnung vom*):<sup>58</sup>
  - The total balance sheet is at least EUR 6,000,000 after deducting the deficit shown on the assets side;
  - The debtor's income is at least EUR 12,000,000 in the twelve months prior to the reporting date;
  - The debtor employs at least fifty employees on an annual average.

### 3. The United States

The United States has seen rapid development in bankruptcy law, which has positively impacted its economy, as bankruptcy decisions serve as a final recourse or *Ultimum Remedium*.<sup>59</sup> Furthermore, the United States, being a Common Law country, often serves as a benchmark for developments worldwide. Professor Mahfud MD noted that Indonesia does not follow either the Common Law or Civil Law system but instead adopts a prismatic legal system based on Indonesian legal ideals. The adoption of Common Law and Civil Law elements is not absolute and must be adapted to fit the country's legal culture.<sup>60</sup>

The United States implements three types of insolvency tests under the Bankruptcy Reform Act of 1978:<sup>61</sup>

<sup>57</sup> Jose M. Garrido et al., “Restructuring and Insolvency in Europe: Policy Options in the Implementation of the EU Directive,” *IMF Working Papers*, 2021, <https://doi.org/10.5089/9781513573595.001.A001>.

<sup>58</sup> Christoph Schotte and Björn Grotebrune, “Insolvency and Directors’ Duties in Germany: Overview,” Thomson Reuters Practical Law, accessed January 4, 2023, [http://uk.practicallaw.thomsonreuters.com/9-607-7545?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](http://uk.practicallaw.thomsonreuters.com/9-607-7545?transitionType=Default&contextData=(sc.Default)&firstPage=true).

<sup>59</sup> Adegbemi Babatunde Onakoya and Ayooluwa Eunice Olotu, “Bankruptcy and Insolvency: An Exploration of Relevant Theories,” *International Journal of Economics and Financial Issues* 7, no. 3 (June 29, 2017): 706–12.

<sup>60</sup> Moh. Mahfud MD, *Politik Hukum Di Indonesia* (Depok: Rajawali Pers, 2020).

<sup>61</sup> Ram Mohan and M. P., “The Role of Insolvency Tests: Implications for Indian Insolvency Law,” SSRN Scholarly Paper (Rochester, April 9, 2021), <https://doi.org/10.2139/ssrn.3823113>.



- a. Cash-Flow Insolvency: This test evaluates not only the debtor's current conditions but also future financial prospects.<sup>62</sup> It aims to predict whether the debtor will be able to meet payment obligations when they become due, thereby determining if the debtor genuinely cannot pay the debt at maturity.
- b. Balance Sheet Insolvency Test: This test assesses whether the debtor's liabilities exceed their current assets.<sup>63</sup> Under this condition, the debtor is deemed unable to fulfill their obligations to repay debts, whether they are currently due or will become due in the future.
- c. Capital Adequacy Test: This test determines whether the debtor has sufficient capital to continue operating their business and to withstand financial performance that falls short of expectations.<sup>64</sup>

#### 4. The United Kingdom

The United Kingdom, a country with a developed economy,<sup>65</sup> utilizes the Common Law system, which is frequently referenced in global legal developments.<sup>66</sup> The United Kingdom's insolvency test is specifically regulated by the Insolvency Act of 1986 and employs three mechanisms:

- a. Cash Flow Test: This test assesses the debtor's cash flow to determine their ability to make payments. A debtor is considered to experience a cash flow deficit if their cash outflows exceed the cash inflows.
- b. Balance Test: According to Article (123) (2) of the Insolvency Act of 1986, this test establishes that a debtor is deemed insolvent if the total value of their assets is less than their obligations.
- c. Legal Action Test: This test applies to debtors with unanswered claims or judgment orders exceeding £750, leading to compulsory liquidation or closure.

From the comparative study above, it is evident that the insolvency test is a fundamental requirement in the bankruptcy dispute resolution process in the Netherlands, Germany, the United States, and the United Kingdom. Each country employs different mechanisms for applying the insolvency test. For example, the Netherlands uses the Continuity Test and Liquidity Test, Germany focuses on debtor balances, the United States employs the Cash-Flow Insolvency, Balance Sheet Insolvency Test, and Capital Adequacy Test, while the United Kingdom uses the Cash Flow Test, Balance Test, and Legal Action Test.

<sup>62</sup> Julie E. Margret, "Insolvency and Tests of Insolvency: An Analysis of the 'Balance Sheet' and 'Cashflow' Tests," *Australian Accounting Review* 12, no. 27 (2002): 59–72, <https://doi.org/10.1111/j.1835-2561.2002.tb00204.x>.

<sup>63</sup> Dr Kubi Udofia, "Establishing Corporate Insolvency: The Balance Sheet Insolvency Test," SSRN Scholarly Paper (Rochester, 2019), <https://doi.org/10.2139/ssrn.3355248>.

<sup>64</sup> Yusuf Setiawan, Mulyadi, and Maniyatin Nupus, "The Effect Of Capital Adequacy Ratio and Loan To Deposit Ratio on Banking Profitability," *Bina Bangsa International Journal of Business and Management* 1, no. 1 (2021): 79–89, <https://doi.org/10.46306/bbijbm.v1i1.9.\uc0\u8221 {\i} {\i} {\i} Bina Bangsa International Journal of Business and Management> 1, no. 1 (2021)

<sup>65</sup> Julia Wardley-Kershaw and Klaus R. Schenk-Hoppé, "Economic Growth in the UK: The Inception," *World* 3, no. 2 (2022): 162–74, <https://doi.org/10.3390/world3020009>.

<sup>66</sup> David Donald, "Legal System Network Effects and Global Legal Development," *Notre Dame Journal of International & Comparative Law* 10, no. 2 (2020): 267–306.

The insolvency test was applied in Indonesia through the Supreme Court Decision Number 075 K/PDT.SUS/2007, following a cassation request filed by PT. DIRGANTARA INDONESIA (PERSERO) and PT. ASSET MANAGEMENT COMPANY (PERSERO) against HERYONO, NUGROHO, and SAYUDI, who were the respondents in the cassations. The case originates from a bankruptcy petition filed by the Respondents on Cassation before the Commercial Court at the Central Jakarta District Court, seeking to declare PT. DIRGANTARA INDONESIA (PERSERO) bankrupt.

One of the primary arguments put forth by the Cassation Respondents (formerly the Bankruptcy Petitioners) was that a debt was due and payable. This was based on the termination of 6,561 workers by the respondent, as mandated by the Delegation of the Central Labor Dispute Settlement Committee No. 142/03/02-8/X/PHK/1-2004, dated January 29, 2004. According to the Center for Labor Dispute Resolution No. 142/03/02-8/X/PHK/1-2004, PT. DIRGANTARA INDONESIA (PERSERO) was obliged to provide pension benefits based on the worker's last wages and old age insurance pursuant to Law Number 3 of 1992 concerning Workers' Social Security. However, PT. DIRGANTARA INDONESIA (PERSERO) failed to pay the required compensation after the decision was rendered.

One of the key points in the cassation memory is that the bankruptcy decision against PT. DIRGANTARA INDONESIA (PERSERO) did not consider the principles outlined in Law 37/2004, particularly the principle of going concern, as explained in the law's commentary. *Judex facti* violated this principle by failing to recognize that PT. DIRGANTARA INDONESIA (PERSERO), the cassation applicant, still had assets valued at of IDR 4 trillion, which is significantly higher than the amount cited in the bankruptcy petition. This indicates that PT. DIRGANTARA INDONESIA (PERSERO) was still solvent. Consequently, the Supreme Court granted the cassation request filed by PT. INDONESIAN DIRGANTARA (PERSERO).

Additionally, the judge's considerations highlighted that PT INDONESIAN DIRGANTARA (PERSERO) is a state-owned enterprise, whose all its capital is owned by the State. The shareholders are the Minister of State-Owned Enterprises of the Republic of Indonesia and the Minister of Finance of the Republic of Indonesia.

The Supreme Court Decision Number 075 K/PDT.SUS/2007 states:

1. Granted the cassation request from the Cassation Petitioner PT. DIRGANTARA INDONESIA (PERSERO) and PT. ASSET MANAGEMENT COMPANY (PERSERO);
2. Annulled the decision of the Commercial Court at the Central Jakarta District Court No. 41/Pailit/2007/PN.Niaga/Jkt.Pst. dated September 4, 2007.

Upon examining the *a quo* decision, it is evident that the judge indirectly considered the assets still owned by the debtor and upheld the principle of going concern. This has logical and juridical implications, such as the invalidation of the insolvency test law as part of the bankruptcy filing process, and the emergence of jurisprudence that indirectly utilizes the insolvency test, leading to multiple interpretations:

1. The insolvency test cannot be used as a basis for considering bankruptcy.
2. It can be a reason not to impose bankruptcy on the debtor being sued.
3. It can be used as a basis for considering bankruptcy, but only within the context of the principle of going concern.

To promote the development of a fair bankruptcy law in Indonesia, it is imperative to establish a clear formulation of the insolvency test that serves as a benchmark in the bankruptcy dispute resolution process.<sup>67</sup> This formulation must be enshrined in a legal norm. As the old maxim goes, *lex semper dabit remedium* (“the law will always provide a remedy”), there is a need for a systematic formulation of norms related to filing for bankruptcy in Indonesia.

The application of the insolvency test as part of the bankruptcy dispute resolution process must be implemented promptly. The insolvency test serves as factual verification,<sup>68</sup> conducted in accordance with Article 2, paragraph (1) of Law No. 37/2004. It involves a financial audit of the debtor to ascertain whether the debtor's company maintains sound finances and is capable of continuing its business activities. This financial reporting examines the assets, liabilities, and capital of the debtor company to determine its ability to meet financial obligations and resume business activities.

The insolvency test process begins with the filing of a bankruptcy lawsuit, which requires two elements: overdue accounts receivable and at least two creditors. Following this, the judge orders the debtor to undergo an insolvency test comprising three stages: the Continuity Test, Cash-Flow, and Balance Sheet Test. Meanwhile, the Continuity Test, conducted by the company's management, assesses whether the company can continue its operations and pay off existing debts. The Cash Flow Test evaluates the company's financial status, while the Balance Sheet Test determines if the debtor's liabilities exceed its assets. The calculation for the Cash Flow and Balance Sheet Tests must be performed by a Public Accountant registered with the Financial Services Authority.

## CONCLUSION

Based on this research analysis, it can be concluded that the settlement of bankruptcy disputes in Indonesia presents significant challenges. Specifically, the requirements for filing bankruptcy, as stipulated in Article 2, paragraph (1) of Law No. 37/2004, rely solely on two elements: accounts payable by the debtor and the presence of at least two creditors. Furthermore, Article 8, paragraph (4) of Law No. 37/2004 fails to elucidate simple facts and circumstances. Therefore, it is essential to implement the insolvency test, a practice already adopted in the Netherlands, Germany, the United States, and the United Kingdom. Thus, to enhance the fairness of bankruptcy law in Indonesia, it is necessary to revise Law No. 37/2004 to incorporate the insolvency test. This mechanism can be structured around three tests: the Continuity Test, the Cash-Flow, and the Balance Sheet Test. The implementation of the insolvency test aims to establish a more equitably bankruptcy law framework.

<sup>67</sup> Rahayu Hartini et al., “Implementation of Bankruptcy Instruments as a Final Means of Overcoming the Impact of the Covid-19 Pandemic in Indonesia,” *AMCA Journal of Community Development* 2, no. 2 (2022): 61–67, <https://doi.org/10.51773/ajcd.v2i2.180>.

<sup>68</sup> Farih Romdoni Putra, “Reform of Plan Termination in the Suspension of Debt Payment Obligations (PKPU) in Indonesia,” *Yuridika* 36, no. 3 (2021): 623–44, <https://doi.org/10.20473/ydk.v36i3.30295>.

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