

**COMPARISON BETWEEN INDONESIA AND THE UNITED STATES’
BANKRUPTCY ARRANGEMENTS FOR COMPANIES DURING COVID-
19 PANDEMIC**

THESIS



**INTERNATIONAL PROGRAM
UNDERGRADUATE STUDY PROGRAM IN LAW
FACULTY OF LAW
UNIVERSITAS ISLAM INDONESIA**

2023

**COMPARISON BETWEEN INDONESIA AND THE UNITED STATES'
BANKRUPTCY ARRANGEMENTS FOR COMPANIES DURING COVID-
19 PANDEMIC**

THESIS

**Presented as the Partial Fulfillment of The Requirements to Obtain a
Bachelor's Degree at The Faculty of Law**

Universitas Islam Indonesia

Yogyakarta



By:

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**INTERNATIONAL PROGRAM
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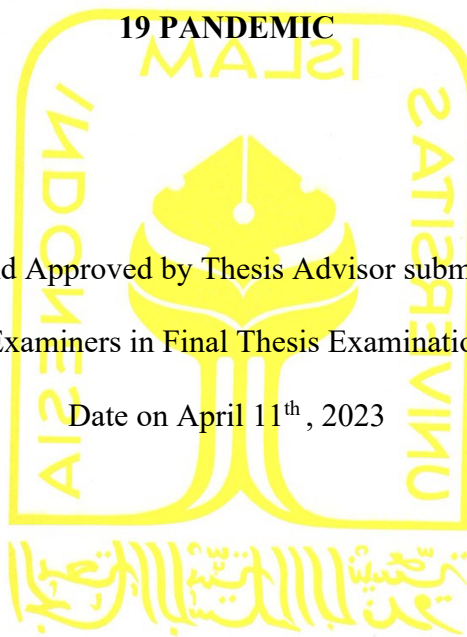
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بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

**COMPARISON BETWEEN INDONESIA AND THE UNITED STATES’
BANKRUPTCY ARRANGEMENTS FOR COMPANIES DURING COVID-
19 PANDEMIC**

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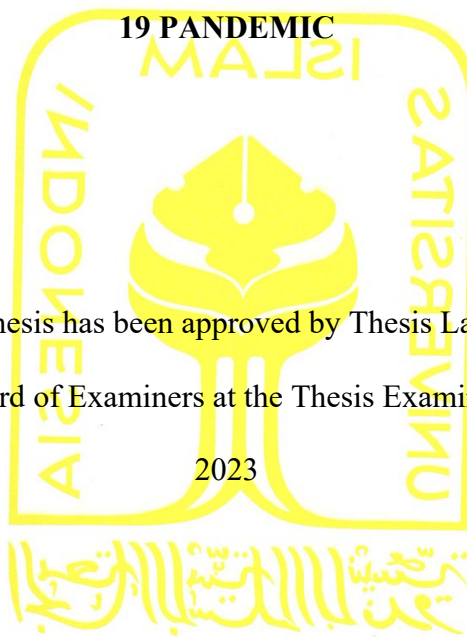
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بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

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DURING COVID-19 PANDEMIC**

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Bismillahirrahmanirrahim

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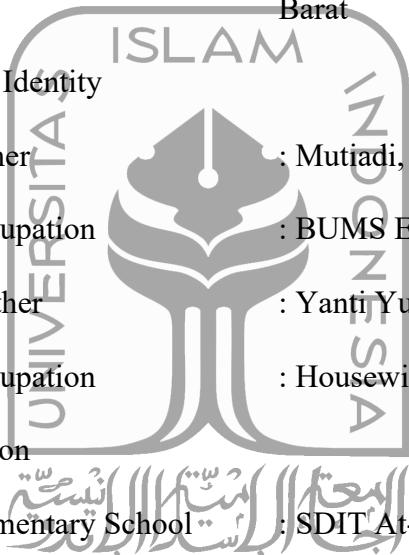


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MOTTO

“We can’t do anything about the past, let it be in the past, the only thing that
can be changed is the future”

“Everything happens for a reason, and there’s always a lesson of everything
that has happened”

– Salsabila Nurul Azizah –



DEDICATION

This thesis is wholeheartedly dedicated to :

Allah Subhanallahu wa ta'ala,

Thanks to Allah SWT who has made me get to this point, has made it run smoothly, and also for all the countless blessings that made me able to finish this thesis;

My Beloved Parents, siblings and the whole family,
who has given me the best prayers and my greatest support;

My fiancé

Thank you for always being there for me, who always encourages me to be better, as well as being my support system;

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who has helped me a lot during my study

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who has been willing to accompany me throughout my studies

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Author,



Salsabila Nurul Azizah



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ABSTRACT

Many Companies and industries have been bankrupted during the covid-19 pandemic. Therefore, the existence of adequate regulations and facilitating bankruptcy legal issues that occurred during the COVID-19 pandemic became an urgent matter, by studying through comparison to the United States' regulations during pandemic to make Indonesia's regulations and policies better in the future. This also could work in a state of crisis and is expected to prevent a surge in bankruptcy filings. This research aims to identify similarities and differences in bankruptcy arrangements for companies during the pandemic in Indonesia and the United States and to find out how should corporate bankruptcy arrangements be made in Indonesia in the future based on the experience of corporate bankruptcy in the USA during the Covid-19 pandemic. The type of research is normative legal research that is supported by library materials. This research concludes similarities between the bankruptcy laws of the two countries, namely the condition of a person or business in applying for bankruptcy, and the definition of creditor and debtor. Bankruptcy filings and declaration of bankruptcy must be conducted through the courts, and parties who can file for bankruptcy are creditors and debtors. Although the two countries adopted policies during a pandemic, the policies that cover the wider community and their impact on bankruptcy issues are different. In the U.S., according to data during the pandemic, CARES Act can help small businesses and individual debtors. Besides, through other policies, the government has also assisted large businesses or corporations in dealing with a pandemic by creating many programs that provide facilities for obtaining loans. Indonesia also issued a regulation through the Financial Services Authority (OJK) that focuses on communities affected by COVID-19. Indonesia could learn from the the U.S. pandemic bankruptcies experience to better prepare for crises and help bankruptcy parties. Indonesia bankruptcy arrangement needs some changes for the future. Even though Indonesia cannot adopt 100% of the USA's regulations because the economic development and legal system are different, Indonesia can learn by harmonizing the USA's regulations to Indonesia's conditions. First, Indonesia could apply Chapter 11 on Reorganization of the U.S. Bankruptcy Law. Second, Indonesia may implement a mechanism for debt relief (discharge) and the separation of corporate and individual bankruptcy. Third, "automatic stay" because it is highly helpful for debtors not to be charged outside of court during pandemics. Fourth, an insolvency test. However, there will be debate over whether the lesson from the United States' bankruptcy arrangements should be applied. This thesis recommendations are Indonesia may adopt regulations related to bankruptcy that cover a wider community and also providing loan facilities. Indonesia may make regulatory changes in the future by implementing some similar regulatory substance that established in the United States

Keyword: Bankruptcy, Comparison, Covid-19 Pandemic, Company

CHAPTER I

INTRODUCTION

A. Background of Study

The Corona Virus or Covid-19 impacted on the Indonesian economy starting in early 2020. For entrepreneurs who are connected to the Indonesian Young Entrepreneurs Association (HIPMI) also cannot be separated from the effects of the economic downturn caused by the Corona virus pandemic.¹ We have been struggling for two years for this situation. Covid-19 Pandemic has been affecting many factors, especially the economic. Economic is related to business that has a massive impact on the society. The government and the public responded to concerns over the high spread of this pandemic. Inevitably, many companies and industries are bankrupt during the covid-19 pandemic. Many businesses cannot survive in pandemic crisis. With the covid-19 pandemic, it is a challenge for the economy, including businesses and industries. Based on data, the number of PKPU and Bankruptcy during the Covid-19 Pandemic period in Indonesia in 2020-2021 has reached more than 1,298 cases.² This can be seen from the statistical data on cases held by the Central Jakarta District

¹ Leny Nadriana, "Sosialisasi Penyelesaian Sengketa Bisnis Melalui Kepailitan dan Restrukturisasi Utang pada Masa Pandemi Covid 19", Paper Presented at the National Seminar on Research and Community Service, Universitas Sang Bumi Ruwa Jurai, Lampung, 2020, p.392.

² Ferry Sandi, *Ribuan PKPU & Pailit Bermunculan, Ternyata Ini Biang Keroknya*, <https://www.cnbcindonesia.com/news/20210907181850-4-274414/ribuan-pkpu-pailit-bermunculan-ternyata-ini-biang-keroknya>, accessed on April 17, 2023

Court (PN), Surabaya District Court, and Semarang District Court. For example, the Central Jakarta District Court was recorded as receiving 440 PKPU cases in 2020. This number has increased dramatically compared to 2019 and 2018, which were 280 cases and 193 cases respectively. The Central Jakarta District Court has also received 331 PKPU from January to August 2021. This increase in cases has also occurred in other commercial courts, namely the Surabaya District Court with 98 cases in 2020, as well as the Semarang District Court which received 51 PKPU cases in 2020.³

Therefore, the existence of adequate regulations and facilitating bankruptcy legal issues that occurred during the Covid-19 pandemic became an urgent matter. The law and government's legal policy should facilitate the needs of the people in order to avoid the threat of crisis. Unfortunately, there are still many legal voids in Indonesia's bankruptcy regulations, which have increased the number of companies that go bankrupt during the pandemic. One of the examples of bankruptcy issues in the pandemic is Financial Services Institutions (LJK). Besides the Covid-19 pandemic, which impacts debtors' ability to pay debts, the surge in cases is due to the uncertainty of legislation regarding bankruptcy and Suspension of Debt Payment Obligation (PKPU) at Financial Services Institutions (LJK). Uncertainty comes in the form of overlap between one regulation and another, and there are provisions that make it easier to declare

³ Monavia Ayu Rizaty, *Jumlah perkara PKPU Meningkat Saat Pandemi Covid-19*, <https://databoks.katadata.co.id/datapublish/2021/08/26/jumlah-perkara-pkpu-meningkat-saat-pandemi-covid-19>, accessed on April 17, 2023

bankruptcy. Because of this legal loophole, declaring bankruptcy and PKPU during the Covid-19 outbreak are a quick way to collect debts.⁴

According to article 2 paragraph (1) of law no. 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations that “Debtors who have two or more Creditors and do not pay off at least one debt that has matured and is collectible, are declared bankrupt by a court decision, either at their own request or at the request of one or more debtors. creditors.”⁵ If viewed from the regulation, then in this Pandemic situation, it is easier to file for bankruptcy because the requirements are to have two or more creditors and not to pay off at least one debt that has matured. The debtor's inability to pay debts due to the pandemic resulted in the debtor experiencing a decline in financial condition and even having to go out of business and fall into bankruptcy.

Learning from the conditions of the 1998 economic crisis and its developments to date, Bankruptcy Law should be a tool for creditors and debtors to obtain solutions to the debt problems between them during the Covid-19 pandemic.⁶ However, what happened is the opposite, regulations that are expected to be a tool that can solve cases make companies can be declared bankrupt easily making bankruptcy cases increase during the

⁴ Siti Anisah,, *Optimalisasi LAPS-LJK untuk Mencegah Kepailitan*, <https://law.uii.ac.id/en/optimalisasi-laps-ljk-untuk-mencegah-kepailitan/>, (accessed on October 3, 2022)

⁵ Law No. 37 of 2004 on Law of Bankruptcy and Suspension of Debt Payment Obligations.

⁶ _____, *Undang Undang Kepailitan Bisa Jadi Solusi di Masa Pandemi*, <https://mediaindonesia.com/politik-dan-hukum/430272/undang-undang-kepailitan-bisa-jadi-solusi-di-masa-pandemi>, accessed on October 29, 2022

pandemic. Therefore, the issue of bankruptcy is not only happened because of the world and Indonesia's economic situation has declined due to the crisis caused by the pandemic, but also the existing regulations in Indonesia. This could be said to be a weakness of the legal arrangements in Indonesia. Apart from the issue of article 2 paragraph (1) of law no. 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations, there are other factors that make bankruptcy regulation is easier to bankrupt companies and cause Suspension of Debt Payment Obligations (PKPU) is very difficult legal remedies. In fact, this is also the main obstacle to peace proposals submitted by debtors often suffers defeat.⁷ Therefore, Indonesia Bankruptcy Arrangement impacts on the ease of a company becoming bankrupt, especially during this Covid-19 period where there is a financial crisis.

One of the policies regarding bankruptcy that occurred during the pandemic is through the Financial Services Authority (OJK) Number 11/POJK.03/2020 concerning National Economic Stimulus. The government has attempted to make special policies for those affected by Covid-19. With the enactment of this OJK Regulation, the provision of stimulus affect the banking industry, since March 13, 2020, until March 21, 2021. The problems come from other companies that are not included in the

⁷ Fitri N Heriani, 6 *Kesalahan Undang-Undang Kepailitan*, <https://www.hukumonline.com/berita/a/enam-kesalahan-uu-kepailitan-lt561737ed1a1cb>, (accessed December 4, 2022)

OJK regulations above.⁸ These conditions caused the policies issued during the pandemic did not cover the entire community and even companies that could go bankrupt. At the beginning of the pandemic, the finance minister predicted that there would be the next wave of bankruptcy because after looking at the whole semester 1 of 2020, there have been at least 43 bankruptcy cases.⁹ With a significant number of bankruptcy cases that occurred during the Covid-19 pandemic, this condition shows that existing regulations in Indonesia make it easier for debtors to go bankrupt, even with small debts, they can be entangled in the bankruptcy article. This also shows that regulation in the form of policies such as a moratorium or even a Government Regulation in Lieu of Law (PERPPU) is very much needed during the Covid-19 period as an emergency condition that has caused a financial crisis in Indonesia.

The United States is a country that adheres to the common law legal system. Apart from the different legal system of the United States of America where Indonesia is a civil law legal system while the United States is a common law legal system, the United States is a developed country that has a massive market economy with the biggest nominal GDP and net wealth in the world. There is a significant correlation between the number

⁸ Agustina Ni Made Ayu Darma Pratiwi dan Putu Sekarwangi Saraswati, “Tinjauan Yuridis Undang-Undang Nomor 34 Tahun 2004 tentang Kepailitan dan PKPU Mengenai PKPU Dalam Hal Debitur Pailit di Masa Covid-19”, *Media Keadilan Jurnal Ilmu Hukum*, Vol. 12 No. 1, Universitas Muhammadiyah Mataram, Mataram (2021). p.64.

⁹ Luthvi Febryaka Nola, “Dampak Kemudahan Pengajuan Pailit di Masa Pandemi Covid-19”, *Kajian Singkat Terhadap Isu Aktual dan Strategis*, Vol. XII No.18, Pusat Penelitian Badan Keahlian SPR RI, Jakarta (2020).

of filings and economic activity. The first component refers to policy responses that may have influenced the filing rates of various economic entities. Policy solutions such as the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) have been enacted in response.¹⁰ Based on data, the number of bankruptcy filings compared to economic growth in the USA from 2013 to 2022 shows that the number of bankruptcies has gone up and down but is still far behind with significant economic developments.¹¹ Therefore, comparison with developed country such as the USA can be studied. Because of the data above, economic development has also affected apart from bankruptcy regulations and policies during the Covid-19 pandemic. From the perspective of legal perspective, USA has bankruptcy law that made many corporates survived in a crisis situation in the end of 19th. This arrangement that was applied at that time helping numerous collapsing railroads to organize using an arrangement that would become known as Chapter 11 (reorganization provisions of bankruptcy).¹² Moreover, several countries use Chapter 11 of the United States Bankruptcy Code as a reference when modifying their Bankruptcy Law.¹³ According to

¹⁰ Marc Martos-Vila and Zongtao Shi, *Bankruptcy Filings During and After the COVID-19 Recession*, https://www.americanbar.org/groups/business_law/publications/blt/2022/03/bankruptcy-filings-during-and-after-the-covid-19-recession/, accessed on October 4, 2022

¹¹ *Ibid*

¹² David Skeel, *Bankruptcy and the coronavirus*, <https://www.brookings.edu/research/bankruptcy-and-the-coronavirus/>, accessed on January 25, 2023

¹³ Siti Anisah, "Studi Komparasi terhadap Perlindungan Kepentingan Kreditor dan Debitor dalam Hukum Kepailitan", Jurnal Hukum No. Edisi Khusus Vol. 16, Fakultas Hukum Universitas Indonesia, 2009, p.34

James Sensenbrenner, chairman of the House Judiciary Committee, makes remarks, “The purpose of the bill is to improve bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system, and to ensure that the system is fair to both debtors and creditors.”¹⁴ In the U.S bankruptcy law, among the others bankruptcy chapters, Chapter 11 is well-known chapter. Therefore, many countries such as some countries in the European Union making adaption of the important chapter 11 provision. Some countries that are following civil law system in the European Union also have made substantial progress toward upgrading their domestic restructuring regimes such as Germany and Netherlands. The German Federal Ministry of Justice published draft legislation on 18 September 2020, which included the introduction of the German restructuring plan, and the Dutch Senate adopted the long-awaited legislative proposal for the act providing for the introduction of the ‘Dutch scheme’ (*Wet Homologatie Onderhandsakkoord* (WHOA)) on 6 October 2020.¹⁵

In the United States, all bankruptcy cases are handled by federal courts in accordance with the rules specified in the United States Bankruptcy Code. In the United States, bankruptcy means that individuals who are unable to pay their debts can start over by liquidating assets or

¹⁴ Todd J. Zywicki, “The Past, Peresent, and Future, of Bankruptcy Law in America”, Michigan Law Review, Volume 101 Issue 6, Rev . 2016, University of Michigan, 2003, p.2026.

¹⁵ Ken Baird, Mark Liscio, Samantha Braunstein, Katharina Crinson and Kevin Connolly Freshfields Bruckhaus Deringer, *The EU Adaption of Important Chapter 11 Provisions*, <https://globalrestructuringreview.com/review/restructuring-review-of-the-americas/2021/article/the-eu-adaption-of-important-chapter-11-provisions> , accessed on April 15, 2023.

arranging a repayment plan. Additionally, bankruptcy laws help financially struggling businesses.¹⁶ However, whether the regulations that have existed in the US during the pandemic can control and deal with the problem of bankruptcy, and also whether the bankruptcy system has been effective, especially in Covid-19 pandemic crisis. With the spread of the covid-19 virus outbreak, On March 13, 2020, Donald J. Trump, proclaimed the Covid-19 pandemic in the United States a national emergency. With the determination of the Covid-19 pandemic as a national emergency, the government is concentrating its efforts on combating the spread of Covid-19. This was followed by state-implemented measures to slow the disease's spread, such as mandatory stay-at-home orders and non-essential business closures. Some predicted an increase in business bankruptcies as these actions unfolded. There are several potential negative outcomes for businesses that are experiencing severe financial stress, including bankruptcy. A company is said to be “bankrupt” when the total value of its debts exceeds the total value of its assets, and it declares bankruptcy (voluntarily or involuntarily) in federal court. Bankruptcy fulfills a specific role for businesses facing financial distress: Chapter 11 of the U.S. The Bankruptcy Code involves a reorganization of the debtor's assets and debts, whereas Chapter 7 is the liquidation of the debtor's assets, with the proceeds distributed to its creditors.¹⁷

¹⁶ <https://www.uscourts.gov/services-forms/bankruptcy>, (accessed on October 4, 2022)

¹⁷ Juli Collins- Thompson, Brendan Collins, John Maher, “Review of U.S Business Bankruptcies During the Covid-19 Pandemic”, Federal Reserve Bank of Boston, 2021

In response to the declaration of Covid-19 as a “national emergency”, to ensure the public's safety from the Covid-19 virus, federal bankruptcy courts adapted their standard operating procedures. The court clerk's office hours, service of process regulations, and filing deadlines are all subject to change. This situation is one of the policies regarding bankruptcy taken in America apart from regulations. In addition, some changes also occurred in regulations as an adjustment to crisis conditions.¹⁸ Consider the CARES Act's modifications to bankruptcy law as an example. The federal Coronavirus Aid, Relief, and Economic Security (CARES) Act and its successor, the Consolidated Appropriations Act of 2021 (CAA), have made some temporary changes to fundamental bankruptcy laws in response to the Covid-19 problem.¹⁹ From these regulations that were established at the time of Covid-19 Pandemic focusing on affected communities and businesses. Apart from that, there are still several other policies and regulations in the United States that were enforced during the covid-19 pandemic. Then whether these regulations can accommodate the needs of bankruptcy and cover all levels of society and business. Based on data, bankruptcy filings declined 6.3 percent in the 12-month period ending December 31, 2022, continuing a decline that began with the commencement of the COVID-19 pandemic. According to statistics issued

¹⁸ Filing for Bankruptcy During the Covid-19 Outbreak, <https://www.justia.com/covid-19/debts-and-bankruptcy-during-the-covid-19-outbreak/filing-for-bankruptcy-during-the-covid-19-outbreak/>, Last reviewed February 2022, (accessed on October 5, 2022).

¹⁹ *Ibid*

by the Administrative Office of the United States Courts, annual bankruptcy filings in calendar year 2022 reached 387,721, compared to 413,616 instances in 2021. In the fiscal year ending December 31, 2022, business filings declined 6%, from 14,347 to 13,481. Non-business bankruptcy filings decreased 6.3 percent, to 374,240, from 399,269 the previous year.²⁰ This table to show how significant decline of bankruptcy fillings starting from covid-19 pandemic until 2022.

Year	Business	Non-Business	Total
2022	13,481	374,240	387,721
2021	14,347	399,269	413,616
2020	21,655	522,808	544,463
2019	22,780	752,160	774,940
2018	22,232	751,186	773,418

Source: United States Courts, <https://www.uscourts.gov/news/>.

²⁰ <https://www.uscourts.gov/news/2023/>

In the United States legal system, debtors can file for bankruptcy independently and choose what chapter to file. Based on U.S. bankruptcy code, in Chapter 13, there are advantages that are in accordance with the condition of the debtor. Chapter 13 is often referred to as a wage earner's plan. Chapter 13 provides individuals with numerous advantages over chapter 7 liquidation. Perhaps most significantly, Chapter 13 can be used to prevent foreclosure on a home owned by an individual. Filing under this chapter can halt the foreclosure process and give borrowers a chance to catch up on mortgage payments they've fallen behind on. Third parties that are equally responsible with the debtor on "consumer debts" are similarly protected from liability under Chapter 13's special provision. Co-signers may be protected by this provision.²¹ So, basically it is not liquidated but maybe it can be said to be similar to a reorganization. However, the reorganization is arranged in chapter 11 and it is for corporations. Using chapter 11 can be said to be expensive compared to chapter 13 it is for individuals and small businesses.

The condition above is not regulated in Law No. 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations. In the bankruptcy law in Indonesia, Law No. 37 of 2004 only regulates bankruptcy and Suspension of debt repayment obligations. In addition, it is not specifically regulated for individuals. It could be that regulations that

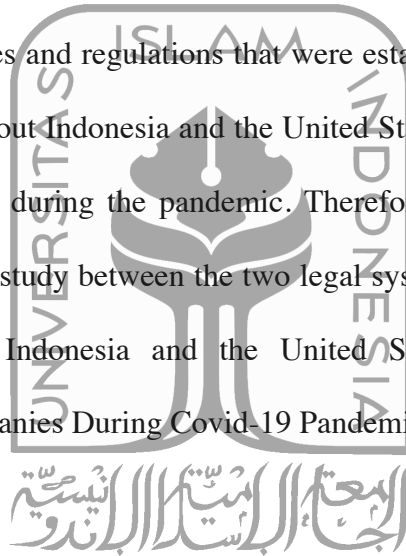
²¹ <https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-13-bankruptcy-basics> (accessed November 9, 2022)

don't exist in the Indonesian legal system can be useful during a pandemic. In the Indonesian legal system of bankruptcy, bankruptcy can be experienced by anyone, both individuals and legal entities as mentioned in Article 1 number 3 jo number 11 Law No. 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations where the Debtor is "a person who has debts due to agreements or laws whose repayment can be collected before the court." Each person in question is a natural person or company in the form of a legal entity or who is not a legal entity in liquidation.²² Meanwhile in the U.S. Chapter 13 of the bankruptcy code can be used as an alternative so that it is not quantified; the system can be said to be restructured and paid back over time, but with less costs and risks than chapter 11. In the Indonesian legal system, the Bankruptcy Law and PKPU cannot choose which article to submit. The term of bankruptcy is explained in Article 2 paragraph (1) of the Law No. 37 of 2004 states that a debtor who has two or more creditors and does not pay in full at least one debt that has fallen due and can be collected, is declared bankrupt by a court decision, either on his own application or on the application of one or more of his creditors.²³

²² Avita Adriyanti, Fifiana Wisnaeni, Irma Cahyaningtyas, "Akibat Hukum Kepailitan Terhadap Individu Yang Memiliki Hubungan Kekeluargaan Dalam Putusan No. 74/pailit/2010/pn.niaga.jkt.pst. jo Putusan No. 156 k/pdt.sus.2011", NOTARIUS, Volume 14 Nomor 1, Universitas Diponegoro, Semarang. (2021). p.164

²³ Tata Wijayanta, "Kajian tentang Pengaturan Syarat Kepailitan Menurut Undang-Undang Nomor 37 Tahun 2004", Fakultas Hukum Universitas Gadjah Mada, Yogyakarta. p.3

From the conditions described above, it can be seen that there are the difference between the bankruptcy arrangement between the U.S. Bankruptcy code and Law No. 37 of 2004 concerning bankruptcy and Suspension of Debt Payment Obligations. In addition, in response to the COVID-19 crisis, the two countries also took their own policy steps. Additionally, the changes and regulations that were established during the pandemic. Then how about Indonesia and the United States' arrangements for bankrupt companies during the pandemic. Therefore, the author will compose a comparative study between the two legal systems with the title "Comparison between Indonesia and the United States' Bankruptcy Arrangements for Companies During Covid-19 Pandemic".



B. Problem Formulations

1. What are the similarities and differences of bankruptcy arrangements for companies during the pandemic in Indonesia and the United States?
2. Based on the experience of corporate bankruptcy in the USA during the Covid-19 pandemic, how should company bankruptcy arrangements be made in Indonesia in the future?

C. Research Objective

1. To identify the similarities and differences of bankruptcy arrangements for companies during the pandemic in Indonesia and the United States

2. To find out how should company bankruptcy arrangements be made in Indonesia in the future based on the experience of corporate bankruptcy in the USA during the Covid-19 pandemic

D. Originalities of Research

No.	Sources	Discussion
1.	Ismail Rumadan, Pri Pambudi Teguh dan Chandra Yusuf, "Government Policy in Settlement of Bankruptcy Applications and Postponement of Debt Payment Obligations in the Covid-19 Pandemic Crisis in Indonesia, Journal Atlantis Press, Vol. 590 ²⁴	<p>Problem Formulation</p> <ol style="list-style-type: none"> 1. How is the impact of the pandemic on financial conditions and defaults by debtors visiting bankruptcy applications and Suspension of Payment? 2. What are government legal policy in overcoming the threat of bankruptcy due to the covid-19 pandemic? 3. How is implementing the going consent principle to avoid bankruptcy amid the covid-19 pandemic? <p>Conclusion</p> <p>Based on the discussion above, the following conclusions can be drawn:</p>

²⁴ Ismail Rumadan1, Pri Pambudi Teguh dan Chandra Yusuf, "Government Policy in Settlement of Bankruptcy Applications and Suspension of Debt Payment Obligations in the Covid-19 Pandemic Crisis in Indonesia" *Journal Atlantis Press, Vol. 590*, Jakarta (2021).

		<p>1. Indonesian economy is in a difficult condition due to government policies to stop the spread of the covid-19. This difficulty can affect the company's business. In addition, the policy of limiting community activities set by the government also disrupts the company's business activities so that the company is unable to generate maximum profits and is at risk of bankruptcy. As a result of the above conditions greatly affect the solvency of the company, which resulted in the company defaulting on its debt repayment obligations to creditors.</p> <p>2. From the Covid-19 condition and with the regulations that already exist in Indonesia, the step that the government must take to overcome the high spike in bankruptcy cases is, if viewing from several countries in terms of facing the threat of bankruptcy, it is to make changes to the bankruptcy regime to protect companies from the threat of</p>
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		<p>bankruptcy. In the Netherlands, for example, it would be easier to impose corporate restructuring on creditors, which could reduce the number of bankruptcy by debtors. The examples above that have been mentioned have not been seen or carried out by the Indonesian government in dealing with the threat of bankruptcy during the pandemic. In contrast to the case in several countries. If viewing from the policies or steps that have been taken by some of the countries, that the government's main priority is to save companies from bankruptcy.</p> <p>3. In the settlement of bankruptcy applications and PKPU in court, it is rare to find judges' considerations in prioritizing aspects of business continuity based on the health condition of the debtor company, because the Bankruptcy Law and PKPU have not clearly regulated the requirements for test</p>
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		<p>solvency as one of the conditions in imposing bankruptcy against the debtor.</p> <p>When the panel of judges considers the suitability of the debtor for a bankruptcy decision, the panel of judges should consider whether the COVID-19 pandemic is the root cause of the debtor's financial difficulties. When the panel of judges considers whether the debtor has met the requirements to be declared bankrupt, the panel of judges needs to consider whether the debtor is in trouble just because of the Covid 19 pandemic.</p> <p>From the discussion above, there are differences between previous research and this research, namely the object studied and the method used in this study. In the previous study, it did not use a comparative approach and focused on how the impact of the pandemic was on bankruptcy and also how the government's legal policy was in dealing with the impact of the pandemic, while in this study it used a comparative approach where</p>
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		there was an object of comparison with the United States' bankruptcy arrangements and what can be learned from it from the comparison.
2.	<p>Suhaila Zulkifli dan Tajuddin Noor, Analisis Hukum Aturan Kebijakan Pengajuan Kepailitan yang Berkeadilan Dimasa Pandemi Covid-19, Jurnal Hukum dan Kemasyarakatan Al-Hikmah, Vol.3, No. 1, 2022²⁵</p>	<p>Problem Formulations</p> <p>1. How is the arrangement for filing a bankruptcy suit in Law Number 37 of 2004 concerning Bankruptcy and PKPU?</p> <p>2. How is the Policy Solution for Bankruptcy Filing Rules during the Covid -19 pandemic that is fair to the parties?</p> <p>Conclusion</p> <p>Based on the results of the research and analysis that the authors have done, the following conclusions are presented which are the answers to the problems in the research, First, Article 2 paragraph (1) and Article 8 paragraph (4) of Law no. 37 of 2004</p>

²⁵ Suhaila Zulkifli dan Tajuddin Noor, "Analisis Hukum Aturan Kebijakan Pengajuan Kepailitan yang Berkeadilan Dimasa Pandemi Covid-19", Jurnal Hukum dan Kemasyarakatan Al-Hikmah, Vol.3, No. 1, Medan (2022).

		<p>concerning Bankruptcy and PKPU states that the requirements for filing an application for bankruptcy are:</p> <ol style="list-style-type: none"> There must be at least 2 (two) creditors Conditions for debt One of the debts has matured and can be collected There is a request for a declaration of bankruptcy from the relevant institution <p>As a result of bankruptcy regulated in Article 21 of the Bankruptcy Law and PKPU, the debtor declared bankrupt loses all “civil rights” to control and manage assets that have been included in the bankruptcy estate (boedel bankrupt). The consequences of bankruptcy are only on the debtor’s wealth. the debtor is not under custody. Second, The solution to the policy for filing bankruptcy during the Covid-19 pandemic is expected by law makers in Indonesia to make a specific policy, for example by revising the Bankruptcy Law and PKPU, especially the Bankruptcy Test requirements, determining</p>
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		<p>the minimum debt threshold, moratorium on PKPU applications or the role of the government in assisting negotiations, debt restructuring, lower interest rates, tax intensive reductions, or prohibit creditors from going bankrupt debtors during the Covid-19 Pandemic.</p> <p>From the discussion above, there are differences between previous research and this research, namely focus or object under study. In previous studies, the focus was on the requirements for filing for bankruptcy and the consequences. Apart from that, what is the solution regarding policies regarding filing for bankruptcy during a pandemic. Meanwhile, this research focuses on how bankruptcy arrangements are made during a pandemic and also comparisons with the United States, along with what is learned from these comparisons.</p>
3.	Centia Sabrina Nuriskia, The Urgency of Regulations	<p>Problem Formulation</p> <p>1. What are the provisions Regarding Filing of Obligations for Payment of Debt and Bankruptcy?</p>

	<p>Revision Related to Filing Bankruptcy and Postponing Debt Payment Obligations Amid the COVID-19 Pandemic, Fakultas Hukum Universitas Pembangunan Nasional Veteran Jakarta, 2021.²⁶</p>	<p>2. How is increased Filing of Bankruptcy and Suspension of Debt Payment Obligations (PKPU) as Urgency for Revision of Law Number 37 of 2004?</p> <p>Conclusions</p> <p>From the description of the results of the research and discussion, it can be concluded that :</p> <p>1. There are many ways to solve bankruptcy problem, starting from litigation and non-litigation. If through litigation, the Debtor may apply for the Suspension of Payment to the Chairman of the Commercial Court. From the provision in Article 222 paragraph (2) of law number 37 of 2004, It can be seen that PKPU is a delay in paying debts through a commercial judge's decision where creditors and debtors are given the opportunity to negotiate related to these debts, and debt restructuring can also</p>
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²⁶ Centia Sabrina Nuriskia dan Ahmad Yoga Novaliansyah, "The Urgency of Regulations Revision Related to Filling Bankruptcy and Posponing Debt Payment Obligations Amid the Covid-19 Pandemic", Lex Scientia Law Review, 5(2), 105-122, Semarang (2021)

		<p>be carried out with all or part of the debt by also looking for ways of payment the debt. The assets will later be distributed to the creditors. Before being declared bankrupt by the commercial court, the Debtor may apply for a PKPU first. Based on the bankruptcy filing process and PKPU. It is clear that Bankruptcy is the last resort for debtors to pay their debts. Based on Article 229 paragraph (3) of Law Number 37 of 2004 that the PKPU application must be decided first if the bankruptcy declaration application and the PKPU application are being examined at the same time. The existence of priority in the PKPU application can anticipate debtors in a bank bankruptcy.</p> <p>2. Problems that arise with Law Number 37 of 2004 concerning Bankruptcy and PKPU are several creditors who are considered to be unable to repay their debts again, or even the Debtor has</p>
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		<p>bankrupted to avoid payments, which is certainly inconvenient to divide the assets of the company or individual Debtor to creditors who is not able to pay and prefer the mechanism for the distribution of assets of the company and individual debtors through a court mechanism. The urgency in the revision of Law Number 37 of 2004 concerning Bankruptcy and PKPU covers several aspects. First, the Bankruptcy Law and the PKPU itself emerged based on the need for legal instruments aimed at solving debt problems in a fair, fast, open, and effective manner. Since its promulgation on November 8, 2004, until now there are still several articles, such as article 2 paragraph 1, which do not provide legal certainty, especially in protecting the sustainability of debtors' business aspects. Second, the Debtor does not pay at least one debt to one of the creditors, which means the debtor defaults</p>
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		<p>regardless of the nominal amount that can be submitted to the commercial court because in Law Number 37 of 2004 Article 2 paragraph 1 of the Bankruptcy Law and PKPU it does not clearly explain the nominal amount of the debt in question.</p> <p>From the discussion above, there are differences between previous research and this research, namely Focus or research object. In previous research, the focus was on how the provisions for filing bankruptcy and also how urgent the revision of Law Number 37 of 2004 was during this pandemic. Meanwhile, this research focuses on managing bankruptcy during a pandemic and also in comparison with the United States along with what Indonesia can learn so that the bankruptcy system can be better in the future.</p>
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E. Literature Review

1. Overview about Bankruptcy

In this literature study, an overview of the bankruptcy of the two countries, namely Indonesia and the United States, will be discussed based on two different legal systems.

a. Definition of bankruptcy

In Indonesia, bankruptcy has been described in Article 1 of the Law of the Republic of Indonesia Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations which states that “Bankruptcy is a general confiscation of all assets of the Bankrupt Debtor whose management and settlement is carried out by the Curator under the supervision of the Supervisory Judge. as regulated in this Law.”²⁷

Meanwhile, U.S. bankruptcy cases are heard exclusively in federal courts and are governed by the provisions of the U.S. Bankruptcy Code. It is explained that individuals and businesses can seek legal relief for their debt issues by filing a case under one of the chapters of Title 11 of the United States Code (the Bankruptcy Code).²⁸

²⁷ Law No. 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations

²⁸ <https://www.uscourts.gov/educational-resources/educational-activities/bankruptcy-basics-glossary>, (accessed on October 11, 2022)

b. Requirements of Filing Bankruptcy

In the Indonesian legal system, the requirements to file for bankruptcy is regulated by Article 2 of the Law of the Republic of Indonesia Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations which states that “Debtors who have two or more creditors and do not pay off at least a debt that has matured and is collectible, is declared bankrupt by a court decision, either at its own request or at the request of one or more of its creditors.”²⁹ From the article above, it can be understood that there are at least two conditions for bankruptcy:

- 1) There are two or more creditors; and
- 2) There is one debt that is due and payable which is not fully paid by the debtor.³⁰

Meanwhile, In the United States, there is no debt threshold below which a person could file for bankruptcy according to U.S Bankruptcy Law. When people are unable to keep up with their payments, bankruptcy becomes an option. The bankruptcy court will examine the debtor’s financial situation in great detail. The bankruptcy court may recommend a different course of action if it finds that the debtors can repay the debts in a manner other than bankruptcy. Even though there is no minimum debt for bankruptcy, there is a debt limit. For

²⁹ Ibid

³⁰ Bernadetha Aurelia Oktavira, 2 Syarat kepailitan dan Penjasannya, <https://www.hukumonline.com/klinik/a/syarat-kepailitan-cl1266>, (accessed on October 11, 2022).

instance, a Chapter 13 bankruptcy case has a limit of \$1,257,850 in secured debts (debts tied to an asset, e.g. a car or home) and \$419,275 in unsecured debts (such as credit card and medical bills).³¹ Additionally, if a bankruptcy court has reason to suspect that a case is abusive or fraudulent, it will not approve it. A individual who quickly maxes out several credit cards without any intention of paying them back is a classic example of a fraudulent bankruptcy case. While everyone's financial condition is different, there are a few telltale indications that filing for bankruptcy might be a good idea. As a result, debtors must declare bankruptcy if:

- 1) Debtors' incomes are significantly lower than the state median in their area.
- 2) Debtors spend the most or the all of your money on bills and necessary expenses (they have little to no disposable income)
- 3) The amount of debt debtor owe is greater than one year's worth of their income.
- 4) Even if the debtor did something drastic (e.g. not eat for a week), the debt would not be paid off in five years.
- 5) Debtor's debt is generating significant stress and affecting your health and relationships negatively.³²

³¹ Busch, Reed, Jones & Leeper, What Are the Requirements for Filing for Bankruptcy?, <https://www.buschreedlaw.com/blog/2021/november/what-are-the-requirements-for-filing-for-bankrup/>, (accessed on October 11, 2022)

³² Ibid

c. Subject that can be a Debtor

In Indonesian legal system, Article 2 of Law number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations, contains as follows.

- 1) A debtor who has two or more creditors and fails to repay at least one debt that has matured and is receivable is declared bankrupt by the court, either at the debtor's request or at the request of one or more creditors.
- 2) The application described in paragraph (1) may also be submitted by the office of the public prosecutor.
- 3) If the debtor is a bank, only Bank Indonesia may submit the application for a declaration of bankruptcy.
- 4) If the debtor is a securities company, stock exchange, clearing guarantee institution, depository or settlement institution, only the Capital Market Supervisory Agency may submit a petition for bankruptcy.
- 5) If the debtor is an insurance company, reinsurance business, pension fund, or State-Owned Enterprise functioning in the public interest, only the Minister of Finance may submit an application for a bankruptcy declaration.³³

³³ Yuhelson, "Hukum Kepailitan di Indonesia", First print, Ideas Publishing, Gorontalo, 2019, e-book, p.69

Based on the above provisions, it can be said that the point is that the debtor is the one who has two or more creditors and does not pay off at least one debt which has matured and is collectible. Those who can become debtors are banks, securities companies, and insurance companies. It can also be said that those who can become debtors are banks, securities companies, and insurance companies. In addition, the debtor can be an individual or a legal entity. These legal entities include limited liability companies, cooperatives, foundations, associations, and BUMN which include Persero and Perum.³⁴

While, in the U.S, 11 U.S.C. §109(a) (the Bankruptcy Code) states that “Notwithstanding any other provision of this section, only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title.”³⁵ However, in the Bankruptcy Code, it can be said that there is a slight difference in the definition of debtor between chapter 7 and chapter 11 of the U.S Bankruptcy Code. Chapter 7 which discusses liquidation, in which the debtors can be a corporation, a small business, or an individual. Meanwhile, In chapter 11, which addresses reorganization, the business dominates the individual as debtor. This includes corporations, partnerships,

³⁴ Ridwan khairandy, “Pokok-Pokok Hukum Dagang Indonesia”, First revision, FH UII Press, Yogyakarta, 2013, p. 462

³⁵ <https://www.law.cornell.edu/uscode/text/11/109> , (accessed on October 25, 2022)

joint ventures, and limited liability companies.³⁶ This is because the terms of this chapter are more complex and more expensive.

d. Legal Consequences Declared Bankrupt

In Indonesian bankruptcy law, the legal consequence of the main bankruptcy judgment is that with the bankruptcy judgment being handed down, the debtor (the bankrupt) loses the right to manage and control his property. The management and control of the property pass to the hands of the curator / Heritage Hall.³⁷ In the principle, in bankruptcy law, the debtor does not have the rights to cover the entire wealth of the debtor at the time of being declared bankrupt along with all the wealth acquired during bankruptcy. Therefore, the debtor has lost the rights to control and care for his wealth. It is calculated from the date of the bankruptcy.

Richard Burton Simaputang, said, “Another very important legal consequence of a declaration of bankruptcy is as asserted in Section 41 of the Bankruptcy Act namely that for the benefit of the insolvent property may be requested annulment of any legal act which has been declared bankrupt which is detrimental to the interests of the creditor, which is done before the declaration of

³⁶Emily Norris, *Chapter 7 vs. Chapter 11 : know the difference* <https://www.investopedia.com/ask/answers/differences-between-chapter-7-and-chapter-11/>, (accessed on October 25, 2022)

³⁷ Evie Sompie, “Akibat Hukum Putusan Pengadilan Niaga Terhadap Debitor yang Dinyatakan Pailit Berdasarkan Undang-Undang Nomor 37 Tahun 2004”, *Lex Privatum Journal*, Vol. 2, No. 2, 2014, Fakultas hukum Sam Ratulangi, Manado (2014). p. 160

bankruptcy is determined. This cancellation is only possible if it can be demonstrated that, at the time the legal act is performed, both the debtor and the party with whom the legal act is performed knew or should have known that the legal act will result in losses to the creditor, unless the legal act committed by the debtor is required by the agreement and/or the law, such as the obligation to pay taxes.” According to section 43 of the Bankruptcy Act it is also that even on a grant made by the debtor, it may be requested for cancellation if the curator can prove that at the time the grant was made the debtor knew or reasonably knew that the act would result in harm to the creditor.³⁸

While, In the United States bankruptcy law, under Chapter 7 states that “The company ceased all operations and completely went out of business. A trustee is appointed to liquidate (sell) the assets of the company, and the money is used to pay off debts”. In this case it is not much different from the bankruptcy law in the country that his right to his property passes to the trustee to be cleared to pay the debt to the creditor.³⁹ The bankruptcy court authorizes trustees to ensure the proper payment of creditors. In the meantime, bankruptcy will stay on the debtor’s credit reports for many years, and these reports may be accessed by potential lenders, insurers, landlords,

³⁸ Ibid

³⁹ Troy Segal, *Corporate Bankruptcy : An Overview*, <https://www.investopedia.com/articles/01/120501.asp>, (accessed on October 25, 2022)

and employers, among others. Due to the severe credit damage caused by bankruptcy, debtors who have been declared bankrupt may have a hard time to borrow money if they need it, such as for a car loan or a mortgage. Additionally, it will be challenging to obtain a conventional credit card.⁴⁰ Seeing from that situation above, that bankruptcy in the United States not only had an impact at that time such as the loss of property and property but also in the long term because of the importance of the credit record in financial terms.

2. Overview about Company

In Indonesian law, the definition of a company can be found in law no. 3 of 1982 concerning Mandatory Registration of Companies and Law of the Republic of Indonesia Number 8 Of 1997 Concerning Company Documents. According to article 1 letter b of The Law of the Republic of Indonesia Number 3 Of 1982 Concerning Mandatory Registration of Companies, “A company is any form of business that engages in all types of permanent and continuous business and is established, operates, and is domiciled within the territory of the Republic of Indonesia for the purpose of generating profit and/or profit.”⁴¹ While, based on article 1 section (1) of Law Number 8 Of 1997 Concerning Company Documents, “A company is any form of business that carries out activities permanently and continuously with the aim of

⁴⁰ Glenn Curtis, *Should You File for Bankruptcy?*, <https://www.investopedia.com/articles/pf/08/bankruptcy-filing.asp>, accessed on October 25, 2022.

⁴¹ Law No. 3 year of 1982 about Mandatory Registration of Companies

obtaining profits, both organized by individuals and business entities in the form of legal entities or non-legal entities, which are established and domiciled within the territory of the Republic of Indonesia.”⁴²

Meanwhile, in the United States Law, there is no clear definition described in the legislation in the United States. This is because in the United States there are federal laws and there are state laws. Whereas in the United States it consists of many states. In the United States, the term of corporate is more often used than company. However, the term “company” is used to describe any individual or group of people who engage in commercial business activities for the purpose of making a profit. The phrase “company” is unrefined enough to require any specific legal recognition, regulations, or authorizations.⁴³ A corporation in the United States is the same as one in Indonesia, which is a legal entity. However, in the United States, the term corporation is used more often because the corporation itself is divided into many types, not limited to large corporations or Limited Liability Companies. An example of the definition of a corporation can be found in chapter 4 article 1 § 102 (4) of the Consolidated laws of New York, the Laws of New York on Business Corporation states that “Corporation” or “domestic corporation” means a corporation for profit formed under this

⁴² Law 8 Of 1997 Concerning Company Documents

⁴³ _____, *Corporations vs. Company: What's the Difference?*, <https://www.indeed.com/career-advice/career-development/corporation-vs-company>, accessed on March 20, 2023

chapter, or existing on its effective date and theretofore formed under any other general statute or by any special act of this state for a purpose or purposes for which a corporation may be formed under this chapter, other than a corporation which may be formed under the cooperative corporations law.⁴⁴

3. Overview about Pandemic

a. Pandemic

In general, according to World Health Organization (WHO), In 2010, the WHO defined a pandemic as “the worldwide spread of a new disease” that affects large numbers of people.⁴⁵ The World Health Organization (WHO) declares a pandemic when the exponential growth of a disease.⁴⁶ Consequently, a situation is considered a pandemic if it spreads globally and occurs in multiple countries, not just one. The designation of a virus as a pandemic has nothing to do with its virology, population immunity, or disease severity. It indicates that a virus affects multiple countries and populations.⁴⁷ World Health Organization (WHO) is responsible for declaring a pandemic. Therefore, WHO is responsible for monitoring the development of disease activity on a global scale.

⁴⁴ <https://www.nysenate.gov/legislation/laws/BSC/102>, (accessed on October 29, 2022)

⁴⁵ Derrick Bryson Taylor, *Is the Coronavirus an Epidemic or a Pandemic? It Depends on Who's Talking*, <https://www.nytimes.com/2020/02/28/health/coronavirus-pandemic-epidemic.html>, accessed on December 15, 2022

⁴⁶ _____, *Epidemic, Endemic, Pandemic : What are the Differences ?*, <https://www.publichealth.columbia.edu/public-health-now/news/epidemic-endemic-pandemic-what-are-differences>, accessed on December 15, 2022.

⁴⁷ Ibid

For instance, on March 11, 2020, the World Health Organization (WHO) declared the novel coronavirus (COVID-19) outbreak a global pandemic. This is because the Covid19 disease spreaded to various countries including Indonesia and the United States.

b. How Pandemic Impact on Economic and National Policy

Pandemics originate from diseases that spread widely throughout the world and can cost lives. Therefore, not only the World Health Organization, but also governments around the world are taking steps in terms of responding to the development and spread of the virus that makes it a pandemic. Consequently, the government will certainly make policies on how to prevent the spread of the disease to minimize victims affected by the disease. This policy will have an impact on various sectors including the economy. The current pandemic and its impacts could result in a globalization economic recession or even a deglobalization process. Deeper impacts accompanied by deeper downturn in all global exchanges. Under this situation, the world will experience a period of deglobalization, with the soft dimension decreasing by 10% and the economic dimension decreasing by 9%.⁴⁸ Shown that the pandemic is a global phenomenon and the economic crisis is a global

⁴⁸ Ferdy Kusno, "Global Political Economy Crisis Impact of Pandemic Covid-19", Journal of Universitas Muhammadiyah Palangkaraya, Vol 19 No. 2, Universitas Muhammadiyah Palangkaraya, Palangkaraya (2020), p.116

risk, isolationism and de-globalization pose a clear threat to the global economy.⁴⁹

On a global scale, pandemics have both a short-term budgetary impact and a long-term economic impact. Efforts to contain the pandemic include enforcing quarantine, preparing health facilities, isolating infected cases, and tracking contacts using public health resources, human resources, and implementation expenses. It also includes health system expenses for the provision of health facilities to infectious cases and the procurement of consumables including drugs, medical supplies, and personal protective equipment. Pandemics can also result in reduced tax receipts and increased expenditures, causing fiscal stress, especially in lower-middle-income countries (LMICs) with greater budgetary constraints and tax systems that are still in need of development.⁵⁰

How the impact of a pandemic on the economy can be seen from the current pandemic, namely the Covid-19 pandemic. Several parties, including the IMF, the World Bank, and the World Economic Forum, had predicted the potential impact of the Covid-19 pandemic on the world economy. For instance, the IMF forecasted March and June of 2020. Among other things, IMF Fiscal Monitoring 2020 provides information and projections for a number of fiscal

⁴⁹ Ibid

⁵⁰ Yunfeng Shang, Haiwei Li, and Ren Zhang, Affects of Pandemic Outbreak on Economics: Evidences from Business History Context, <https://www.frontiersin.org/articles/10.3389/fpubh.2021.632043/full>, accessed on December 2022.

monetary indicators for the affected nations. The International Monetary Fund (IMF) established three categories of countries: Advanced Economies, Emerging Market and Middle-Income Economies, and Low-Income Developing Countries. During the Covid-19 pandemic, the IMF economic team expected that developed countries (Advanced Countries) would experience a contraction in economic growth between -5.5% (Germany) and -15% (US). During the pandemic, the average developed country experienced negative 10.7% growth.⁵¹

In addition, the pandemic could also affect national policies. A pandemic that spreads around the world requires policies from every country to handle it so that its country can survive. The pandemic that caused the crisis in various factors requires policies from the government so that it can be handled nationally. Pandemic is such a vast and complex crisis that it has shown disparities in the capacity of governments around the world to integrate and coordinate diverse policy instruments to manage the pandemic and cope with its repercussions. The pandemic offers an inevitable experiment because the problem governments faced was incredibly similar, but their policy responses varied. In the case of the Covid-19 pandemic, the government adopted a "mix" or bundle of tools in a number of

⁵¹ Dedi Junaedi dan Faisal Salistia, "Dampak Pandemi Covid-19 Terhadap Pertumbuhan Ekonomi Negara-Negara Terdampak", Simposium Nasional keuangan Negara 2020, jurnal.bppk.kemenkeu.go.id, 2020, p.999

policy sectors – social, health, medical, and economic – rather than a single tool (such as quarantine).⁵²

4. Theory of Justice

In Dutch, the theory of justice is *theorie van rechtvaardigheid*.

Justice means a fair character, action, treatment. the notion of fair can be associated with:

- a. Not biased or impartial
- b. Side with the truth
- c. Appropriate or not arbitrary⁵³

Therefore, the theory of justice is related to morals and focuses on justice that occurs in society, nation and state. In Indonesia justice is described in Pancasila as the basis of the state or constitution, namely in the fifth precept which states that "social justice for all Indonesian people". The fifth precept contains values which are the goal of living together. This justice is based on and imbued with the essence of human justice, namely justice in the relationship between humans and themselves, humans and other humans, humans and society, nation and state, as well as the relationship between humans and God.⁵⁴ According to Hans Kelsen's

⁵² Giliberto Capano, Michael Howlett, Darryl S.L. Jarvis, M. Ramesh and Nihit Goyal, "Mobilizing Policy (in) Capacity to Fight Covid-19: Understanding Variations in State Responses", *Policy and Society*, Vol 39 No. 3, Taylor & Francis Group, Informa UK Limited, United Kingdom, 2020. p.291

⁵³ Halim HS dan Erlies Septiana Nurbani, *Penerapan Teori Hukum pada Penelitian Disertasi dan Tesis*, Rajawali Pers, Jakarta, 2014, p.25

⁵⁴ Komala Permatasari, "Pandangan Masyarakat Yogyakarta terhadap Pembedaan Kepemilikan Tanah Bagi WNI Non Pribumi Ditinjau dari Perspektif Sosiologi Hukum" Thesis, Universitas Islam Indonesia, Yogyakarta, 2019, p.20

book general theory of law and state, “law as a social order can be declared fair if it can regulate human actions in a satisfactory way that they can find happiness in it.”⁵⁵ According to Hans Kelsen's view, law is a social order which if it can achieve happiness then the law can be said to be fair. Meanwhile, according to Halim HS and Erlies Septiana Nurbani in their book, “Theory of Justice is a theory that examines and analyzes the impartiality, truth or arbitrariness of institutions or individuals towards society or other individuals.”⁵⁶

Viewing further from another scholar's opinion, according to John Rawls the state that upholding justice should be based on two principles, namely giving equal rights and opportunities to the broadest basic freedoms as wide as equal freedoms for everyone. In addition, being able to rearrange the socio-economic disparities that occur so that they can provide reciprocal benefits for everyone, both those from fortunate and disadvantaged groups.⁵⁷ Furthermore, justice and law are inseparably connected; one could even argue that law and justice must be coupled because the aim of the law is to accomplish justice in society. A legal and judicial system cannot be developed without concern for justice, because justice is an important understanding of a legal and judicial system, and so it must be governed by certain general principles. These are the concepts that concern a nation's and state's interests, notably the belief

⁵⁵ Hans Kelsen, *General Theory of Law and State*, Translated by Rasisul Muttaqien, Nusa Media, Bandung, 2011, p.9.

⁵⁶ Halim HS dan Erlies Septiana Nurbani, *Op.cit*, p. 26

⁵⁷ *Ibid*, p.31

that exists in society about a fairness of life, because the purpose of the state and law is to attain the greatest happiness for everyone.⁵⁸ In this research, justice can be associated with fairness in the law regarding bankruptcy between debtors and creditors. Therefore, bankruptcy arrangements should be for the benefit of both parties and to accommodate the interests of both debtors and creditors.

F. Operational Definitions

In order to avoid multiple interpretations in the comprehension of research discussion, the following terms have been defined:

1. Comparative study

Comparative study is comparing, meaning comparing to find similarities or differences of two or more research objects.⁵⁹

2. Arrangement

In legal terms, arrangement refers to legislation in written form.

3. Corporation

According to Utrecht, a corporation is a legal entity with members that has its own rights and responsibilities separate from those of its members.⁶⁰ Corporation is legal entity. The term corporation here

⁵⁸ Ibid, p.27

⁵⁹ Ulul Arham, “Studi Komparasi Terhadap Pembagian Harta Waris Ditinjau Dari Hukum Islam Dan Kitab Undang-Undang Hukum Perdata (BW) (Studi di Pengadilan Agama dan Pengadilan Negeri Sidoarjo)”, (Thesis, UPN “Veteran” Jawa Timur, Surabaya). p.11

⁶⁰ Suparno S. Iryadi, “Pertanggungjawaban Pidana Direksi dari Suatu Korporasi yang Terlibat Tindak Pidana Lingkungan Hidup”, Thesis, Universitas Islam Indonesia, Yogyakarta, p.8.

primarily refers to United States' businesses or companies because corporation term includes many types of companies. Meanwhile, in Indonesia, corporation is authorized to carry out legal actions is recognized by civil law. Corporations here refers to Limited Liability Company (PT)

4. Company

In Indonesia, a company is any form of business that runs every type of business that is permanent and continuous and that is established, works, and is domiciled in the territory of the Republic of Indonesia, for the purpose of obtaining profit.⁶¹ Company here refers to any type of business in Indonesia. Meanwhile, In the United States, company refers to a legal entity founded by a group of people to engage in and operate a commercial or industrial business enterprise. It is any member of the Group for which the applicable jurisdiction is a state or the District of Columbia. However, the United States of America uses the term corporate more often than company.

G. Research Methods

1. Type of Research

Type of research is also possible to refer to normative legal study as doctrinal legal research.⁶² This type of research is referred to as doctrinal

⁶¹ Law Number 3 of 1982 concerning Compulsory Company Registration

⁶² Jonaedi Efendi & Johnny Ibrahim, *Metode Penelitian Hukum Normatif dan Empiris*, (Depok: Prenadamedia Group, 2016). p. 124

legal research since it is limited to written regulations and is therefore closely tied to libraries. Therefore, normative law will necessitate secondary library data.⁶³ This research is supported by library materials that are in accordance with the problem under study related to “Comparison between Indonesia and the United States’ Bankruptcy Arrangements for Companies During Covid-19 Pandemic”.

2. Method of Approach

In this research, the author uses several approach methods in this type of normative research, namely:

a. Statue Approach

In principle, legislative, conceptual, historical, comparative, and philosophical approaches are all used in normative legal studies.⁶⁴ The author use the legislative or statue approach to answer the formulation of the problem in this thesis, the author uses various related laws and regulations related to bankruptcy that occurred during the Covid-19 pandemic. It also examines government regulations and policies regarding bankruptcy, based on Indonesian law and the United States law.

⁶³ Muhammad Syahrur, *Pengantar Metodologi penelitian Hukum Kajian Penelitian Normatif, Empiris, penulisan Proposal, Laporan Skripsi dan Tesis*, (Riau: Dotplus Publisher, 2022). p. 3

⁶⁴ *Pedoman Penulisan Tugas Akhir Mahasiswa*, p. 10

b. Comparative Approach

The author uses a comparative approach is because this thesis compares bankruptcy law in the United States to conduct research related to bankruptcy arrangements for companies that were damaged during the Covid-19 pandemic. This study compares the bankruptcy of two legal systems of the United States and Indonesia.

3. Object of Research

The object of research carried out and written by the author on this thesis is about bankruptcy arrangements for bankrupt companies during pandemic covid-19 between Indonesia and the United States.

4. Source of data

The source of data in the research is related to literature studies because the type of research that is used in this research is normative. Because this research uses normative research methods, it will require secondary data, which is through literature. Secondary data requires data such as documents and libraries by collecting and examining information related to legal issues raised in this research. The legal materials used in both Indonesian and U.S. law are:

a. Primary Legal Material

Primary legal material is legal material that is authoritative, meaning that it has authority, consists of legislation, official records, laws, and judges' decisions. The primary legal materials in this study are:

1) Indonesian Law

- a) Indonesian Civil Code
- b) Law No. 37 of 2004 concerning Bankruptcy and Suspension of Payment
- c) Law of the Republic of Indonesia Number 40 of 2007 Concerning Limited Liability Companies
- d) Law of the Republic of Indonesia Number 2 Of 2020 Concerning the Establishment of Government Regulations in Lieu of Law Number 1 of 2020 Concerning State Financial Policy and Financial System Stability for Handling the Corona Virus Pandemic 2019 (Covid-19) and/or in Order to Face Dangerous Threats the National Economy and/or Financial System Stability Becomes Law
- e) Regulation of the Financial Services Authority of The Republic of Indonesia Number 11 /Pojk.03/2020 Concerning National Economic Stimulus as A Countercyclical Policy Impacting the Spread of Coronavirus Disease 2019
- f) Decision of the Chairman of the Supreme Court Number 109/KMA/SK/IV/2020 of 2020

2) The United States Law

- a) United States Code, main editions of the U.S. Code
- b) United States Bankruptcy Code, Pubs. L. 95–598, title I, §101, Nov. 6, 1978, 92 Stat. 2549, provided in part: “The law

relating to bankruptcy is codified and enacted as title 11 of the United States Code, entitled 'Bankruptcy', and may be cited as 11 U.S.C. §—.”

- c) Federal Rules of Bankruptcy Procedure, effective August 1, 1983, as amended to December 1, 2022
- d) Corporations - State Laws such as chapter 3 business corporations Code of the District of Columbia (Last codified D.C. Law: Law 24-289 effective March 10, 2023) and Chapter 4 business corporation of the consolidated laws became a law April 24, 1961, the New York State Senate
- e) Coronavirus Aid, Relief, and Economic Security (CARES) Act, Public Law 116-136, March 27, 2020

b. Secondary Legal Material

Secondary legal materials are all publications about the law that are not official documents. Secondary legal materials can be books and journals used as references to support primary legal materials in this research.

c. Tertiary Legal Materials

Tertiary legal materials are data used to support secondary legal materials. Tertiary legal materials can be dictionaries and terminology related to what is described in the previous legal material and relating to the object of this research.

5. Method of Data Collecting

The technique used in collecting data for this research is by collecting secondary data consisting of primary legal materials, secondary legal materials, and tertiary legal materials that are related to the main research problem, namely bankruptcy that occurred during the Covid-19 pandemic.

6. Data Analysis

Based on the problems and objectives of this research, the method of research is descriptive-comparative which is used to examine regulations and legal policies on bankruptcy issues that occurred during the pandemic. This research provides a view on bankruptcy during the pandemic from a legal perspective by collecting data through literature review. This view is presented by comparing the two legal systems of the two countries, namely Indonesia and the United States.

H. Structure Of Writing

In this study, it will be structured by dividing into 4 parts, namely:

CHAPTER I: an introduction that consist of Background of Study, Problem Formulations, Research Objectives, Originalities of Research, Operational Definitions, Literature Review, Research methodology and Structure of Writing.

CHAPTER II: Theoretical Review. In this chapter will be discussed about theories that is related to problem formulations in this research about

Bankruptcy Arrangements for Bankrupt Companies During the Covid-19 Pandemic between Indonesia and the United States.

CHAPTER III: Finding and Result. In this chapter will answer the two of problem formulations. First, to answer the problem formulation regarding what is the difference between the bankruptcy arrangements for companies that went bankrupt during the pandemic between the USA and Indonesia, and which one is more profitable. Second, to answer the problem formulation regarding what are the advantages and disadvantages of bankruptcy arrangements in Indonesia and the USA.

CHAPTER IV: Conclusion and Recommendation. In this chapter will be divided into two. The conclusion will provide the summary of the answer of the two problem formulations that has been explained above. The recommendation provide suggestion as to what is expected or what should happen, and also author's thoughts after analyzing and finding the answers of two problem formulations then it will made to be as recommendations.

CHAPTER II

GENERAL OVERVIEW ABOUT BANKRUPTCY, COMPANY / CORPORATE, AND PANDEMIC

A. Overview about Bankruptcy

1. Definition of Bankruptcy

a. Definition of Bankruptcy according to Indonesian Legal System

According to the Big Indonesian Dictionary (KBBI), *pailit* means falling while *kepailitan* means the circumstances or conditions of a person or legal entity who is no longer able to pay their obligations (in terms of their debts) to the receivable.⁶⁵ In Indonesia, *pailit* is not the same as *bangkrut* because the meaning and legal status are different. From a financial point of view, *pailit* can occur in companies whose finances are in good condition, but *bangkrut* there is an unhealthy financial element in the company. *Pailit* can be imposed on the debtor if it has two or more creditors, does not pay in full at least one debt that has matured, and can be imposed on its own application or on the application of one or more creditors. Meanwhile, *bangkrut* is A state in which a company has severe losses until it collapses, causing it to cease operations. A company's *bangkrut* is a result of the losses it has

⁶⁵ <https://kbbi.web.id/pailit>

incurred.⁶⁶ In addition to the understanding according to the dictionary above, bankruptcy in Indonesia can be interpreted from various sources such as according to laws of the Republic of Indonesia and according to scholar opinions.

First, looking from the point of view of the law of the Republic of Indonesia regarding the definition of bankruptcy, which is regulated in the Law of the Republic of Indonesia number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations. Indonesia used the term *Faillissementsverordening* from the time before independence up to several years after independence. The complete legislation was *Verordening op het Faillissement and de Surseance van Betaling voor de Europeanen in Dutch Indie* (Regulations for bankruptcy and Suspension of payments For Europeans).⁶⁷ Indonesian bankruptcy law is identical to Dutch bankruptcy law, which was applied in Indonesia on the basis of the concept of concordance, when its historical roots are examined.⁶⁸ Therefore, Indonesia is one of the countries included in the Civil Law Country legal Previous to the passage of law number 37 of 2004, bankruptcy matters were governed by *Staatsblad* 1905:217 jo. *Staatsblad* 1906:348 concerning to

⁶⁶Willa Wahyuni, *Perbedaan Pailit dan Bangkrut*, <https://www.hukumonline.com/berita/a/perbedaan-pailit-dan-bangkrut-lt62bc216145909/>, accessed on December 22, 2022

⁶⁷ Sutan Remy Sjahdeini, *Hukum Kepailitan Memahami Undang-Undang No.37 tahun 2004 tentang Kepailitan*, Cetakan ke-3, Pustaka Utama Grafiti, Jakarta, 2009, p.19.

⁶⁸ Sunarmi, "Perbandingan Sistem Hukum Kepailitan Antara Indonesia (Civil Law System) Dengan Amerika Serikat (Common Law System)", e-USU Repository, Universitas Sumatera Utara, 2004, p. 16

Faillissement Verordening (Bankruptcy Law), which was subsequently revised by a Government Regulation in Lieu of Law Number 1 of 1998 and subsequently enacted as Law Number 4 of 1998.⁶⁹

In the Law of the Republic of Indonesia, the definition of bankruptcy is explained in article 1 paragraph (1) of law number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations,⁷⁰ which reads:

"Bankruptcy is a general confiscation of all the assets of the Insolvent Debtor whose management and settlement is carried out by the Curator under the supervision of the Supervising Judge as provided in this Act."

Based on the above regulations, the debtor can be declared bankrupt by a court that decides through a court decision. According to this law, the curator is also in charge of managing and/or clearing the bankruptcy property which is then under the supervision of a supervisory judge appointed by a commercial court judge. Meanwhile, The general confiscation referred to in the preceding regulation is a confiscation of all of the debtor's assets, both current and future, so that the proceeds from the sale of the seized property can be fairly distributed and proximately among fellow creditors based on the

⁶⁹ Rifqani Nur Fauziah Hanif, *Kepailitan dan Akibat Kepailitan Terhadap Kewenangan Debitur Pailit Dalam Bidang Hukum Kekayaan*, <https://www.djkn.kemenkeu.go.id/artikel/baca/13451/Kepailitan-dan-Akibat-Kepailitan-Terhadap-Kewenangan-Debitur-Pailit-Dalam-Bidang-Hukum-Kekayaan.html>, accessed on December 22, 2022

⁷⁰ Article 1 paragraph (1) of law number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations

amount of receivables from each, unless the creditors have reason to take priority.⁷¹

Second, the definition of bankruptcy according to scholars' opinion, According to Munir Fuady, Bankruptcy refers to the confiscation of all of a debtor's assets in order to achieve peace between debtors and creditors or so that the assets can be distributed equitably among creditors. R. Subekti contends that bankruptcy is a cooperative endeavor to collect money from all debtors. In the meantime, H. M. N. Puwosutjipto claimed that bankruptcy encompasses all aspects of the bankruptcy occurrence. Insolvency is the discontinuance of payment (its debts).⁷² From the opinion of scholars above that in essence bankruptcy is to pay debts to creditors in the event that the debtor is bankrupt or stops paying.

b. Definition of Bankruptcy according to United States Legal

The origin of the word “bankrupt” is the Italian *banca rotta*, which means “broken bench” In Italy, currency dealers conducted business from benches or tables. If a money dealer had no more money, his table or bench would be broken in half and he would be out of business. The word's French counterpart, *banqueroute*, eventually entered the English language as both a figure of speech and a literal

⁷¹ Luthvi Febryka Nola, “Kedudukan Sita Umum terhadap Sita Lainnya dalam Proses Kepailitan”, *Negara Hukum*, Vol. 9, No. 2, Pusat Penelitian Badan Keahlian DPR RI, <https://jurnal.dpr.go.id>, 2018, p.218.

⁷² Larassatya, “Restrukturisasi Hutang dengan Pola Konversi Utang Menjadi Saham (*Debt to Equity Swap*): Studi Kasus PKPU PT Argo Pantes Tbk. Dan PT Sekar Laut Tbk”, Thesis, Universitas Indonesia, Depok, 2004, p.11.

characterization of what happened to the affected individual.⁷³ Therefore, in the United States, it uses the word bankruptcy. To find out better about the definition of bankruptcy in the United States, we can look at the dictionaries, laws, and opinions of scholar.

First, the definition of bankruptcy in the USA can be seen from the dictionary that bankruptcy based on the etymological dictionary, The term bankruptcy derives from the word “bankrupt”, which means to render insolvent (as a verb) or to be unable to pay bills or satisfy commitments (as adjective). Consequently, bankruptcy signifies the dissolution of a business due to incapacity to pay debts.⁷⁴

Second, The United States bankruptcy law is governed by Title 11 of the United States Code, known as the bankruptcy code. Looking further at the history of United States regulations regarding bankruptcy, 1952 was a milestone year for countries with a common law legal tradition originating in the United Kingdom, as the Act Against Such Persons As Do Make Bankrupt was promulgated by parliament during King Henry VIII's reign was utilized from Roman Legal Tradition. The United States is a member of the group of countries with an Anglo-Saxon legal system.⁷⁵ In the colonial age in the United States, the statute of Bankruptcy of 1570 in force in England also applied in the United

⁷³Dov Y. Frankel, The History and Origin of Bankruptcy, <https://www.lexology.com/library/detail.aspx?g=6e2478f5-485d-4cbb-8fa7-536fde59c581>, accessed on December 24, 2022

⁷⁴ <https://www.etymonline.com/word/bankrupt>, accessed on December 24, 2022

⁷⁵ Sunarmi, *Op.cit*, p. 10

States as the law of bankruptcy. The Bankruptcy Act of 1898, which has been amended several times, was the bankruptcy law in force in the United States until 1979 when the current bankruptcy law, the Bankruptcy Code, came into force. The Bankruptcy Act was the United States' first modern bankruptcy law and is the primary inspiration for the current Bankruptcy Code.⁷⁶ In the US Bankruptcy Code there is no clear explanation of the meaning of bankruptcy but the meaning of bankruptcy can be found in the glossary. Based on bankruptcy basics glossary, a case filed under one of the chapters of Title 11 of the United States Code, which is the Bankruptcy Code to resolve consumer or commercial debt obligations.⁷⁷ Basically, Bankruptcy is a general term word for a federal court system that assists consumers and corporations in eliminating debts and repaying creditors.⁷⁸

Third, seeing the definition of bankruptcy is a scholar's opinion, Insolvency in bankruptcy, definition according to Friedman scholar Jack P in his book Munir Fuady:⁷⁹

“Inability to meet financial obligations when time falls as befits in a business or excess liabilities compared to its assets within a certain time.”

⁷⁶ Sutan Remy Sjahdeini, *Op.cit*, p.14.

⁷⁷ <https://www.uscourts.gov/educational-resources/educational-activities/bankruptcy-basics-glossary>, accessed on December 24, 2022

⁷⁸ _____, Bankruptcy Definitions: What exactly Is It?, <https://www.findlaw.com/bankruptcy/what-is-bankruptcy/bankruptcy-definition-what-exactly-is-it.html>, accessed on December 24, 2022

⁷⁹ Munir Fuady, *Hukum Pailit 1998 dalam Teori dan Praktek*, Cetakan Pertama, Citra Aditya Bakti, Bandung, 1999, p.135

Based on the opinion of Friedman, Jack P above, the insolvency or bankruptcy can be said that the circumstances in which the liabilities or debts are more than the assets so that there is a state of inability to meet the debt payment obligations.

2. Requirements of Filing Bankruptcy

a. Requirements of Filing Bankruptcy according to Indonesia Legal System

Seeing from the point of view of bankruptcy in Indonesia, what man has explained in article 2 paragraph (1) of law Number 37 of 2004 Concerning Bankruptcy and Suspension of Debt Payment Obligations which reads: ⁸⁰

“A debtor who has two or more Creditors and does not pay in full at least one debt that has fallen over time and can be collected, is declared bankrupt by a court decision, both on his own plea and on the application of one or more of his creditors.”

Based on the regulation above, the terms of bankruptcy as stipulated in Article 2 paragraph (1) of the Bankruptcy and Suspension of Debt Payment Obligations are indeed very simple. Debtors with the ability to repay debts can be inflated by the court when all three conditions of bankruptcy are normatively met.⁸¹ The conditions stipulated in the article above are:

1) The Debtor has Two or More Creditors

⁸⁰ Law Number 37 of 2004 Concerning Bankruptcy and Suspension of Debt Payment Obligations

⁸¹Tata Wijayanto, “Kajian Tentang Pengaturan Syarat Kepailitan Menurut Undang-Undang Nomor 37 Tahun 2004”, *Mimbar Hukum*, Vol. 26 No. 1, Universitas Gadjah Mada, Yogyakarta, 2014, p.3

The terms of the creditor must be more than one have been clearly stated in the bankruptcy law as mentioned above. The reason for this is that the definition of bankruptcy, which is followed by bankruptcy property settlement, is the equitable repayment of obligations. If the debtor has only one creditor, all of the debtor's assets instantly get to be collateral for the repayment of the debtor's obligation, and neither *pro rata* nor *pari passu* distribution is necessary. Consequently, it is evident that a debtor with a single creditor cannot be sued for bankruptcy.⁸² The various creditors in bankruptcy are also divided into three, namely concurrent, preferred, and separatist creditors. In general, there are three types of creditors known in the Civil Code, namely:

a) Concurrent creditor

Article 1132 of the Civil Code governs these concurrent creditors. Creditors that have *pari passu* and *pro rata rights* are entitled to make repayments against the debtor's assets in proportion to the value of their separate receivables, without any creditor having priority over the others.

b) Preferred creditor

Creditors who receive a preferential interest rate from a debtor due to the special status of their receivables are known as

⁸² Jono, *Hukum Kepailitan*, Edisi 1, Cetakan ke-4, Sinar Grafika, Jakarta, 2015, p.5

“preferred creditors” (Article 1134 of the Civil Code). Thus, this creditor is paid first.

c) Separatist creditor

Separatist creditor is a creditor of the holder of the right of treasury guarantee *in rem*, referred to as lien and mortgage in the Civil Code.⁸³

Based on Based on the various creditors above, it can be said that indeed all creditors have the same rights, namely paid their receivables. However, of the three types of creditors above have their privileges or different positions.

2) There must be Debt

The requirements regarding the existence of debt have been explained in Law number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations, which in article 1 paragraph 6 reads:

“Debt is an obligation that is stated or can be expressed in the amount of money both in Indonesian currency and foreign currency, either directly or that will arise in the future or contingently, which arises due to an agreement or law and which must be fulfilled by the Debtor and if not fulfilled gives the Creditor the right to get its fulfillment from the Debtor's wealth.”

Through the definition of debt provided by the Bankruptcy Act, it is clear that the definition of debt must be interpreted broadly, debts coming from any agreements that can be assessed with a certain

⁸³ Ibid

amount of money, not just those arising from debt-receivable or loan-borrowing contracts.⁸⁴

3) At Least One Debt that is Matured and Collectable

The condition that the debt must have fallen over time and be collectible indicates that the creditor already has the right to sue the debtor to fulfill his obligations. According to Jono in his book stating:⁸⁵

“This condition indicates that the debt must be born out of perfect attachment (the presence of schuld and Haftung). Thus, it is clear that debts born of natural attachment (the existence of schuld without Haftung) cannot be advanced for the application for a declaration of bankruptcy. For example, debt that comes from gambling.”

In this requirement, it also means that the debtor does not pay at least one debt that is due and collectable. The meaning of not paying this means that the debtor stops paying. In this instance, the law provides no further clarification. The doctrine and the judge determine the size or criteria of the debtor who stops paying or does not pay the debt.⁸⁶ According to some jurisprudence, “stop paying” does not have to be regarded as a circumstance in which the debtor is unable to fulfill his debts to one or more creditors. At the moment the bankruptcy petition is filed, it can still be interpreted as a state in

⁸⁴ Dian Ayu Istyaningrum, “Legal Consequences of Bankruptcy Declaration of Inheritance Based on Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations”, Thesis, Universitas Islam Indonesia, Yogyakarta, 2016, p.26

⁸⁵ Jono, *Op.cit.*, p.11

⁸⁶ Rachmadi Usman, *Dimensi Hukum Kepailitan Indonesia*, PT. Gramedia Pustaka Utama, Jakarta, 2004, p.15

which the debtor no longer performs. In other words, the debtor has not been in a state of payment cessation if he or she is able to continue making payments even after a petition for bankruptcy has been filed with the court.⁸⁷ In this state, debts due indicates a predetermined date by which a payment or item must be received.⁸⁸

b. Requirements of Filing Bankruptcy according to United States Legal System

The requirements for filing for bankruptcy in the United States can be said to be quite different from Indonesia. In the United States, there are many types of bankruptcy. Almost any person in the United States can file for bankruptcy, even when that person is not a large company. Debtors can file for bankruptcy according to the chapter corresponding to their circumstances. For instance, if the court determines that granting relief under chapter 7 would be an abuse, the court may reject a chapter 7 case brought by a person whose obligations are predominantly consumer debts rather than corporate debts. The Bankruptcy Code requires a “means test” to evaluate if the chapter 7 filing is presumptively abusive if the debtor's “current monthly income” is greater than the state median. A pattern of abuse is indicated if the debtor's average monthly income over the past five years, after deducting certain permitted costs and secured debt payments, has been

⁸⁷ *Ibid.* p.16

⁸⁸ <https://kbbi.lektur.id/jatuh-tempo>, accessed on January 2, 2023

less than the larger of 25% of the debtor's nonpriority unsecured debt or \$9,075, or \$15,150, then abuse is deemed to have occurred.⁸⁹ Therefore, the court not only determines whether a person is worthy of being declared bankrupt but also whether the debtor is using the right chapter.

In the United States, there is no debt threshold below which a person cannot petition for bankruptcy. Chapter 7 bankruptcy, on the other hand, is a choice when they just cannot keep up with your debt payments. As part of the bankruptcy process, the court will look closely at their finances. The bankruptcy court may advise them to pursue another course of action if it finds that they have the ability to repay their obligations in some other way. The threshold for filing for bankruptcy is not set in stone, although there are debt limits in place. For instance, a Chapter 13 bankruptcy case has a limit of \$1,257,850 in secured debts such as debts tied to an asset, e.g. a car or home and \$419,275 in unsecured debts such as credit card and medical.⁹⁰ In United States legal system, it is not explained clearly what the requirements are because the debtor may file for bankruptcy and then the court will judge whether the debtor can be bankrupted and in accordance with the proposed chapter. However, bankruptcy is begun

⁸⁹<https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-7-bankruptcy-basics>, accessed on January 3, 2023

⁹⁰ Busch, Reed, Jones & Leeper, P.C, *What are the requirements for filing for bankruptcy?*, <https://www.buschreedlaw.com/blog/2021/november/what-are-the-requirements-for-filing-for-bankrup/>, accessed on January 3, 2023

by filling a petition which can be either voluntary, that is, started by the debtor; or involuntary, that is started by creditors. If the bankruptcy case is filed using voluntary petitions, according to Sutan Remy in his book, it states that:⁹¹

“Voluntary petitions can be filed by anyone except railroads and most banks and insurance companies.

- 1) A Debtor need not be insolvent or even allege that there are any debts.*
- 2) The filing of a voluntary petition equals an order by the bankruptcy court that the debtor is entitled to relief.”*

Based on the provisions above, it is not explained exactly what the conditions are like what the number of creditors is or how much the debt is not paid, it is only explained that the debtor is insolvent. Debtors who voluntarily file for bankruptcy are based on being insolvent so they cannot pay their debts. Alternatively, in general, debtors can file for bankruptcy with the following conditions:

- 1) Debtor makes a salary that is below the average income in debtor's state
- 2) Debtor spends the majority of debtor's money on bills and necessary expenses (debtor has little to no disposable income)
- 3) Debts are more than half of debtor's annual income
- 4) Even if debtor took extreme measures (such as skipping meals), Debtor could not pay off debt in 5 years

⁹¹ Adrian Sutedi, *Hukum Kepailitan*, Ghalia Indonesia, Bogor, 2009, p. 19

- 5) Debt is causing extreme stress and negatively affecting your health and relationships⁹²

If the debtor was in these conditions, filing for bankruptcy would be a solution. This condition tends to affect individual debtors where the debtor is unable to manage the debts.

Moreover, there are involuntary petitions that can be filed by creditors. Involuntary petitions can be filed only if the debtor:

- 1) Unable to pay bills as they become due, or
- 2) A court has appointed custodian or receiver (within 120 days after the state receiver is appointed).

Chapter 7 and 11 are the only involuntary filing options, and they cannot be used to submit a petition against a farmer, municipality or charitable organization. To require an involuntary bankruptcy, there must be :

- 1) A debtor with twelve or more creditors, and a minimum of three creditors must be owed at least \$5,000 in unsecured debt.
- 2) A debtor has fewer than twelve creditors, one creditor with an unsecured \$5,000 claim can file a petition, and if there is no one creditor with an unsecured claim of at least \$5,000, than any number of creditors with that amount can join together.

⁹² Busch, Reed, Jones & Leeper, P.C, *What are the requirements for filing for bankruptcy?*, <https://www.buschreedlaw.com/blog/2021/november/what-are-the-requirements-for-filing-for-bankrup/>, accessed on January 3, 2023

- 3) The Unsecured claim cannot be subject to a dispute raised in good faith.⁹³

If seen from the provisions above that the minimum amount of debt is \$ 5,000, then the creditor should file for bankruptcy. The provision also regulates the number of creditors in order to file for bankruptcy. These provisions also only apply to chapters 7 and 11, not all chapters.

3. Subject that can be Debtor

a. Subject that can be Debtor according to Indonesian Legal System

In Indonesian Legal System, this can be found in law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations, in article 2 paragraphs (3) to (5) it reads: ⁹⁴

“(3) In the event that the Debtor is a bank, the application for a declaration of bankruptcy may only be filed by Bank Indonesia. (4) In the event that the Debtor is a Securities Company, Stock Exchange, Clearing and Guarantee Institution, Depository and Settlement Institution, the application for a declaration of bankruptcy may only be filed by the Capital Market Supervisory Agency. (5) In the event that the Debtor is an Insurance Company, Reinsurance Company, Pension Fund, or State-Owned Enterprise engaged in the public interest, the application for a declaration of bankruptcy may only be filed by the Minister of Finance.”

From the article above, it can be concluded that those who can become debtors in bankruptcy are banks, Securities Companies, Stock

⁹³ Adrian Sutedi, *Loc.cit*

⁹⁴ Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations

Exchanges, Clearing and Guarantee Institutions, Depository and Settlement Institutions, Insurance Companies, Reinsurance Companies, Pension Funds, or State-Owned Enterprises engaged in the public interest. Debtor can also be said to be a party who can be declared bankrupt in an bankruptcy case. Article 2 also explains the requirements of bankruptcy, which explains that the condition is to have two or more Creditors and not to pay in full at least one debt that has fallen due and can be collected. The article has its subject, namely the debtor. The debtor here may consist of a person or a private entity or a legal entity, then based on the foregoing the parties that can be declared bankrupt are:

- 1) A person or private entity.

The subject that can be declared bankrupt here is The individual or business, which is a human who qualifies the article 2 requirement of having two or more creditors and failing to pay in full at least one debt that has fallen due and can be collected. The debtor or by one or more of the debtor's creditors may file bankruptcy petition.

- 2) Married debtors.

If there is a mixture of property between a married debtor and his or her spouse, the spouse's consent is required for the filing of a petition for bankruptcy. In addition, Article 119 of the Civil Code provides that from the moment a marriage is legally valid, union

of the husband's and wife's property applies, unless they have marriage agreement.

- 3) Legal entities, including limited liability companies, state companies, cooperatives, and associations with legal entity status, such as foundations.

A legal entity can be declared bankrupt since it is a legal subject. Even though they have a separation of wealth from the property, this legal entity can still be declared bankrupt. When a company declares bankruptcy, the organs of the legal entity lose the authority to manage the company's assets. When a company or other legal entity declares bankruptcy, its assets are turned over to a curator. Hence, pursuant to Article 24 of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations, litigation arising from the debtor's property rights and responsibilities must be filed with the curator. The Law on Limited Liability Companies (PT) governs the responsibility of the company's management in bankruptcy, specifically Law No. 1 of 1995 Article 1 Paragraph 4, which states that the Board of Directors is responsible for operating and representing the Limited Liability Company.

- 4) Inherited property.

According to Article 197 of the Bankruptcy Law Number 4 of 1998, If one or more of the decedent's creditors files an application

and provides a brief summary of the statement that the decedent has either stopped making payments on his debts or that his estate is insufficient to cover those debts upon his death, then the decedent's property must be declared bankrupt. Only one creditor may file a petition for bankruptcy against this estate through the court in the jurisdiction where the deceased debtor resided. The petition must be submitted no later than three months after the applicant has received the inheritance or six months after the debtor's death. In addition, under Article 1107 of the Civil Code, the deceased's inheritance is legally distinct from the property of his heirs after a bankruptcy is declared.⁹⁵

b. Subject that can be Debtor according to United States Legal System

In the United States, who can be used as a debtor can be found in 11 U.S.C. §109(b) (the Bankruptcy Code), in paragraph b which reads:⁹⁶

“A person may be a debtor under chapter 7 of this title only if such person is not: a railroad; a domestic insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, a New Markets Venture Capital company as defined in section 351 of the Small Business Investment Act of 1958, a small business investment company licensed by the Small Business Administration under section 301 of the Small Business Investment Act of 1958, credit union, or industrial bank or similar institution which is an insured bank as defined in section 3(h) of the Federal Deposit Insurance Act, except that an uninsured State member bank, or a corporation organized under section 25A of the Federal Reserve Act, which

⁹⁵Rahayu Hartini, *Penyelesaian Sengketa Kepailitan di Indonesia: Dualisme Kewenangan Pengadilan Niaga & Lembaga Arbitrase*, Edisi 1, Cetakan ke-1, Kencana, Jakarta, 2009, p.94-99.

⁹⁶ Chapter 1 of title 11 of the United States Code (the Bankruptcy Code)

operates, or operates as, a multilateral clearing organization pursuant to section 409 [1] of the Federal Deposit Insurance Corporation Improvement Act of 1991 may be a debtor if a petition is filed at the direction of the Board of Governors of the Federal Reserve System; or a foreign insurance company, engaged in such business in the United States; or a foreign bank, savings bank, cooperative bank, savings and loan association, building and loan association, or credit union, that has a branch or agency (as defined in section 1(b) of the International Banking Act of 1978) in the United States.”

Based on the above provisions, what can be used as a debtor under chapter 7 is everyone except the person or entity mentioned above.

Then it continues in paragraph c which reads:⁹⁷

“An entity may be a debtor under chapter 9 of this title if and only if such entity: is a municipality; is specifically authorized, in its capacity as a municipality or by name, to be a debtor under such chapter by State law, or by a governmental officer or organization empowered by State law to authorize such entity to be a debtor under such chapter; is insolvent; desires to effect a plan to adjust such debts; and has obtained the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter; has negotiated in good faith with creditors and has failed to obtain the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter; is unable to negotiate with creditors because such negotiation is impracticable; or reasonably believes that a creditor may attempt to obtain a transfer that is avoidable under section 547 of this title.”

Based on the above provisions that can be declared debtor under chapter 9 is municipality, which then becomes a debtor under such chapter by State law or by a governmental officer or organization empowered by State law. Then in paragraph e which reads:⁹⁸

⁹⁷*Ibid*

⁹⁸*Ibid*

“Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated debts of less than \$2,750,000 or an individual with regular income and such individual’s spouse, except a stockbroker or a commodity broker, that owe, on the date of the filing of the petition, noncontingent, liquidated debts that aggregate less than \$2,750,000 may be a debtor under chapter 13 of this title.”

Based on the above provisions a person who can be declared a debtor under chapter 13 is an individual with regular income that owes or an individual with regular income and such individual's spouse. Then in paragraph f which states that, “Only a family farmer or family fisherman with regular annual income may be a debtor under chapter 12 of this title.”⁹⁹ Based on the above provisions that can become a debtor under chapter 12 is a family farmer or family fisherman with regular annual income. Based on the Chapter 1 of title 11 of the United States Code (the Bankruptcy Code), there are many types of bankruptcy. There are six types of bankruptcy – Chapter 7, 9, 11, 12, 13 and 15. Chapter 7 and 13 are the most common types affecting individuals:

- 1) **Chapter 7:** If a debtor has assets that are not exempt under Chapter 7, a trustee appointed by the court may sell those assets and distribute the net proceeds to the debtor's creditors.
- 2) **Chapter 9:** Municipalities (cities, townships, school districts, etc.) in financial difficulties – with protection from creditors. It

⁹⁹ *Ibid*

formulates a plan to settle the debt owed by the municipality to its creditors.

- 3) **Chapter 11:** When a debtor files for bankruptcy protection under Chapter 11, it is possible to reorganize the debtor's business, debts, and assets. Under Chapter 11, companies can reorganize their debts while continuing operations.
- 4) **Chapter 12:** This is aimed toward "family farmers" and "family fisherman" who are having financial difficulty. The debtor formulates a plan to repay creditors over the next three to five years.
- 5) **Chapter 13:** Those who have a steady income can reorganize their debts and return some or all of their creditors through Chapter 13. It is commonly known as "wage-earner's bankruptcy."
- 6) **Chapter 15:** To facilitate collaboration between U.S. and foreign courts in cases where overseas bankruptcy filings have an impact on U.S. financial interests, Chapter 15 bankruptcy was added to the code in 2005.¹⁰⁰

Based on the explanation above, the debtor in the United States legal system can be categorized into different types according to the

¹⁰⁰ Bill Fay, *What is Bankruptcy & How Does It Works?*, <https://www.debt.org/bankruptcy/>, accessed on January 3, 2023

appropriate chapter. The types of bankruptcy that have been described above, it has different consequences, conditions, and methods.

4. Legal Consequences Declared Bankrupt

a. Legal Consequences Declared Bankrupt according to Indonesian Legal System

In Indonesian Legal System, All of the debtor's assets at the time the bankruptcy statement is declared, as well as any wealth acquired during the bankruptcy, are included in the bankruptcy estate, as detailed in the annex to article 19 of the Bankruptcy Law No. 4 of 1998 and article 21 of the Bankruptcy Law No. 37 of 2004.¹⁰¹ Based on the provisions of the annex to article 19 of Bankruptcy Law Number 4 of 1998 and article 21 of the Bankruptcy Law Number 37 of 2004, what is declared bankrupt is the entire wealth of the debtor, not the person. Therefore, Article 24 of Law No. 37 of 2004 states that a person who is legally insolvent forfeits the right to dispose of and care for any property that is involved in the bankruptcy proceeding as of the date the bankruptcy decision is pronounced. The verdict date is based on the local midnight (00.00).¹⁰² Therefore, when the debtor loses his right to manage or take care of his property, the property will be taken care of by the curator.

¹⁰¹ Rahayu Hartini, *Hukum Kepailitan*, Edisi Revisi, Cetakan ke-2, UMM Press, Malang, 2007, p.103

¹⁰² *Ibid.* p.104

For example, if a bankrupt debtor serves on the board of directors of a limited liability company or other legal organization, that board's ability to govern the bankrupt debtor's company or legal entity will be “shackled” by the bankruptcy decision, even if the directors continue in office. There is a *functus officio* in the management of the debtor company or other legal entities.¹⁰³ Shackling in this condition can be said to mean that although they still serve as directors, the legal action they can take is limited and under the supervision of the curator in matters relating to finances that can become bankruptcy assets. The directors' authority, at least in relation to financial assets that might be bankruptcy property, has been suspended, and they are not authorized to issue any additional directives in this regard. Particularly in the instance of a limited liability company debtor, the company's organs continue to function in accordance with the explanation of Article 24 paragraph (1), provided that if in its operation it causes a decrease in bankruptcy assets, then the expenses of money which is part of the bankruptcy property, is within the authority of the curator. This means that the company's management can only pursue legal action insofar as it relates to the company's receipt of income, while the curator has power to decide over any expenditures made from the bankruptcy estate.¹⁰⁴

¹⁰³ Sutan Remy Sjahdeini, *Op.cit*, p.191

¹⁰⁴ *Ibid*

b. Legal Consequences Declared Bankrupt according to United States

Legal System

In the United States, there are different outcomes in bankruptcy according to the type of chapter that is filed. But not all chapters are available for all businesses. If a single owner or a single owner and a partner file for Chapter 7 bankruptcy, the business's debts will be discharged in almost their entirety. Corporations have the alternatives of filing under Chapter 11 or Chapter 13, both of which require the repayment of at least some of the debt over time.¹⁰⁵ One of the influential ones after filing for bankruptcy for all chapters is the ability to get a credit. Business owners may be impacted by a bankruptcy filing. Only if the business owner applies for a loan or establishes a credit card in his or her own name will the business's debts appear on the owner's personal credit report. Additionally, if the company in which they have invested declares bankruptcy, the shareholders will also be negatively impacted.¹⁰⁶

In the United States, Chapter 7 and Chapter 13 bankruptcies are the most often type of bankruptcy filed. The most common form of bankruptcy is Chapter 7, which is a liquidation, and Chapter 13, which

¹⁰⁵ _____, *What are the Long-Lasting Effects of Bankruptcy?*, <https://www.ksnpc.com/blog/what-are-the-long-lasting-effects-of-bankruptcy/#:~:text=They%20will%20typically%20lose%20money,shareholders%27%20benefits%20regarding%20that%20company>, accessed on January 17, 2023

¹⁰⁶ *Ibid*

is a reorganization, in which the debtor proposes a plan to repay some or all of their creditors. Part of the process of filing for Chapter 7 or Chapter 13 bankruptcy proceedings is the sale of assets to repay debtors. The term “non-exempt assets” is used to describe a wide variety of possessions, such as those used for vacation or rental purposes, valuable art, stamp, or coin collections, fine jewelry and designer apparel, antique or modern furniture, late-model vehicles, and specific investment types. To simplify, the debtor will lose his or her possessions.¹⁰⁷ It is possible to “exempt” certain assets from the bankruptcy process. The type and quantity of applicable exemptions vary from state to state. This implies the debtor can typically protect a portion of the equity in their home and other assets. Generally, the federal limit is \$25,150, or \$40,000 if the debtor is married.¹⁰⁸ Aside from taking the debtor's property to pay the debt to the debtor, another consequence in bankruptcy in the United States is that it hugely impacts debtor credit. According to the website of the credit scoring model FICO, a bankruptcy will always be viewed as a negative occurrence by debtor's FICO Score. As long as a bankruptcy case remains on a debtor's credit report, the debtor's credit score will be negatively impacted for many years. A Chapter 7 bankruptcy remains on a credit

¹⁰⁷ _____, *Understanding the Consequences of Bankruptcy*, <https://www.takechargeamerica.org/understanding-the-consequences-of-bankruptcy/>, accessed on January 12, 2023

¹⁰⁸ Bill Fay, *What Are the Consequences of Bankruptcy?*, <https://www.debt.org/bankruptcy/consequences/>, accessed on January 17, 2023

report for ten years, whereas a Chapter 13 bankruptcy remains for seven.¹⁰⁹

5. Efforts that can be Used to Restructure Debt so as to Avoid Bankruptcy

a. Efforts that can be Used to Restructure Debt so as to Avoid Bankruptcy according to Indonesian Legal System

Generally, a company may choose to reorganize or restructure its internal structure in order to boost efficiency and productivity.¹¹⁰ Debt restructuring is one of the efforts to avoid bankruptcy. In Indonesia, by restructuring their debt in a way that keeps them in business and protects their assets, the Debtor can apply to have their debts suspended or Suspension of debt repayment obligations while still paying their debts to creditors.¹¹¹ Debt restructuring of the debtor company in order to pay its debts can generally be done in two ways, namely:

- 1) Debt restructuring involves cooperative effort and consensus on the part of creditors and debtors.
- 2) By requesting a Suspension of debt payment obligations provided by Law No. 37 of 2004.¹¹²

¹⁰⁹Elizabeth Gravier, *Filing for bankruptcy can cause a good credit score to drop at least 200 points—here's what you should know*, <https://www.cnbc.com/select/how-long-do-bankruptcies-stay-on-credit-report/>, accessed on January 17, 2023

¹¹⁰ Zaeni Asyhadie dan Budi Sutrisno, *Hukum Perusahaan dan Kepailitan*, Penerbit Erlangga, Jakarta, 2012, p.173.

¹¹¹ Hasdi Hariyadi, “Restrukturisasi Utang Sebagai Upaya Pencegahan Kepailitan Pada Perseroan Terbatas”, *SIGn Jurnal Hukum*, Vol.1, No. 2, Sekolah Tinggi Ilmu Hukum Lamadukelleng, 2020, p.120

¹¹² *Ibid*, p.123

In addition, Suspension of Payment, also known as *Surssance van Befaling*, is a legal remedy granted by a commercial judge that allows the creditor and debtor a chance to negotiate a repayment plan for the debt, or to restructure the debt if necessary. the suspension of debt repayment obligations is a kind of moratorium, namely a legal moratorium.¹¹³ At its core the purpose of restructuring in addition to paying debts is to make peace. Usually debt restructuring programs consist of:

- 1) A moratorium, which is a postponement in the repayment of matured debts.
- 2) Haircut, which is nothing but a deduction or reduction of the principal and interest
- 3) Reduction of interest rates
- 4) Extension of the repayment period
- 5) Conversion of debt to shares
- 6) Debt Forgiveness
- 7) Bailouts, e.g. government expropriation of private debts
- 8) Write-off, i.e. write-off of debts.¹¹⁴

The restructuring step through a business-to-business approach strategy, is more direct and informal between the debtor and his creditor. In addition, even though Indonesia is different

¹¹³ Munir Fuady, *Op.cit*, p.177.

¹¹⁴ *Ibid*, p.209.

from Singapore's Bankruptcy Law and other Common Law countries that have more debt restructuring facilities available to them, the Indonesian's Bankruptcy Law still gives debtors two options for filing for restructuring such as a PKPU application based on Article 222 of the Bankruptcy Law, and the filing of a peace proposal after the debtor has been declared bankrupt under Section 144 of the same Act.¹¹⁵

b. Efforts that can be Used to Restructure Debt so as to Avoid Bankruptcy according to United States Legal System

Viewing from the point of view of Bankruptcy Law in the United States, the United States is a country that uses a common law legal system. In Bankruptcy Code, restructuring or reorganization is described in Chapter 11. The benefits of filing for Chapter 11 bankruptcy is that it gives debtors the opportunity to maintain their operations as a going concern while receiving judicial debt adjustment in the form of, for example, a reduction in the principal owed or an extension of the time allowed to repay the debt. Additionally, restructure the operations by disposing of money-losing contracts and departments (among other things). However, in the United States, a company is not required to be insolvent or unable to pay its debts on time in order to file for Chapter 11 relief, and there is no eligibility test or other requirement that a debtor's debts exceed its assets or that it is

¹¹⁵ Ricardo Simanjuntak, *Restrukturisasi Utang, Upaya Menghindari Kebangkrutan Akibat Pandemi*, <https://www.hukumonline.com/berita/a/restrukturisasi-utang--upaya-menghindari-kebangkrutan-akibat-pandemi-oleh--ricardo-simanjuntak-lt5f02fc6fd426b/?page=1>, (accessed on November 15, 2022)

unable to pay its debts as they become due. Many United States' businesses reorganize their operations through Chapter 11 bankruptcy even when they have sufficient funds to meet their current debt responsibilities. Nonetheless, the fact that the debtor is making timely payments on its debts might be used as a defense against an involuntary petition.¹¹⁶

By decreasing the debt load of reorganized corporations, Chapter 11 may provide an opportunity for corporate debtors to create sufficient cash flow to make debt service payments. As part of the process, the debtor's secured and/or unsecured debt may be converted into new equity in the reorganized debtor, with the result that the prior equity interests are cancelled. Although it happens less often, if creditors are paid in full or agree to a reorganization, old equity holders may be allowed to continue to participate in the reorganized debtor through warrants or a substantially decreased equity holding.¹¹⁷ It also allows for a reorganization of the debtor corporate's operations. This may need significant foreclosures or lease denials, the sale of underperforming

¹¹⁶ Dennis F. Dunne and Gerard Uzzi, Milbank LLP, *Restructuring and insolvency in the United States: overview*, [https://content.next.westlaw.com/practical-law/document/Id4cf8e42f3ad11e28578f7ccc38dcbee/Restructuring-and-insolvency-in-the-United-States-overview?viewType=FullText&transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://content.next.westlaw.com/practical-law/document/Id4cf8e42f3ad11e28578f7ccc38dcbee/Restructuring-and-insolvency-in-the-United-States-overview?viewType=FullText&transitionType=Default&contextData=(sc.Default)&firstPage=true), (accessed on November 19, 2022)

¹¹⁷ Baker McKenzie, *Global Restructuring & Insolvency Guide United States*, <http://restructuring.bakermckenzie.com/wp-content/uploads/sites/23/2016/12/Global-Restructuring-Insolvency-Guide-New-Logo-United-States.pdf>, (accessed on November 19, 2022)

business units, or the downsizing of operations to create more effective business models.

B. Overview about Company / Corporate

1. Overview about Company according to Indonesian Legal System

According to numerous literatures, company is an economic term recognized by the Trade Law Code (KUHD) and other provisions of the Trade Law Code (KUHD).¹¹⁸ To find out more clearly and further the definition of company in the perspective of Indonesian legal system can be found in laws, dictionaries and scholar's opinions. First, according to Indonesian law, this can be found in article 1 of Law Number 3 of 1982 concerning Compulsory Company Registration, which reads:¹¹⁹

"A company is any form of business that runs every type of business that is permanent and continuous and that is established, works and is domiciled in the territory of the Republic of Indonesia, for the purpose of obtaining profit and or profit."

Based on the above definition, it can be said that the company has a goal to get profit and or profit. This company works and is domiciled in Indonesia and is subject to Indonesian law. A company to conduct its business can become a legal entity. Moreover, from the above

¹¹⁸ Zaeni Asyhadie dan Budi Sutrisno, *Hukum Perusahaan dan Kepailitan*, Penerbit Erlangga, Jakarta, 2012, p.36

¹¹⁹ Law Number 3 of 1982 concerning Compulsory Company Registration

definition, there are two main elements contained in a company, namely:

- a. Establish a business entity that operates each type of business in Indonesia in the form of a partnership or a legal entity, operational, and domiciled in Indonesia.
- b. Kind of business that consists of activities in the business field that are conducted continually for profit.¹²⁰

Second, the definition of company can be found in the dictionary, which according to the Big Indonesian Dictionary (KBBI) defines a company as:¹²¹

“A company is an activity (work and so on) organized with equipment or in an orderly way with the aim of making a profit (by producing something, processing or making goods, trading, providing services). A company is an incorporated organization that enters into a transaction or undertaking.”

From the definition of a large Indonesian dictionary company, a company is something that is associated with businesses and activities whose purpose is to seek profit from producing something, processing or making goods. Third, the definition of a company can be understood further by looking at it from the point of view of scholar's opinions. Molengraaf argues that a company is an integrated set of activities carried out over time with the aim of earning profits (either directly or indirectly) through the exchange of goods or the making of trade

¹²⁰ Zaeni Asyhadie dan Budi Sutrisno, Op.Cit. p.37

¹²¹ <https://jagokata.com/arti-kata/perusahaan.html>, accessed on January 17, 2023.

agreements. Polak, on the other hand, states that there is only a company if a profit-and-loss assessment is required and everything is recorded in the books.¹²² Based on Molengraaf's opinion that the company carries out a business activity to earn income while according to Polak that the company needs to calculate profit and loss. Therefore, it can be seen that based on the two opinions of both Molengraaf and Polak, the company is related to income.

In principle, companies as a vehicle / pillar of economic development regulated in the Civil Code, Trade Code, and other laws and regulations consist of three types, namely as follows:

- a. Sole proprietorships, often known as an individual company, is a business whose ownership is held by a single individual. Individual companies with modest capital, restricted production in terms of type and quantity, few workers/laborers, and unsophisticated technological means of production.
- b. Legal entity partnership companies can be organized as Limited Liability Corporations (PT), cooperatives, or even State-Owned Businesses (SOEs) (BUMN). A limited liability company (LLC) is a type of corporate organization in which at least two persons ownership of a company, with liability that only applies to the firm and excludes personal or individual property. There are many

¹²² Ridwan khairandy, Op.cit. p.160

requirements, including a minimum capital requirement, that must be met in order to form a limited liability company.

- c. A partnership company is not a legal entity and is also known as a partnership company, which refers to a business entity controlled by two or more people who collaborate to achieve business objectives. Civil partnerships, firm partnerships, and communitarian companies are all examples of the partnership business entity. Establishing a partnership as a business entity requires the acquisition of the appropriate permits from the relevant government agencies.¹²³

Moreover, for further understanding, the forms of companies in Indonesia according to the law, namely:

- a. Regulation of individual companies according to Law No. 11 of 2020 concerning Job Creation which gave rise to a new form of legal entity called an individual company. According to Article 109 which states that a Company that meets the criteria for Micro and Small Enterprises can be established by 1 (one) person. Then in same article which reads that:¹²⁴

“(1) The shareholders of the Company for Micro and Small Enterprises as referred to in Article 153A are natural persons. (2) The Founder of the Company may only establish a Limited Liability Company for Micro and Small Enterprises in the amount of 1 (one) Company for Micro and Small Enterprises in 1 (one) year.”

¹²³ Zaeni Asyhadie dan Budi Sutrisno, *Op.cit*, p.37

¹²⁴ Law No. 11 of 2020 concerning Job Creation

Based on the above provisions that in Indonesia allows the existence of individual companies but is limited to Micro and Small Enterprises and can only establish 1 a year. Therefore, this form of individual company is a business entity. In addition, individual companies include companies that are required to be registered with the Company Registration Office according to Law Number 3 of 1982 concerning Mandatory Company Registration. However, according to article 6 paragraph 1 letter b which states that the exemption from the mandatory list is any Individual Small Company that is run by its own private entrepreneur or by employing only its own closest family members and does not require a business license and does not constitute a legal entity or an alliance.¹²⁵ According to the above provisions, an individual business entity can be established without being a legal entity as long as the company is taken care of, run, or managed privately by the owner, by only employing family members and really just to meet the daily living needs of the owner. This company can be in the form of a Home industry.

- b. Legal entities or legal entity partnerships can be in the form of Limited Liability Companies (PT), Foundations and Cooperatives. In addition, it can be in the form of State-Owned Enterprises

¹²⁵ Article 6 paragraph 1 letter b Law Number 3 of 1982 concerning Mandatory Company Registration

(BUMN), Regionally Owned Enterprises (BUMD) and Village-Owned Enterprises (BUMDes). Limited Liability Company has its own legal basis, which is regulated in Law of the Republic of Indonesia Number 40 of 2007 concerning Limited Liability Companies. According to article 1 of this law states that a Limited Liability Company, hereinafter referred to as the Company, is a legal entity that is a capital partnership, established under an agreement, conducting business activities with authorized capital divided entirely into shares and fulfilling the requirements set forth in this Law and its implementing regulations.¹²⁶ Then, it is further regulated by law Number 11 of 2020 concerning Job Creation which replaces Article 32 paragraph (2) of the Limited Liability Company Law, which in article 109 of the job creation law states that the amount of the Company's authorized capital as referred to in paragraph (1) is determined based on the decision of the Company's founder.¹²⁷

In addition to limited liability companies, other business entities are foundations. According to article 1 of the Law of the Republic of Indonesia number 16 of 2001 concerning Foundations states that a foundation is a legal entity consisting of wealth that is separated and intended to achieve certain goals in the social, religious, and

¹²⁶ Article 1 Law of the Republic of Indonesia Number 40 of 2007 concerning Limited Liability Companies.

¹²⁷ Article 109 law Number 11 of 2020 concerning Job Creation

humanitarian fields, which do not have members.¹²⁸ Then in article 3 it is explained that the Foundation can carry out business activities to support the achievement of its goals and objectives by establishing a business entity and / or participating in a business entity.¹²⁹ Meanwhile, according to article 1 of the Law of the Republic of Indonesia Number 25 Of 1992 concerning Cooperatives explained that a Cooperative is a business entity consisting of people or legal entities of a Cooperative based on the principle of Cooperatives as well as a people's economic movement based on the principle of kinship.¹³⁰ Based on the two types of business entities above, they are both business entities such as limited liability companies, but different purposes where limited liability companies focus on business where the orientation is to get a profit of the amount.

In addition, the types of business entities where legal entities are also State-Owned Enterprises (BUMN), Regionally Owned Enterprises (BUMD), and Village-Owned Enterprises (BUMDes). The most noticeable difference is the coverage area where BUMN is state-owned, the scope is one state, BUMD is owned by a region where the scope is an area that can be provincial or city level, and BUMDes belongs to a village, so the regional coverage is a certain

¹²⁸ Article 1 of the Law of the Republic of Indonesia number 16 of 2001 concerning Foundations

¹²⁹ Article 3 of the Law of the Republic of Indonesia number 16 of 2001 concerning Foundations

¹³⁰ Article 1 of the Law of the Republic of Indonesia Number 25 Of 1992 concerning Cooperatives

village. In Indonesia, BUMN is regulated in the Law of the Republic of Indonesia number 19 of 2003 concerning State-Owned Enterprises. According to article 1 of this law, it states that State-Owned Enterprises, hereinafter referred to as BUMN, are business entities whose entire or most of the capital is owned by the state through direct participation derived from segregated state assets.¹³¹ Then, in article 4 it is explained that the capital of BUMN is and comes from the wealth of the separated state.¹³² Meanwhile, According to article 1 of the Law of the Republic of Indonesia number 23 of 2014 concerning Regional Government explains that Regionally Owned Enterprises, hereinafter abbreviated as BUMD, are business entities whose entire or most of their capital is owned by the regions.¹³³ Besides, in Article 134 paragraph 1 explains that civil servants, members of the Indonesian National Army / National Police of the Republic of Indonesia, employees of state-owned enterprises, BUMDs, or other entities whose budgets are sourced from the APBN / APBD.¹³⁴ Then it is further explained through Government Regulation Number 54 of 2017 concerning Regionally

¹³¹ Article 1 Law of the Republic of Indonesia number 19 of 2003 concerning State-Owned Enterprises.

¹³² Article 4 Law of the Republic of Indonesia number 19 of 2003 concerning State-Owned Enterprises.

¹³³ Article 1 of the Law of the Republic of Indonesia number 23 of 2014 concerning Regional Government

¹³⁴ article 134 of the Law of the Republic of Indonesia number 23 of 2014 concerning Regional Government

Owned Enterprises in article 4 paragraph 2 that the Establishment of BUMD is determined by Local Regulations (PERDA).¹³⁵

Additionally, According to article 1 of the Law of the Republic of Indonesia number 6 of 2014 concerning Villages, it is explained that Village-Owned Enterprises, hereinafter referred to as Village-Owned Enterprises, are business entities whose entire or most of the capital is owned by the Village through direct participation derived from village assets that are separated to manage assets, services, and other businesses for the maximum welfare of the village community.¹³⁶ Meanwhile, according to article 117 of law Number 11 of 2020 concerning Job Creation explains that Village-Owned Enterprises, hereinafter referred to as Village-Owned Enterprises, are Legal Entities established by villages and/or together with villages to manage businesses, utilize assets, develop investment and productivity, provide services, and/or provide other types of businesses for the welfare of the village community.¹³⁷

- c. Business entities that are not legal entities, civil partnerships are regulated in article 1618 of the Civil Code which reads:¹³⁸

“A civil company is an agreement between two or more persons, who undertakes to incorporate something into the company with the intention that the profits derived from the company be divided between them.”

¹³⁵ Article 4 paragraph 2 Government Regulation Number 54 of 2017 concerning Regionally Owned Enterprises

¹³⁶ Article 1 of the Law of the Republic of Indonesia number 6 of 2014 concerning Villages

¹³⁷ Article 117 of law Number 11 of 2020 concerning Job Creation

¹³⁸ Article 1618 of the Civil Code

Meanwhile, the firm is regulated in the Trade Law Code which in article 16 explains that a Firm Company is a company established to conduct a business under one common name.¹³⁹ In addition, according to article 19, it is explained that a Company formed by lending money or also called a private company, is established between a person or between several persons who are jointly responsible for the whole, and one or more persons as money lenders. A company can be at once a corporate company against a firm company in it and a company against a money lender.¹⁴⁰

2. Overview about Corporate according to United States Legal System

In the United States legal system, it uses the term corporation more than company. To find out more clearly and further the definition of corporation in the perspective of the United States legal system can be found in laws, dictionaries and scholar's opinions. First, according to United States law, what is meant by a United States corporation means a corporation that has been formed and recognized under the laws of the United States, any state in the United States, or the District of Columbia.¹⁴¹ In the United States, Corporations are fictitious single-person entities. Similar to an individual, a corporation can sue, be sued, lend, and borrow. In contrast, the word “company” is commonly used to refer to any single person or group of individuals who operate a

¹³⁹ Article 16 Trade Law Code

¹⁴⁰ Article 19 Trade Law Code

¹⁴¹ <https://www.lawinsider.com/dictionary/us-corporation>, accessed on January 19, 2023

business for the aim of producing a profit. Companies do not need to register with the government or obtain special permission to operate since the term “company” is too broad.¹⁴² A corporation in the United States is the same as one in Indonesia, which is a legal entity. However, in the United States, the term corporation is used more often because the corporation itself is divided into many types, not limited to large corporations or Limited Liability Companies. Therefore, a “corporation” in the United States refers to the kind of companies that are not included as a legal entity in Indonesia but is included in the United States. The majority of jurisdictions’ authorization and regulation of corporations are found in state statutes, with many of those statutes being modeled after the American Bar Association’s Model Business Corporation Act (ABA). Corporations are generally governed by state law, but there are several areas where federal law takes precedence. In instance, the Securities Act of 1933 mandates that financial statements and other executive information be frequently disclosed by most stock-issuing corporations through filings with the Securities Exchange Commission (SEC).¹⁴³ Therefore, the definition of corporation can be found from state laws, in this case as an example can be seen from New York State and Washington D.C. According to 29A

¹⁴² _____, *Corporations vs. Company: What's the Difference?*, <https://www.indeed.com/career-advice/career-development/corporation-vs-company>, accessed on March 20, 2023

¹⁴³ <https://www.law.cornell.edu/wex/corporations>, accessed on January 19, 2023

Chapter 3 subchapter I § 29A–301.02. (4) Code of the District of Columbia which reads: ¹⁴⁴

“"Corporation", "domestic corporation", or "domestic business corporation" means a corporation for profit, which is not a foreign corporation, incorporated under or subject to this chapter.”

Meanwhile, according to chapter 4 article 1 § 102 (4) of the Consolidated laws of New York, the Laws of New York which reads:¹⁴⁵

“"Corporation" or "domestic corporation" means a corporation for profit formed under this chapter, or existing on its effective date and theretofore formed under any other general statute or by any special act of this state for a purpose or purposes for which a corporation may be formed under this chapter, other than a corporation which may be formed under the cooperative corporations law.”

Based on the two state laws, both New York State Law and Washington D.C State Law, it is explained that corporations are those that aim to gain profit and which are regulated in these state laws.

Second, the definition of corporation from the dictionary, according to the Cambridge Dictionary states that “A large company or group of companies that is controlled together as a single organization.”¹⁴⁶ Based on the definition of corporation described in the Cambridge Dictionary that a corporation consists of a group and into a single organization. This corporation is associated with business. Third,

¹⁴⁴ <https://code.dccouncil.gov/us/dc/council/code/sections/29-301.02>, accessed on January 19, 2023

¹⁴⁵ <https://www.nysenate.gov/legislation/laws/BSC/102>, accessed on January 19, 2023

¹⁴⁶ <https://dictionary.cambridge.org/dictionary/english/corporation>, accessed on January 19, 2023

The definition of a corporation is based on scholar's opinion, according to Fisher and Phillips says that: ¹⁴⁷

“The word corporation derives from the Latin word corpus, which means 'body'. A corporation is a legal person body, or entity. It is intangible. It is a legal fiction. It is made up, a notion created by the law to satisfy certain social and economic needs.”

According to Fisher and Phillips' scholar's opinion, a corporation is a body formed by law to meet social and economic needs. Therefore, it is the law that makes the corporation a legal entity.

In the United States, there are generally 6 types of corporations, namely:

- 1) Sole proprietorship: There is no formal separation between the business and its owner in a sole proprietorship. When a business has a single owner, that person is personally responsible for all business debts and damages.
- 2) Partnerships, there are 3 kinds of partnerships, namely :
 - a) General partnership, Similar to sole proprietorships, partners in general partnerships take personal risk for business operations.
 - b) Joint venture, While resembling a general partnership in many aspects, a joint venture is distinguished by its limited scope and time duration. A joint venture is often formed for a shorter period

¹⁴⁷ Ryan Amanda Fitra, “Pertanggungjawaban Pidana Korporasi Pelanggar Baku Mutu Air Limbah PT Albasi Priangan Lestari Dihubungkan dengan Undang-Undang Nomor 32 Tahun 2009 tentang Perlindungan dan Pengelolaan Lingkungan Hidup”, Thesis, Universitas Pasundan, Bandung, 2017, p.38

of time than a general partnership, which may or may not have an end date.

c) Limited liability partnership, an Partners in an LLP do not personally bind the debts or obligations of the business. A partner in a limited liability partnership (LLP) is not responsible for the torts (illegal actions) of other partners, employees, or the partnership, in contrast to the general partnership and joint venture structures.

3) Limited Liability Company (LLC) : A limited liability company is a corporate entity that provides a certain separation between the owners of the company and the company itself. A limited liability company shields its owners from liability for most debts and damages and safeguards their personal assets in the case of business failure.

4) S Corporation : S companies (S corps) are business entities that pass through company profits, losses, credits, and deductions to shareholders, who number no more than 100. Companies organized as S corporations (S corp) can pay wages to shareholders who are also employees of the company, which is not possible for general partnerships or sole proprietorships.

5) C Corporation : C corporations (C corp) are similar to S corporations in that profits may be distributed to shareholders. A C corp can have an unlimited number of stockholders, while a S corp cannot.

However, a C corp must always have a board of directors, the company's primary decision-makers.

- 6) Non-profit Corporation : In many ways, the structure of a nonprofit corporation is similar to that of a for-profit one. Similar to how shareholders provide capital for and exert some control over for-profit businesses through stock ownership, nonprofits are governed by boards of directors and receive funding from, and in some cases may exercise oversight over, the company's activities. Additionally, shareholders have ownership while donors do not have ownership. However, a non-profit organization does not make profit.¹⁴⁸

C. Overview about Pandemic

a. Overview about Pandemic according to Indonesian Legal System

As a phenomenon, the pandemic is linked to medical concerns. The word “pandemic” is derived from the Greek words “*pan*” meaning “all” and “*demos*” meaning “people.”¹⁴⁹ From an Indonesian Legal perspective, the definition of pandemic can be found from dictionaries, and Indonesian laws. First, the definition of a pandemic according to the Big Indonesian Dictionary (KBBI), a pandemic is an outbreak that spreads simultaneously everywhere, covering a large geographical

¹⁴⁸ _____, *6 Types of Corporations: A Comparison of Business Structures*, <https://www.shopify.com/blog/types-of-corporations>, accessed on January 19, 2023

¹⁴⁹ <https://aido.id/health-articles/mengenali-perbedaan-pandemi-dan-epidemi/detail>, accessed on January 19, 2023

area.¹⁵⁰ Based on the definition according to the Big Indonesian Dictionary (KBBI), a pandemic is a disease that spreads to various regions. Therefore, it means that the pandemic is happening on a large scale. Second, In Indonesian law, it is not clearly explained what a pandemic is, but according to the Ministry of Health of the Republic of Indonesia, a pandemic is an outbreak that happens simultaneously worldwide, spanning a vast geographical region (all countries or continents), and typically affecting a huge number of people. COVID-19 is an example of a disease that is currently becoming pandemic.¹⁵¹

After presidential decree number 11 of 2020 concerning the Determination of Public Health Emergencies Corona Virus Disease 2019 (COVID-19) which decided that in the first part, namely Establishing Corona Virus Disease 2019 (COVID-19) as a type of disease that causes a Public Health Emergency, various regulations emerged, one of which was the Regulation of the Minister of Health of the Republic of Indonesia number 9 of 2020 concerning Guidelines for Large-Scale Social Restrictions in order to accelerate handling Corona Virus Disease (Covid-19). In this regulation in the appendix to the introductory section it is explained that:¹⁵²

¹⁵⁰ <https://kbbi.web.id/pandemi>, accessed on January 19, 2023

¹⁵¹ Widya Istanto Nurcahyo, *Pandemi ke Endemi Covid-19*, https://yankes.kemkes.go.id/view_artikel/1112/pandemi-ke-endemi-covid-19, accessed on January 19, 2023

¹⁵² Regulation of the Minister of Health of the Republic of Indonesia number 9 of 2020 concerning Guidelines for Large-Scale Social Restrictions in order to accelerate handling Corona Virus Disease (Covid-19).

“Corona Virus Disease 2019 (COVID-19) has been declared by WHO as a pandemic and the Government of Indonesia based on Presidential Decree Number 11 of 2020 concerning the Determination of Corona Virus Disease 2019 (COVID-19) Public Health Emergency has declared COVID-19 as a public health emergency that must be carried out countermeasures. In the context of countermeasures, the implementation of health quarantine is carried out as stipulated in Law Number 6 of 2018 concerning Health Quarantine.”

Based on the introduction in the annex to the regulation, the regulations in Indonesia regarding the pandemic are based on the World Health Organization which has declared it a pandemic. Then the government handles it by making regulations.

b. Overview about Pandemic according to United States Legal System

In a sense, the definition of pandemic from the legal system of the United States is the same as the definition of pandemic from the Indonesian Legal Perspective. However, to find out more, the meaning of the pandemic from the perspective of the United States needs to be understood. A transmissible disease that spreads across international borders and affects millions of people is called a pandemic. Pandemics are typically caused by viruses, such as Coronavirus Disease 2019 (COVID-19), which are highly contagious.¹⁵³ Based on the definition of pandemic above, it is that a pandemic is an outbreak that occurs most often caused by a virus that spreads to various countries. The World Health Organization (WHO) defines a pandemic as a situation that has

¹⁵³ <https://www.ready.gov/pandemic>, accessed on January 19, 2023

the potential to affect the health of people all over the world.¹⁵⁴ Moreover, the World Health Organization (WHO) defines a pandemic as “the globally spread of a new disease” that affects huge numbers of people. According to the Centers for Disease Control, it is “an epidemic that has spread over several countries or continents, usually affecting a large number of people.”¹⁵⁵ Based on the definition above, World Health Organization explains that a pandemic is a new disease that spreads and can make people sick. The World Health Organization (WHO) is in charge of making the official declaration of a global pandemic. The World Health Organization accomplishes this through observing illness outbreaks and consulting with worldwide health experts.¹⁵⁶ Therefore, The World Health Organization (WHO) also tracks the progression of diseases that spread widely over numerous nations. For instance, on 11 March 2020, the World Health Organization (WHO) proclaimed the new coronavirus (COVID-19) outbreak a global pandemic.¹⁵⁷

According to United States Legal system, The primary responsibility for controlling the transmission of infectious diseases

¹⁵⁴ Dwi Winarsih, “Hubungan Pola Asuh Orang Tua Saat Pandemi Covid -19 Terhadap Kemandirian Anak Usia Dini Usia 4-6 Tahun di Kabupaten Ponorogo.” , Thesis, Universitas Muhammadiyah Ponorogo, Ponorogo, 2020, p.9

¹⁵⁵ Derrick Bryson Taylor, Is the Coronavirus an Epidemic or a Pandemic? It Depends on Who's Talking, <https://www.nytimes.com/2020/02/28/health/coronavirus-pandemic-epidemic.html>, accessed on January 19, 2023

¹⁵⁶ <https://www.healthdirect.gov.au/what-is-a-pandemic>, accessed on January 19, 2023

¹⁵⁷ Domenico Cucinotta and Maurizio Vanelli, WHO Declares COVID-19 a Pandemic, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7569573/>, accessed on January 19, 2023

inside their jurisdictions with the respective state governments, as established by the 10th Amendment to the United States Constitution and numerous Supreme Court judgments over a two-century period. The 10th Amendment, which grants the states all powers not expressly delegated to the federal government, gives them the authority to impose public health emergency measures, such as quarantines and business restrictions.¹⁵⁸ In the United States, Extra funding, expanded federal authority, cross-jurisdictional cooperation, and exemptions from some regulations are all made possible by The Department of Health and Human Services (HHS). Similarly, public health emergencies at the state and local levels are likely to be declared. The government has a special obligation to strike a fair balance between public health safety and individual liberty during times of crisis.¹⁵⁹ From the arrangements when there is a pandemic in the United States, state laws and existing regulations are also imposed, focusing more on how to handle the pandemic when it occurs, including at this time, namely the COVID-19 pandemic.

¹⁵⁸ <https://www.americanbar.org/news/abanews/publications/youraba/2020/youraba-april-2020/law-guides-legal-approach-to-pandemic/>, accessed on January 19, 2023

¹⁵⁹ Lawrence O. Gostin, and James G. Hodge Jr, US Emergency Legal Responses to Novel Coronavirus Balancing Public Health and Civil Liberties, <https://jamanetwork.com/journals/jama/fullarticle/2761556>, accessed on January 19, 2023

D. Arrangements of Bankruptcy for Companies during the Covid-19

Pandemic according to Islamic Law

Basically, Islamic law is based on the Qur'an and hadith. In the Sharia Economic Law Compilation (KHES), the term debt is also referred to as *dain*, which is defined in Article 1 number 29 as an obligation that is stated or can be conveyed in amount of money, either in Indonesian rupiah or other currencies directly or contingently. According to the KHES, the definition of debt in terms of *dain* is in line with the concept of debt in Law Number 37 of 2004 about Bankruptcy and Suspension of Debt Payment Obligations.¹⁶⁰ Bankruptcy is associated with debt. In Islamic law, the concept of debt in Islam is also something that must be returned properly. According to a hadith, if a debtor fails to repay his loan, he is deemed to have sinned, and this is an unforgivable sin. Moreover, debtors who are unable to pay their debts may be declared bankrupt or bankrupt. The hadith which states that unpaid debt is an unforgivable sin in the sight of Allah, namely:¹⁶¹

From Abdullah bin 'Radhiallahu 'anhu, Rasulullah Shallallahu 'alaihi wasallam said,

يُغْفَرُ لِلشَّاهِدِ كُلُّ ذَنْبٍ إِلَّا الدَّيْنَ

¹⁶⁰ Liza Dzulhijjah , Fahmi Fatwa Rosyadi Satria Hamdani , dan Asep Hakim Zakiran, "Pandemi Covid-19 Sebagai Upaya Pencegahan Kepailitan dalam Perspektif Hukum Positif dan Hukum Islam", Jurnal Peradaban dan Hukum Islam, Vol.4 No.2, Universitas Islam Bandung, 2021, p.16

¹⁶¹ *Ibid*, p. 3

“All the sins of a martyr are forgiven except for debts” (HR. Muslim no. 1886).

In addition, there is another hadith, namely:

From Abu Hurairah Radhiallahu ‘anhu, Rasulullah Shallallahu ‘alaihi wasallam said,

نفس المؤمن مُعلّقة بِدَيْنِهِ حتّى يُقضى عنه

“The soul of a believer (who has died) is in limbo because of his debts until the debt is repaid” (HR. At Tirmidzi no. 1079, he said, “(Hadith) hasan”, authenticated by Al Albani in Sahih At Tirmidzi).¹⁶²

Based on these two traditions, it can be understood that the position of debt in Islamic law is very important and must be repaid. Therefore, it is explained in the Qur'an that debts must be recorded and require witnesses. According to QS. Al-Baqarah (2) verse 282, it is said that Muslims must define the time limit for accounts payable, record debts, and the existence of two male witnesses or one male and two female witnesses.¹⁶³

Meanwhile, In a condition of bankruptcy, the debtor is unable to pay the creditors. In most cases, the inability to pay is due to the debtor's company's deteriorating financial situation. According to Al - Zuhaili, bankruptcy occurs when a debtor cannot repay the debts and a judge

¹⁶² Yulian Purnama, Hadits-Hadits tentang Bahaya Hutang, <https://muslim.or.id/68043-hadits-hadits-tentang-bahaya-hutang.html>, accessed on January 20, 2023

¹⁶³ Liza Dzulhijjah, Fahmi Fatwa Rosyadi Satria Hamdani , dan Asep Hakim Zakiran, *Loc,cit.*

places restrictions on the debtor's ability to use his assets. This opinion is also believed by the Al - Syafi'iyah and Al - Hanafiyah scholars when interpreting bankruptcy in a special sense.¹⁶⁴ From the above understanding that bankruptcy is a condition where a person is unable to pay his debts, which is the same as the definition according to Indonesian bankruptcy law. According to another history, Umar ibn Al-Khattab once withheld the distribution of debtors' assets to creditors. According to the narrative of this history, a friend from Bani Juhainah named Usaifi' did not pay his debts. Therefore, Umar reserved his wealth and asked those who owed money to come to him so that he may distribute it to pay off debts. From the Prophet's sunnah and Caliph Umar ibn Al-Khattab's deeds, it is apparent that the authority of the ruler or judge lies in making bankruptcy decisions and restricting debtors who have been declared bankrupt.¹⁶⁵ Based on this history, it was explained that at the time of the Prophet, there was a bankruptcy dispute which was resolved by distributing the debtor's assets to the creditors.

In Islamic *fiqh*, *Iflaas* is the condition in which a person lacks property ownership. A bankrupt person is referred to as a *muflis*, while a judge's decision of bankruptcy is referred to as a *tafliis*. The Arabic

¹⁶⁴ Muhamad Subhi Apriantoro , Salsabilla Ines Sekartaji, dan Apriliya Suryaningsih, "Penyelesaian Sengketa Kepailitan Ekonomi Syariah Perspektif Ibnu Rusyd Al-Qurthubi Dalam Bidayatul Mujtahid Wa Nihayatul Muqtashid", Jurnal Ilmiah Ekonomi Islam, 7(03), Universitas Muhammadiyah Surakarta, 2021, p.3

¹⁶⁵ Ibid

term *tafliis* is frequently regarded as a ban against acting on one's wealth. The prohibition was imposed because the individual in question had more debt than assets.¹⁶⁶ As for the meaning of the second *muflis*, which has been greatly debated by jurists, it refers to a person whose overall debt exceeds their total assets (in their hands).¹⁶⁷ In the event when a person becomes *muflis* (bankrupt) due to an excessive amount of debts and his remaining assets (in his hands) are insufficient to pay off the debts that are due, the result is *hajr*, which is the cessation or reduction of the expenditure of the *muflis* assets that are still in his hands. There are several laws relating to *hajr*, namely:

1. It is not permitted to assign a *hajr* to a *muflis* unless the total of debts exceeds his assets. However, it is not allowed to execute *hajr* on the *muflis* if his assets are equal to or greater than the total of his debts..
2. It is not allowed to determine a *hajr* to the *muflis* unless the property owner requests it (the creditor). Additionally, if there is the dispute between the debtor and creditor concerning the demand for *hajr*, the *hajr* may be carried out against the *muflis* based on the preferences of those who demand it, provided that the amount of debts of the *muflis* exceeds the amount of the *muflis*' assets.

¹⁶⁶ Muhammad Yasin, *Kepailitan dalam Islam*, <https://www.hukumonline.com/klinik/a/kepailitan-dalam-islam-cl7009>, accessed on January 20, 2023

¹⁶⁷ Abu Humaid Arif Syarifuddin, *Jika Seseorang Tertimpa Pailit*, <https://almanhaj.or.id/13731-jika-seseorang-tertimpa-pailit-2.html>, accessed on January 20, 2023

3. If the judge imposes a *hajr* on the *muflis*, the right of the property owner (the creditor) switches from being attached to the *muflis'* *dzimmah* (dependent) to being directly attached to his property. As with something that is used as collateral, it becomes the guarantee recipient's property. In order to satisfy their rights, the *Shari'a* grants mastery rights to the property owner (the creditor) of the *muflis'* property.
4. It strongly encouraged that the judge declare the *hajr* ruling to the *muflis* so that the public does not freely share (money) with *muflis*.
5. The judge must liquidate the existing assets of the *muflis*, and then the proceeds are allocated among the asset's owners (lenders) in proportion to the amount they lent to the *muflis*. In this instance, it is advised to sell the *muflis'* property as quickly and profitably as possible, while still paying attention to the benefit of the *muflis* being *hajr* in selling *muflis'* property.
6. If the *muflis'* assets have been divided among the rights holders (lenders) in accordance with the proportion of each party's rights, the rights holders should grant a reprieve to the *muflis* if their remaining rights remain with him until he is released from his troubles.¹⁶⁸

Based on the *hajr* provisions above, there are various kinds of laws to impose *hajr* on the debtor. In essence, Islam holds on for the good of both debtors and creditors. Moreover, what is in line with PKPU in

¹⁶⁸ *Ibid*

Indonesian bankruptcy law is point 6 above, namely the provision of deferred if there is still a creditor's rights that still exist in the debtor, then it should be given deferred, which is explained in the Qur'an Al-Baqarah verse 280:

وَإِنْ كَانَ ذُو عُسْرَةٍ فَنَظِرَةٌ إِلَىٰ مَيْسَرَةٍ وَأَنْ تَصَدَّقُوا خَيْرٌ لَّكُمْ إِنْ كُنْتُمْ تَعْلَمُونَ

“And if (the debtor) is in trouble, then give respite until he is spacious. And charity (part or all of the debt) is better for you, if you know.”

Based on the verse above, it can be said that tough means that it is given time until the debtor becomes free or able to repay the debt. In addition, it is explained that charity which is associated with *ikhlas* will be better for you. If it is related to the condition of the Covid-19 pandemic, where the pandemic that caused this crisis is the disaster of *Allah's* destiny. No disaster will afflict a human except what Allah has written to human. Therefore, what a human really needs in this condition is always keep in faith and believe in the destiny of *Allah Subhanahu wa Ta'ala*. Everything that is written by Allah must happen. In addition, what happens to humans will not miss Allah, and what misses a human will not happen to Allah. Therefore, what *Allah Subhanahu wa Ta'ala* wants will definitely happen and what *Allah* does

not want will not happen.¹⁶⁹ Even though this pandemic condition has caused many companies to go bankrupt, it is inseparable from *Allah's* destiny. Therefore, the *hajr* provisions above will apply where the wealth has decreased due to the crisis.



¹⁶⁹ Eman Supriatna, “Wabah Corona Virus Disease Covid 19 Dalam Pandangan Islam”, Jurnal Sosial & Budaya Syar-i, Vol. 7 No. 6, UIN Syarif Hidayatullah Jakarta , 2020, p. 7

CHAPTER III

COMPARISON BETWEEN INDONESIA AND THE UNITED STATES' BANKRUPTCY ARRANGEMENTS FOR COMPANIES DURING COVID- 19 PANDEMIC

A. The similarities and differences of bankruptcy arrangements for companies during the pandemic in Indonesia and the United States

1. Arrangements for Companies during Pandemic in Indonesia

In Indonesia, bankruptcy is regulated in Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations. Previously, the bankruptcy law originated from a Government Regulation in Lieu of Law Number 1 of 1998 issued during the 1998 economic crisis. Then, the world was hit by the Corona Virus Disease 2019 (COVID-19) outbreak. The first COVID-19 case in Indonesia was detected on March 2, 2020.¹⁷⁰ Since then, Covid-19 began to spread in Indonesia and affected all sectors including the economy and business. Consequently, the crisis situation resulted in an increase in bankruptcy cases. Responding to the situation, the government finally issued all policies and regulations that aimed to support the massive impact caused by the pandemic so that the economy does not collapse and companies do not go bankrupt.

¹⁷⁰ Basri, *WFH di Tengah Pandemi COVID-19*, <https://www.djkn.kemenkeu.go.id/kpkn1-jakarta1/baca-artikel/13177/WFH-di-Tengah-Pandemi-COVID-19.html#:~:text=Kasus%20COVID%2D19%20pertama%20di,pada%20tanggal%202%20Maret%202020>, accessed on January 20, 2023

The applicable regulation in Indonesia regarding bankruptcy is Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations which has amended Law Number 4 of 1998 concerning Establishment of Government Regulation in Lieu of Act Number 1 of 1998 concerning Amendment to the Act on Bankruptcy to Become Act. Looking further from the existing regulation that also applied in pandemic situation, the existing regulations in Indonesia do not meet the needs of the community. This is because changes in Indonesia's Bankruptcy Law tend to further protect the interests of creditors. Creditors can easily apply for bankruptcy against their debtors because they only have the condition that there are two more creditors and do not pay debts to one creditor. Deferring Suspension Debt Payment Obligation also tends to safeguard creditors' interests because the time is relatively short, creditors choose the peace process, and it is possible to reverse a peace judgement with permanent legal force.¹⁷¹ This condition would be damaging the bankruptcy parties, especially debtor in pandemic situation.

Viewing from the bankruptcy filing requirements, the minimum requirements to file for bankruptcy as bankruptcy applicants is too simple. Article 2 paragraph 1 of the Bankruptcy Law stipulates that a bankruptcy petition can be filed if the debtor has two or more creditors and fails to pay

¹⁷¹Siti Anisah, *Perlindungan Kepentingan Kreditor dan Debitor dalam Hukum Kepailitan di Indonesia*, Total Media, Yogyakarta, 2008, p. 42

at least one debt that is due and collectable.¹⁷² Based on the conditions for filing for bankruptcy, it is considered very easy to file for bankruptcy especially in covid-19 pandemic. Only by having a minimum of 2 creditors and not paying at least one debt that has matured, a debtor can be declared bankrupt. In the article that regulates the requirements for filing for bankruptcy, it does not regulate how much the minimum amount of debt that can be bankrupted. The philosophy of the Insolvency Act is a debtor who has a larger debt than his property, so that his property must be divided proportionally to the creditors, it is better to declare bankruptcy. Therefore, debtors who can be declared bankrupt must be financially insolvent, meaning that their debts exceed their assets. If the debtor's assets exceed the debt, ordinary debt is used to settle the receivables. For companies whose assets are less than their debts but who have the potential to repay their debts in the future, reorganization is an option.¹⁷³ However, the bankruptcy law requires that only two creditors and one debt must be due and collectable making it easy for debtors to be easily bankrupted. Moreover, perhaps even for debtors who still have potential or the possibility to pay in the future.

Viewing from the perspective of the creditor, in practice, article governing the requirements for declaring bankruptcy is evidence that the Bankruptcy Law is conflicting with the necessity for bankruptcy legal

¹⁷² Niru Anita Sinaga dan Nunuk Sulisrudatin, Hukum Kepailitan dan Permasalahannya di Indonesia, Jurnal Ilmiah Hukum Dirgantara, Volume 7 No. 1, Universitas Dirgantara Marsekal Suryadarma, 2016, p. 168

¹⁷³ Siti Anisah, *Loc.cit*

remedies that should be for the benefit of all creditors. The problems can arise when creditors who are not filing for bankruptcy and whose bills are past due or not yet due do not intend to pursue legal action (bankrupting the debtor) must register as creditors for the bankruptcy.¹⁷⁴ Therefore, the number of creditors as a condition of filing for bankruptcy is too small. Meanwhile, creditors who have unpaid receivables may not intend to take legal action or to file for bankruptcy. Moreover, if the debtor or creditor chooses Suspension of Debt Payment Obligations (PKPU), the time given by the Bankruptcy Law is only 45 days. It is challenging to complete peace proposals, lobbying, and business reorganization within this 45-day period. If the creditor initiated the PKPU process, the debtor must submit a peace proposal for the entire creditor. Ideally, creditors would also propose peace proposals.¹⁷⁵ In fact, the essence of PKPU is reorganization which provides an opportunity for debtors to reorganize or improve their business. Meanwhile, it takes a long time to reorganize or improve the business. Then the time given is less or not enough.

Therefore, the conditions of the existing regulations above, which are also used to apply for bankruptcy during a pandemic, may cause difficulties for debtors and creditors due to the financial crisis during the pandemic. Bankruptcy Laws are difficult to adjust during a pandemic to meet the needs of the community during the COVID-19 pandemic. Many

¹⁷⁴ Fitri Novia Heriani, Enam Kesalahan UU Kepailitan, <https://www.hukumonline.com/berita/a/enam-kesalahan-uu-kepailitan-lt561737ed1a1cb/>, accessed on January 20, 2023

¹⁷⁵ Niru Anita Sinaga dan Nunuk Sulisrudatin, *Op.cit*, 169

businesses failed as a result of the financial crisis caused by the covid-19 pandemic. Alfin Sulaiman argues that the PKPU and bankruptcy legal systems are plagued by inadequacies in the Bankruptcy Law and the Civil Procedure Law. It has been determined that the Bankruptcy Law and the Civil Procedure Law are not relevant to the current pandemic caused by the Covid-19.¹⁷⁶

Consequently, to respond and adapt to the pandemic situation, the government began to issue various regulations and policies in the economic field to maintain the stability of the country in this extraordinary or emergency situation. One of the regulations issued is through the Financial Services Authority (OJK) Number 11 / POJK.03 / 2020 concerning the Government's National Economic Stimulus. This regulation is pursued specifically for those affected by COVID 19. With the enactment of this OJK Regulation, the provision of stimulus for the banking industry had been valid from March 13, 2020, to March 21, 2021. This regulation applies to banks targeting debtors affected by Covid-19 including Micro, Small and Medium Enterprises (MSMEs). This regulation specifies that debtors who have obtained preferential treatment in line with this POJK may get additional credit, financing, or other provision of funds from banks. The particular treatment is also in accordance with the determination of the quality of credit/financing/other

¹⁷⁶ Fitri Novia Heriani, *RICI Dukung Moratorium PKPU dan Kepailitan, Ini Pertimbangannya*, <https://www.hukumonline.com/berita/a/rici-dukung-moratorium-pkpu-dan-kepailitan--ini-pertimbangannya-lt61279433a6853/?page=1>, accessed on January 20, 2023

provision of funds that was conducted independently from the determination of the quality of credit/financing/other provisions of funds that was conducted earlier. Then, Additionally, the bank may assist with debtor payments/debt through credit/financing restructuring carried out in accordance with OJK standards pertaining to asset quality evaluation, such as:

- a. Lower interest rates.
- b. Extension of time period.
- c. Reduction of principal arrears.
- d. Decrease in interest arrears.
- e. Supplementary credit/financing options.
- f. Credit/financing conversion to Temporary Equity Participation.

The problem comes from other companies that are not included in the OJK regulations above. There are still many companies who have debts to non-financial services institutions. These companies are affected by Covid-19, but they not protected because they are not included in OJK Regulation above. The companies that are not protected by OJK regulation are they who have debts to non-financial institutions such as savings and loan cooperatives, capital markets, leasing companies, and others. Another problem also occurs from companies that received financial stimulus because the creditors (banks and finance companies) do not necessarily provide convenience. The debt must still be paid even though the tenor or

term is extended.¹⁷⁷ In addition, this regulation was valid from March 13, 2020 to March 21, 2021, which is one year, but what if the debtor is still not out of their final problem or is still affected by COVID-19 within one year or after one year.

Furthermore, in line with article 1 of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations, Decree of the Chief Justice of the Supreme Court of the Republic of Indonesia Number 109 / KMA / SK / IV / 2020 concerning the Implementation of the Guidelines for Settlement of Bankruptcy Cases and Suspension of Debt Payment Obligations enacted during pandemic conditions. However, both regulations make the debtors can be bankrupted easily. Basically, the decision of the chairman of the supreme court cannot be different from the bankruptcy requirements stipulated in the bankruptcy law because it will be contradictory. According to section 5.1.3. decision letter c Decree of the Chief Justice of the Supreme Court of the Republic of Indonesia Number 109 / KMA / SK / IV / 2020 concerning the Implementation of the Guidelines for Settlement of Bankruptcy Cases and Suspension of Debt Payment Obligations, there are facts or circumstances which is simply, namely: i. There are 2 (two) or more Creditors; ii. A failure to settle debts that have become due and overdue; iii. The existence of debt can be proven by the Petitioner.¹⁷⁸ Based on the provisions above,

¹⁷⁷ Agustina Ni Made Ayu Darma Pratiwi dan Putu Sekarwangi Saraswati, *Loc.cit.*

¹⁷⁸ Section 5.1.3. decision letter c Decree of the Chief Justice of the Supreme Court of the Republic of Indonesia Number: 109 / KMA / SK / IV / 2020 concerning the Implementation of the Guidelines for Settlement of Bankruptcy Cases and Suspension of Debt Payment Obligations

that is in line with the bankruptcy requirements in the bankruptcy law and also uses simple evidence. Letter d states that the difference in the amount of debt does not preclude the granting of the bankruptcy application.¹⁷⁹ Based on Decree of the Chief Justice of the Supreme Court of the Republic of Indonesia Number 109 / KMA / SK / IV / 2020 concerning the Implementation of the Guidelines for Settlement of Bankruptcy Cases and Suspension of Debt Payment Obligations, it is not regulated how much the minimum debt amount and even the difference in the amount of debt can still be granted a bankruptcy request. Additionally, in letter e part iii states that if it is not stated in the agreement or there is no agreement about the maturity date, then the maturity date is determined when the debt is collected.¹⁸⁰ Based on these provisions, if debt collection can make the debt matured then in a pandemic situation could cause the financial hardship for the debtor. During a crisis, creditors who need money by collecting it from debtors can allow a debtor to become bankrupt.

2. Arrangements for Companies during Pandemic in the United States

In the United States, originally, bankruptcy law is regulated in federal law. Federal bankruptcy law is contained in Title 11 of the United States Code, which is bankruptcy code. The Congress of the United States has the authority to pass nationwide legislation on it, as stated in the

¹⁷⁹ Section 5.1.3. decision letter d Decree of the Chief Justice of the Supreme Court of the Republic of Indonesia Number: 109 / KMA / SK / IV / 2020 concerning the Implementation of the Guidelines for Settlement of Bankruptcy Cases and Suspension of Debt Payment Obligations

¹⁸⁰ Section 5.1.3. decision letter e Decree of the Chief Justice of the Supreme Court of the Republic of Indonesia Number: 109 / KMA / SK / IV / 2020 concerning the Implementation of the Guidelines for Settlement of Bankruptcy Cases and Suspension of Debt Payment Obligations

Constitution.¹⁸¹ Even though states are unable to regulate bankruptcy, they can legislate how debtors and creditors interact in other ways.¹⁸² Each bankruptcy proceeding is handled in accordance with the same federal statute. The bankruptcy procedure is governed procedurally by the Federal regulations of Bankruptcy Procedure (often known as the "Bankruptcy Rules") and the local regulations of each bankruptcy court.¹⁸³ The Covid-19 pandemic has disrupted normal life and precipitated a massive economic slowdown in the United States, resulting in dramatic declines in consumer spending and the highest unemployment rates since the Great Depression.¹⁸⁴ During a pandemic, the bankruptcy law remained in effect and was used to file for bankruptcy, but several modifications were made to accommodate the pandemic. In response to these conditions, the United States government, in addition to existing bankruptcy regulations, made policies to support the massive impact of covid-19 and mitigate the potential wave of bankruptcy filings.

Responding to the increasingly spreading pandemic conditions in the United States, the federal bankruptcy courts changed their operations to help public safety. This has an impact on filing for bankruptcy because some courts are closed, and the rest are open with certain health security

¹⁸¹ Mary Eschelbach Hansen and Bradley A. Hansen, *Bankrupt in America A History of Debtors, Their Creditors and the Law in the Twentieth Century*, the University of Chicago Press, Chicago, 2020, p. 29

¹⁸² <https://www.law.cornell.edu/wex/bankruptcy>, accessed on January 21, 2023

¹⁸³ <https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/process-bankruptcy-basics>, accessed on January 21, 2023

¹⁸⁴ Jialan Wang, Jeyul Yang, Benjamin Iverson, and Raymond Kluender, "Bankruptcy and the COVID-19 Crisis", Working Paper 21-041, Harvard Business School, 2020, p. 1

procedures. If the debtor has filed for bankruptcy, but the court in which the debtor filed closes before the debtor completes the process, the United States has an automatic stay policy. So, the debtor will continue to be protected from creditors by the automatic stay. The US Bankruptcy Code has provided legal protection to debtors and creditors since the application for a bankruptcy statement was submitted to the court. During the bankruptcy inspection process, the US Bankruptcy Code provides debtors and creditors with legal protection known as automatic stay.¹⁸⁵ When a debtor files for Chapter 7, Chapter 11, or Chapter 13 bankruptcy, the automatic stay is triggered. It is a fundamental defense for debtors against most bill collectors. Once an automatic stay goes into effect, creditors and collection agencies must cease all collection activities immediately. The creditors and collection agencies may no longer contact the debtor by phone or any correspondence, cannot file or maintain a lawsuit to collect the debt, and cannot garnish the debtor's wages or file a lien.¹⁸⁶ In a pandemic, automatic stay will be useful for the debtors because they cannot be billed directly by the creditor, that will harm the debtor and even other creditors who do not collect the debts. Moreover, Similar to Indonesia, Actio pauliana is regulated in the United States as fraudulent transfer law. The purpose of fraudulent transfer law is to prevent debtors from engaging in deceptive behavior toward creditors in the form of

¹⁸⁵ Sutan Remy Sjahdeini, *Op.cit*, p. 157

¹⁸⁶ <https://www.justia.com/bankruptcy/automatic-stay/>, accessed on January 21, 2023

certain transfers of debtor assets prior to the declaration of bankruptcy. Furthermore, the scope of fraudulent transfer in the Bankruptcy Code has been expanded to include constructively fraudulent conveyance.¹⁸⁷ Unfortunately, during this pandemic, many are experiencing a crisis, so protection for debtors is also needed.

The Coronavirus Aid, Relief, and Economic Security (CARES) Act and the Consolidated Appropriations Act (CAA) of 2021 were both measures passed by the United States Congress in response to the Covid-19 Pandemic. Covid-19 has resulted in several interim changes to substantive bankruptcy rules under the federal CARES Act and CAA. For instance, Chapter 13 debtors have the option of requesting a seven-year repayment extension on their current repayment plan. Specifically, Section 1113(b)(1)(C) of the CARES Act amends § 1329 to allow a debtor to modify a confirmed plan following notice and a hearing if the debtor is enduring a material financial hardship as a direct or indirect result of the COVID-19 pandemic. Plan payments could be suspended temporarily at the debtor's request. Moreover, a Chapter 13 plan could have its duration temporarily extended up to seven (7) years after the first payment under the original confirmed plan became due.¹⁸⁸ Chapter 13 previously required Debtors to establish a repayment plan to pay off creditors over a period of three to five years. There must be notice and a hearing for this change.

¹⁸⁷ Siti Anisah, "The Protection of Creditor's Right and Actio Pauliana", Universitas Islam Indonesia, 2009, p.2

¹⁸⁸ <https://www.areb.uscourts.gov/news/expiration-cares-act-bankruptcy-provisions>, accessed on January 22, 2023

Debtor must show significant financial difficulty due to the COVID-19 pandemic. Furthermore, if a small business debtor can show that COVID-19 has caused them a severe financial hardship, they may be eligible for an extension of 60 days to complete post-petition obligations deriving from the conditions of a commercial lease, in accordance with Section 1106 (g) of the CARES Act.

The new regulations that was established during the pandemic applies to cases confirmed prior to its effective date of March 27, 2020, therefore, unlike the language in § 1329(a), the plain language of § 1329(d) requires the debtor to demonstrate “a material financial hardship due, directly or indirectly, to the coronavirus disease 2019 (COVID-19) pandemic.” The new statute referred to here is section 113(b)(1)(C) codified at 11 U.S.C. § 1329 (d). After a year has passed since the CARES Act was passed into law, it will no longer be in effect. but this law covers a wider community because there are many debtors who are eligible for chapter 13. On top of that, the CARES Act facilitates the reorganization of small businesses. Small business reorganization is governed by the CARES Act amended the Small Business Reorganization Act of 2019 (SBRA), which added a new subchapter to the United States Bankruptcy Code. The Small Business Reorganization Act (SBRA), also known as Subchapter 5, was passed to make Chapter 11 reorganization easier and cheaper for small enterprises.¹⁸⁹

¹⁸⁹ Melissa A. Peña, Inside the CARES Act: Changes to the Bankruptcy Code Under the CARES Act, <https://norrismclaughlin.com/blogs/blb/category/inside-the-cares-act-changes-to-the-bankruptcy-code-under-the-cares-act>, accessed on January 22, 2023.

The CARES Act increases the debt qualifying level from \$2,725,625 to \$7,500,000 for businesses filing under Subchapter V of Chapter 11 of the United States Bankruptcy Code. Additionally, COVID-19 payments are no longer included in the definition of "current monthly income" for Chapter 7 and Chapter 13 debtors under 11 U.S.C. § 101(10A)(B)(ii)(III), (IV), and (V) as a result of the CARES Act.

Coronavirus Aid, Relief, and Economic Security (CARES) Act is geared toward helping individuals and small enterprises. Therefore, this regulation does not apply to medium and big businesses. The Federal Reserve's response to the pandemic is detailed in the Covid-19 resource page. There are three sources of emergency funding that could help large and medium-sized businesses such as credit, liquidity, and lending facilities.¹⁹⁰ These policies are:

- a. Main Street Lending Program: Businesses that were in "good financial standing" with their lending institutions prior to the pandemic were eligible for funding through the Main Street Business Lending Program. In order to provide loans to qualified borrowers (i.e., business), qualifying credit institutions (e.g. banks) participate in the provision of credit facilities.
- b. Commercial Paper Lending Facility: The CPFF (Commercial Paper Lending Facility) will buy commercial paper. (short-term debt).

¹⁹⁰ Maria Kreiser, "Larger Business and COVID-19: Financial Relief an Assistance Resources", Congressional Research Service, IN11368, 2021, p. 1

Issuers of US commercial paper, including municipal issuers and US issuers with a foreign parent business, are generally eligible if their paper has a good credit rating.

- c. Corporate Credit Facilities: The PMCCF and SMCCF helped the corporate bond markets by purchasing corporate debt from the primary and secondary markets, respectively. In most cases, these facilities were available to companies with a high investment grade credit rating. The PMCCF and SMCCF established no size restrictions on businesses but prior to the existence of COVID-19, businesses were obliged to be active issuers in both markets. This credit facilities are more likely to be issued by larger enterprises.

Apart from that, another policy is from the Department of the Treasury. To assist particular businesses affected by the COVID-19 pandemic, the federal government has established two initiatives that offer direct grants, loans, or loan guarantees:

- a. Payroll Support Program: The Payroll Support Program provides up to \$25 billion to airline employees, \$4 billion to cargo carriers, and \$3 billion to airport contractors, including those that serve airlines with food, security, tickets, and cleaning services.
- b. CARES Act Loan Program: The CARES Act Loan Program has limited qualifying requirements and offers up to \$25 billion for passenger airlines, \$4 billion for freight airlines, and \$17 billion for essential national security industries.

Based on the above policies, it is not only individual debtors or small businesses that receive assistance from the government through law, but also medium-large businesses. Medium-large companies are also supported by policies in which the implementation of massive support in response to dramatic shocks to economic activity. The regulations and policies are expected to mitigate the potential for soaring bankruptcy filings. Large-scale forbearance policies and moratoriums on evictions and foreclosures have also aimed to alleviate financial distress for both businesses and consumers.¹⁹¹

3. The similarities and Differences of Bankruptcy Arrangements for Companies during Pandemic between Indonesia and the United States

a. Similarities

The similarities in the comparison between bankruptcy law in Indonesia and bankruptcy law in the United States are the condition of a person or business in applying for bankruptcy where both of these legal systems describe bankruptcy as when the debtors cannot pay their debts to creditors. Bankruptcy is indicated as the beginning of a legal proceeding that occurs when an individual or business is unable to repay current debts or obligations. In addition, the definition of creditor and debtor can be considered to be similar where the creditor is a person who has receivables while the debtor is a person who has debts, both of

¹⁹¹ Jialan Wang, Jeyul Yang, Benjamin Iverson, and Raymond Kluender, *Op.cit*, p. 2

which are regulated under bankruptcy law both in Indonesia and in the United States.

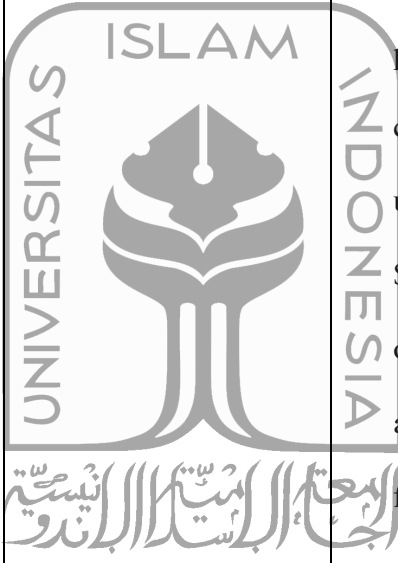
Furthermore, in both the Indonesian legal system and the United States legal system, bankruptcy filings must be conducted through the courts as well as a declaration of bankruptcy based on a court decision. In addition, both the bankruptcy laws that apply in Indonesia and the laws that apply in the United States regulates parties who can file an application for a bankruptcy statement, namely creditors and debtors.

b. Differences

No.	Material	Indonesian Law	United States Law
1.	Bankruptcy filing requirements	Based on the bankruptcy law, it consists of 3, namely: <ol style="list-style-type: none"> 1. The debtor has two or more creditors 2. There must be debt 3. At least one debt that is mature and collectable 	The "means test" must be applied to all Chapter 7 bankruptcy filers to determine eligibility for liquidation. Title 11, Chapter 7 of the United States Bankruptcy Code governs the liquidation procedure. A bankruptcy trustee is tasked with selling off any nonexempt assets to generate funds to pay off

			<p>debtors. Filing for Chapter 13 bankruptcy is the sole alternative if the debtor cannot pass the means test. In the United States, there is no minimum amount of debt to qualify for bankruptcy filings. Debt limits are in place instead. For instance, Chapter 13 filers are limited to a total of \$1,257,850 in secured debts (such as a house) and \$419,275 in unsecured debts (such as credit card bills or medical expenses). Bankruptcy is a petition that the debtor files voluntarily when he is unable to pay his debts.</p>
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			<p>If the debtor does not pay his bills when they are due and a custodian or receiver has been appointed by the court, the creditor may file an involuntary petition for bankruptcy. (Within 120 days after the state receiver is appointed). Both Chapter 7 and Chapter 11 are the only options for involuntary petitions. These are the required aspects of an involuntary petition:</p> <p>1) A debtor having twelve or more creditors, of whom at least three owe \$5,000 or more in unsecured debt.</p>
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			<p>2) If there are less than twelve creditors, any creditor having an unsecured claim of \$5,000 can file a petition, and if no creditor has an unsecured claim of \$5,000, any number of creditors with that amount can join forces to file a petition.</p> <p>3) Unsecured claim cannot be the basis of a dispute in good faith.</p>
2.	Length of the process	A bankruptcy case's examination hearing must take place no later than 20 (twenty) days after the application for a declaration of	Chapter 7: From the time of filing for Chapter 7 bankruptcy until the time of obtaining a final discharge might take 4 to

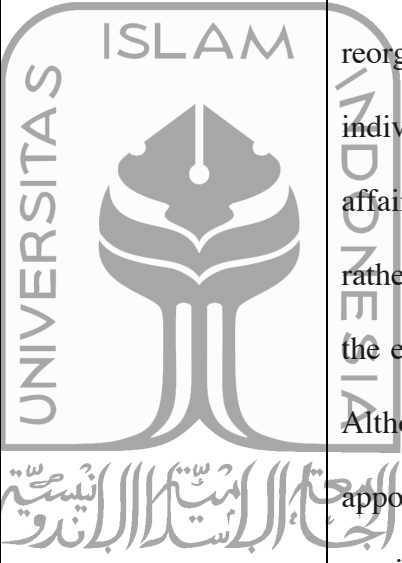
		<p>bankruptcy is filed. On the request of the debtor and for good cause, the Court may delay the trial for up to 25 days from the date the application was filed. The Court must make a decision on the application for a declaration of bankruptcy within 60 days of the applicant's registration.</p> <p>Suspension of Obligations for Payment of Debt (PKPU) has two stages or procedures: temporary PKPU and permanent PKPU. In the Temporary PKPU, the debtor is allowed</p>	<p>6 months (often 90 to 120 days).</p> <p>Chapter 9: The entire procedure might take anywhere from several months to several years, depending on the intricacy of the case and the total amount of debt.</p> <p>Chapter 11: Ordinarily, the Debtor has 120 days from the petition date to create and file a Plan of Reorganization stating the details of the business's reorganization. It has the special right to submit a plan throughout that time frame of 120 days.</p> <p>11 U.S.C. § 1121(b). This term of exclusivity is subject to review and</p>
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		<p>45 days to come up with a peace proposal that includes a debt payment plan. If the creditor accepts the peace proposal within 45 days, the debt settlement scheme can be executed immediately. If there is no consensus, a Fixed PKPU will be implemented. PKPU may last up to 270 days. Throughout this time, the debtor and creditor will continue to negotiate to achieve an agreement on a debt settlement scheme. If after 270 days there is no agreement, the court</p>	<p>possible modification by the court. However, the total duration of the exclusivity period (including any extensions) cannot be more than 18 months. 11 U.S.C. § 1121(d).</p> <p>Chapter 12: A repayment plan must be presented to the court within 90 days after filing for Chapter 12. Chapter 12 bankruptcy plans often involve a repayment schedule with monthly payments to creditors over the course of 3 to 5 years. Unless the court orders otherwise “for cause,” payments must be spread</p>
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		<p>will declare the debtor bankrupt.</p>	<p>out over a period of three years.</p> <p>Chapter 13: From the time the petition is filed to the time the request is granted can range from one to five months. The debtor has to start making regular payments to the creditor within 30 days of the bankruptcy filing. Typically, Chapter 13 payment schedules are set to last for three to five years.</p> <p>Chapter 15: Considering that this is a case of cross-border insolvency requiring collaboration between United States and foreign courts, the</p>
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			specifics are not really explained.
3.	Bankruptcy type	<p>There is no type of bankruptcy, only declared bankrupt or through Suspension of Debt Payment Obligations (PKPU). The difference is only in who can file for bankruptcy according to who the debtor is.</p> <p>For example, if the Debtor is a Securities Company, Stock Exchange, Clearing Guarantee Institution, Depository and Settlement Institution, a declaration of bankruptcy can only be submitted by the</p>	<p>There are six types of bankruptcy, namely:</p> <p>Chapter 7: Liquidation (individuals, businesses, corporations, partnerships)</p> <p>Chapter 9: Municipality Bankruptcy (including a wide variety of governmental entities such as cities, counties, townships, municipal utilities, taxing districts, and school districts)</p> <p>Chapter 11: Reorganization (Individuals, corporations including Limited Liability</p>

		Capital Market Supervisory Agency.	Companies, and partnerships) Chapter 12: Family Farmer Bankruptcy or Family Fisherman Bankruptcy Chapter 13: Individual Debt Adjustment (individuals including sole proprietors) Chapter 15: Ancillary and Cross-Border Cases Each chapter is different, who can qualify and who can file a petition.
4.	Who settles the bankruptcy estate	From the date the bankruptcy declaration decision is stipulated, the curator under the supervisory judge has the right to manage and	There are two types of bankruptcy cases in the United States, namely trustee and receiver. Chapter 11 bankruptcy, which allows for the reorganization of a

		<p>settle the bankruptcy assets.</p> 	<p>business, requires the appointment of a receiver. Both Chapter 7 (for liquidation) and Chapter 13 (for reorganization of an individual's financial affairs) involve a trustee rather than a receiver in the event of bankruptcy. Although the court appoints both the receiver and the trustee, the receiver is more involved in asset management and reorganization while trustee is in either Chapter 7 or Chapter 13.</p>
5.	“Automatic Stay”	<p>The bankruptcy law does not adhere to provisions regarding automatic stay since</p>	<p>According to the United States Bankruptcy Code, from the time the application for a</p>

		<p>the application for a bankruptcy statement is filed and registered by the court. However, Indonesia regulates Actio Pauliana instead. One of the remedies under Indonesian Bankruptcy Law is to protect creditors' rights in order to avoid debtor fraud. This is known as actio pauliana in Indonesian bankruptcy law. Actio Pauliana is managed by <i>Faillissements-verordenen</i>, a government regulation. Actio Pauliana is defined as a debtor's behaviour</p>	<p>bankruptcy statement is submitted to the court, an automatic stay applies.</p>
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		<p>toward a creditor before the debtor is declared bankrupt, which is not an obligation to do and results in a disadvantage to the creditor's interest.¹⁹² Even though in Indonesia there is no automatic stay, which means creditors cannot collect debts out of court, Indonesia has arrangements for actio pauliana which can protect the interests of creditors from debtors who do not have good faith.</p>	
6.	What changed	During the pandemic, Indonesia still used the	In the United States, filing for bankruptcy still

¹⁹² Siti Anisah, Op.cit, p.1

	<p>during the pandemic (regulations and policies)</p>	<p>bankruptcy law as it originally regulated bankruptcy cases. However, since the outbreak of Covid-19, the government has made policies and regulations. One of the various regulations made by the government that intersect with bankruptcy is the Financial Services Authority (OJK) regulation Number 11/POJK.03/2020 concerning the National Economic Stimulus which is focused on communities affected by a pandemic so that</p>	<p>uses the Bankruptcy Code as the original that regulates bankruptcy. However, the government makes regulations and large policy responses to the pandemic. One of the policies to prevent the spread of the corona virus is to close several bankruptcy courts or open them according to standard health protocols, but debtors will continue to be protected from creditors by the automatic stay. In addition, the Government makes laws through the CARES Act which directly relates to bankruptcy to assist and</p>
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		<p>through banks, businesses are helped and it is not easy to become bankrupt. The moratorium was only a plan and is still being debated. Another thing, the government has made a policy of holding programs to help affected communities, for example for Micro, Small and Medium Enterprises and for Micro Enterprises. In addition, it is not too intersected with bankruptcy. For example, wage or salary subsidy assistance, pre-employment cards,</p>	<p>mitigate the increase in bankruptcy filings. Because the CARES Act focuses more on small businesses and consumer debtors, the government has also made various policies for those who do not meet the requirements of the regulations, such as medium-large businesses, namely through Main Street Lending Program, Commercial Paper Lending Facility, Corporate Credit Facilities, Payroll Support Program and CARES Act Loan Program</p>
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		cash social assistance (BANSOS)	
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B. Future arrangements for company bankruptcy in Indonesia based on the experience of corporate bankruptcy in the United States during the Covid-19 pandemic.

Comparing the arrangements of the two countries between Indonesia and the United States, apart from the different legal systems, there are various things that Indonesia can learn so that future bankruptcy arrangements can better facilitate various parties in bankruptcy cases and bankruptcy is not an alternative that makes it easier to bankrupt debtors. The pandemic that has devastated the stability and financial and economic situation of a country has greatly affected the increase in bankruptcy filing cases. This pandemic situation is a momentum where not only the readiness of a country in facing these circumstances but also how existing regulations can still effectively regulate the situation caused by the pandemic. Existing regulations should be a tool to resolve cases and even to prevent them from happening. This extraordinary situation, which is an emergency situation for both Indonesia and the United States, is a challenge for both countries to manage so that bankruptcy cases do not rise sharply which makes the country's economic and business conditions more unstable.

Judging from the existing arrangements in the United States related to bankruptcy during the pandemic, this country made a large policy and

massive response to the consequences of the pandemic related to bankruptcy. Bankruptcy lawyers, financial analysts, and other professionals predict that the COVID-19 period will usher in a massive financial tsunami.¹⁹³ However, the number of Chapter 11 petitions filed by U.S. businesses dropped by 5% instead.¹⁹⁴ During the pandemic, government assistance programs and sufficient bankruptcy procedures have contributed to the survival of businesses. In the United States, the laws for reorganizing businesses were developed in response to and as a means of coping with a severe economic crisis brought on by the collapse of the railroad industry at the end of the 19th century. The majority of large corporate debtors survive bankruptcy, including almost every major airline that filed for bankruptcy in the 1990s and early 2000s.¹⁹⁵ The bankruptcy process is usually effective even during crises. Numerous failing railways were restructured using a framework that would later become known as Chapter 11 (bankruptcy's reorganization provisions) during the repeated economic "panics" of the late nineteenth century. Given this history, it is reasonable to conclude that bankruptcy will be available on an as-needed basis without the need for prior planning.¹⁹⁶

¹⁹³ Bill Fay, *COVID-19 Bankruptcies*, <https://www.debt.org/blog/covid-19-bankruptcy/>, accessed on January 25, 2023.

¹⁹⁴ Paul Venderberg, *Why Have Bankruptcies Fallen During the Pandemic?*, <https://blogs.adb.org/blog/why-have-bankruptcies-fallen-during-pandemic>, accessed on January 25, 2023

¹⁹⁵ Kenneth Ayotte and David Skeel, *Bankruptcy Law Needs a Boost for Coronavirus*, <https://www.wsj.com/articles/bankruptcy-law-needs-a-boost-for-coronavirus-11585608800>, accessed on January 25, 2023

¹⁹⁶ David Skeel, *Bankruptcy and the coronavirus*, <https://www.brookings.edu/research/bankruptcy-and-the-coronavirus/>, accessed on January 25, 2023

Indeed, the pandemic provides a shock to the economy which has an impact on bankruptcy filings, but apart from the existing regulations, the role of the government in considering new policies or regulations also has a significant impact. Bankruptcy filings in the United States were predicted to increase dramatically during this year's economic crisis brought on by Covid-19. In contrast, they decreased by 27 percent in pandemic situation, due to an unexpected drop in consumer and small business files. Kluender says, "Large corporations are not afraid to take advantage of the benefits of the generous debt forgiveness or reorganization that we have available through the US bankruptcy system."¹⁹⁷ Based on the assessment of the scholar above, that apart from the existing regulations, the USA bankruptcy system has facilitated and become a tool for parties to manage their bankruptcy cases. As a result, effective governmental responses in the situation of increased uncertainty and difficulties in accessing the bankruptcy system may postpone or even prevent bankruptcy cases. Even if there is a limitation of the bankruptcy code as an existing regulation that originally regulates bankruptcy issues, the government's vast response to the impact of the pandemic on the economy and business through policies and other regulations is very helpful in dealing with bankruptcy problems that occur. As a result, many companies have survived, although some have still gone bankrupt, but through the CARES Act many small businesses and

¹⁹⁷ Rachel Layne, *COVID Was Supposed to Increase Bankruptcies. Instead, They've Gone Down*, <https://hbswk.hbs.edu/item/covid-was-supposed-to-increase-bankruptcies-instead-theyve-gone-down>, accessed on January 25, 2023

consumer debtors have survived. Coinciding with the COVID-19 crisis has been a surge of major corporate filings, which have been driven in part by industries like retail that were already struggling before the outbreak. However, towards the beginning of the crisis in mid-March, particularly in high-unemployment areas, filings from consumers and small businesses declined drastically. This was likely due to a combination of financial, physical, and technological challenges to accessing the court system, as well as an increase in economic instability.¹⁹⁸ During the pandemic caused by Covid-19, fewer small enterprises have gone bankrupt. Business Chapter 7 filings (which are dominated by small and medium-sized businesses) have fallen by 20–30% year over year from the middle of March to the end of August, and by 13% from January to August, mirroring the trend observed in consumer Chapter 7 files.¹⁹⁹

Moreover, the United States is one of the countries with the strongest economy in the world, Filings for bankruptcy can be tracked over time to see how they fluctuate in relation to the economy. The two Figures below show a Federal Reserve released economic activity index and the seasonally adjusted number of Chapter 7 and Chapter 11 bankruptcies (two prevalent types of bankruptcy).²⁰⁰

¹⁹⁸ Jialan Wang, Jeyul Yang, Benjamin Iverson, and Raymond Kluender, *Op.cit*, p.4

¹⁹⁹ Jialan Wang, Jeyul Yang, Benjamin Iverson, and Raymond Kluender, *Op.cit*, p.3

²⁰⁰ Marc Martos-Vila, Zongtao Shi, Bankruptcy Filings During and After the COVID-19 Recession, https://www.americanbar.org/groups/business_law/publications/blt/2022/03/bankruptcy-filings-during-and-after-the-covid-19-recession/, accessed on January 26, 2023

Figure 1: Business Chapter 7 Filings and Coincident Economic Activity Index 2013–Sep 2021

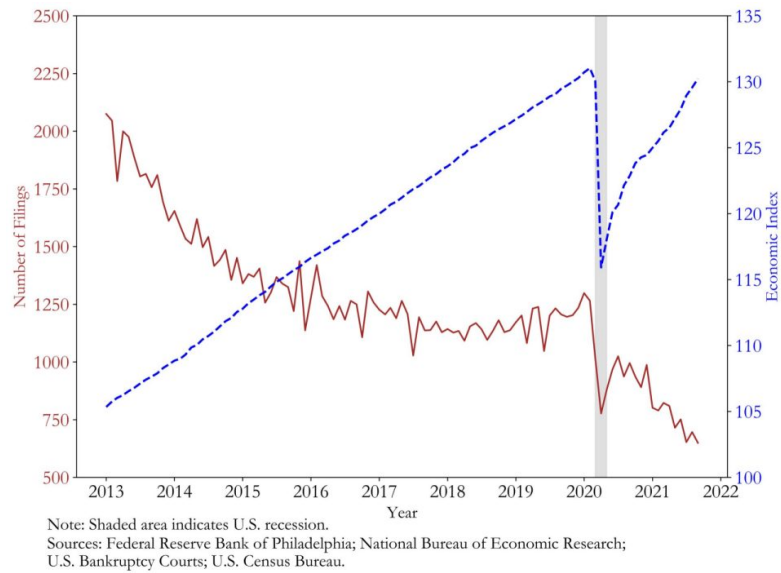
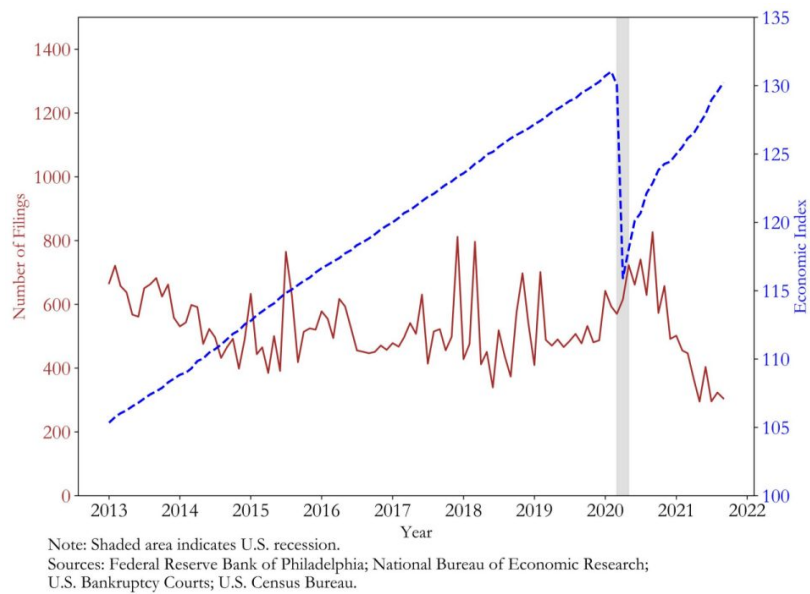


Figure 2: Business Chapter 11 Filings and Coincident Economic Activity Index 2013–Sep 2021



Source: Federal Reserve Bank of Philadelphia, National Bureau of Economic Research

Figures 1 and 2 demonstrate that the number of Chapter 7 and Chapter 11 bankruptcies filed for decreased as the economy expanded up until the beginning of the COVID-19 recession. In other words, the number of filings for bankruptcy is inversely correlated to the strength of economic activity. Figure 1 further demonstrates that the economic contraction in 2020 was accompanied by a significant decrease in Chapter 7 files, as opposed to the increase in filings projected given the historical correlation between the two variables. In contrast, business Chapter 11 filings increased, albeit not as much as the historical correlation would indicate.²⁰¹ It can be seen above regarding the number of bankruptcy filings with economic growth in the USA from 2013 to 2022, that the number of bankruptcies has gone up and down but is still far behind with significant economic developments. Even though it had fallen at the beginning of the COVID-19 pandemic, economic development continued to increase until 2022. Additionally, bankruptcy cases also decreased. This means that the bankruptcy settlement system can deal with pandemic conditions, and it turns out that economic developments also have an effect. Meanwhile, Economic conditions are external elements that can affect the business's operations. Regardless of the business's industry, the country's economic status will undeniably affect its condition. If the economic climate is positive the business in question will undoubtedly be healthy as well. This is due to the fact that if the economy as a whole is

²⁰¹ Ibid

good condition, then the rate of public consumption will be at a normal level, hence affecting the business's revenue.²⁰²

Therefore, based on the experience of bankruptcy issues that occurred in the United States during the pandemic, Indonesia can learn from its bankruptcy arrangements. Certainly, not all provisions in the United States are suitable for conditions in Indonesia but learning from what can be taken from arrangements in United States and adjusting them to conditions in Indonesia can make bankruptcy arrangements in Indonesia better. Although, Indonesia cannot be able to be adopted 100 percent due to differences in the legal system and also economic strength, it is not impossible for Indonesia that the economic situation in the future can become a developed country and bankruptcy arrangements will be better. Indonesia can learn by harmonizing the USA's regulations to Indonesia's conditions. Harmonizing means to be suitable together.²⁰³ Additionally, in legal term, harmonization means the adjustment of differences and inconsistencies among different laws, regulations, methods, procedures, schedules, and specifications, to make them uniform or mutually compatible among different national or regional regulatory authorities.²⁰⁴ Harmonizing in legal meaning could be the essential part of regulation that is already implemented in another country would be harmonized in Indonesia legal

²⁰² Ismanto Hadi Santoso and Sony Kristiyanto, "Potential Bankruptcy with Systemic Impact During Pandemic", *International Journal of Economics, Business and Accounting Research*, Vol-6, Issue-3, 2022, p.1259

²⁰³ <https://dictionary.cambridge.org/>, accessed on April 18, 2023

²⁰⁴ <https://www.lawinsider.com/>, accessed on April 16, 2023

system. Therefore, in this case of USA bankruptcy arrangements, especially during pandemic, what essential part from USA's regulations that is suitable with Indonesian legal system and Indonesia condition can be adjusted to be implemented in Indonesia. What Indonesia can learn from the United States are:

1. Chapter 11 on Reorganization, a very important and popular section of the United States Bankruptcy Code that is not found in Indonesian bankruptcy law, is a very important and popular part of the Bankruptcy Code.²⁰⁵ Chapter 11 of the United States Bankruptcy Code is a reference for several countries in making changes to the Bankruptcy Law.²⁰⁶ Chapter 11 is a reorganization chapter where the debtor continues to be "owned", has the powers and duties of a trustee, is allowed to continue in business, and is allowed to borrow new money with court approval. Indeed, if looking further at the bankruptcy law in Indonesia which does not regulate the possibility of reorganizing the company, but the company's reorganization institution is similar to the Suspension of Debt Payment Obligations. However, Indonesia needs PKPU regulations that are more detailed and facilitate restructuring for the good of both debtors and creditors. In fact, proposing restructuring in the chapter 11 mechanism in the U.S. are creditors who are really in an active position to support the restructuring. Even if the creditor has

²⁰⁵ Adrian Sutedi, *Op.cit*, p.23

²⁰⁶ Siti Anisah, "Studi Komparasi terhadap Perlindungan Kepentingan Kreditor dan Debitor dalam Hukum Kepailitan", *Jurnal Hukum* No. Edisi Khusus Vol. 16, Fakultas Hukum Universitas Indonesia, 2009, p.34

seen no more potential for the debtor to be restructured, then the creditor will not advance using chapter 11, but using the liquidation mechanism in chapter 7. However, in Indonesia, creditors appeared to be pro-restructuring and submitted PKPU but at the time of voting they refused.²⁰⁷ In addition, the duration of PKPU is also relatively shorter. As part of U.S. restructuring, debtors can defer tax payments for six years or more. The debtor may also pay the creditor more than the previously agreed time, as long as it equals the value of the bill of exchange at the time the creditor provided the loan. Indonesian bankruptcy law relies on the consent of the creditors for the court to establish the PKPU. Bankruptcies requiring a fair PKPU should only be conducted by courts specializing in bankruptcy cases.²⁰⁸ Therefore, further arrangements such as those in chapter 11 will make PKPU in Indonesia even better.

2. Bankruptcy law helps protect honest debtors by letting go of their claims (discharge). This goal is specific to individual bankruptcy. These arrangements can be seen in the bankruptcy laws developed in the United States. Therefore, need a separation of individual and companies' bankruptcy. The separation of bankruptcy for individuals and companies is due to differences in objectives and benefits. The

²⁰⁷ Hamalatul Qur'ani, *Hak Kreditur Ajukan PKPU: Salah Kaprah Memaknai Chapter 11 US Bankruptcy Code*, <https://www.hukumonline.com/berita/a/hak-kreditur-ajukan-pkpu--salah-kaprah-memaknai-chapter-11-us-bankruptcy-code-lt5b4dc4c0dea5a?page=2>, accessed on January 25, 2023

²⁰⁸ Siti Anisah, *Op.cit*, p.39-40

purpose and benefit of the arrangement for individual debtors is to distribute assets fairly among creditors through a fresh start which is associated with debt relief or discharge debts. Forgiveness in bankruptcy is based on the principle of a “fresh start,” which this law established. This doctrine emphasizes the successful reintegration of bankrupt debtors into society. In Indonesia, there is no process for debt relief (discharge), and Indonesia has not yet implemented the separation of business and individual bankruptcy.²⁰⁹ Individual debtor could also mean consumer debtor that is personal debts such as Credit card debt, student loans, auto loans, and mortgages. In the USA, consumer debtor can be declared bankruptcy while in Indonesia it is conducted through ordinary civil lawsuits. If there is consumer bankruptcy, there is also reorganization for consumer debtor through repayment plan.

3. There is an “automatic stay” which applies in the U.S. bankruptcy system. In the United States, when a debtor files for bankruptcy, all of its property becomes bankruptcy property. Automatic stay is ordered by the court in favor of all creditors seeking repayment of the bill of exchange from the debtor's property. A creditor cannot receive a portion of the debtor's bankruptcy property until the trustee disburses the bankruptcy property at the time of the closing of the bankruptcy

²⁰⁹ Ibid, p.35

case.²¹⁰ During the pandemic, automatic stays will be useful not only for creditors but also for debtors so that there will be no creditors who collect their debts directly to debtors. Whenever a debtor files for bankruptcy, all of their creditors are required by law to immediately stop any and all collection activities (automatic stay). During the automatic stay applies, debtors are given time to take assessment of their financial status, engage into negotiations with creditors (particularly secured creditors), and either liquidate assets (Chapter 7) or offer a repayment plan (Chapter 13). For Chapter 11 enterprises, the automatic stay provides time to analyze business worth, establish claim amounts, restructure operations, contracts, or leases, and offer a reorganization plan.²¹¹ Perhaps the most significant advantage of bankruptcy, especially in the midst of the COVID-19 crisis, is the automatic stay, which stops most creditors from collecting or liquidation obligations. It is possible that this "pause button" is all many debtors and businesses need during a crisis. The automatic stay applies as soon as the debtor files for bankruptcy. Meanwhile, where is no provision in Indonesian law for an automatic stay, therefore it is possible for creditors to collect from debtors immediately while court procedures are ongoing. Besides that, in Indonesia, actually there is the term of "ultimum remedium", which means bankruptcy should be the

²¹⁰ Ibid, p.41

²¹¹ Edward R. Morrison and Andrea C. Saavedra, "Bankruptcy's Role in the COVID-19 Crisis", Law in The Time of Covid-19, Katharina Pistor, Ed., Columbia Law School, 2020, p.129

ultimum remedium or the last resort not as a *premium remedium* or the first resort for settlement of debts.²¹² Therefore, in a crisis situation, both parties need to make sure to use this term for the good of both parties.

4. Bankruptcy law in Indonesia needs to apply an insolvency test, or in bankruptcy law in the United States is a means test. The means test in the United States is designed for persons who petition for chapter 7 bankruptcy. This procedure is performed to determine if a debtor is qualified to file for bankruptcy under Chapter 7. If the debtor fails on the means test, the only bankruptcy option available is Chapter 13. Whether or not the debtor can still afford to make payments on their debts or whether or not the amount of their assets is greater than their debts is determined by a “means test” designed to detect possible bankruptcy fraud. There are several purposes of the insolvency test, namely:
 - a. To prevent a debtor whose assets are more than his debts from being declared bankrupt by the Court. The main purpose is to find out whether the debtor is really in an insolvent condition.
 - b. The broad definition of debt in Law Number 37 of 2004 requires evidence that is not simple. In practice, simple evidence in Law No. 37 of 2004 is used as a reason to reject an application for a

²¹² Lilies Anisah and Eni Suarti, “Akibat Hukum Debitor Melakukan Perbuatan Melanggar Hukum Berdasarkan Undang Undang No. 37 Tahun 2004 tentang Kepailitan dan Penundaan Kewajiban Pembayaran Utang”, Jurnal Hukum Samudera Keadilan, Vol 17 No 1, Universitas Samudera, 2022, p.110

declaration of bankruptcy by a Commercial Court judge on the grounds that the application for a declaration of bankruptcy filed requires not simple evidence. This further makes it clear that an application for a declaration of bankruptcy requiring debt in a broad sense cannot be resolved through a simple evidentiary mechanism.²¹³

Through the insolvency test mechanism can test the eligibility of debtors declared bankrupt can prevent abuse of the bankruptcy system and not many debtors are easily bankrupt. If the court determines debtors can pay off their debts without filing for bankruptcy, it may suggest an alternative. This means test also could be introduced to replace simple evidence in order to settle cases that cannot be proven by simple evidence. In addition, insolvency test is to prove fairly which in terms of debt in a broad sense and if there are other provisions that affect the debtor to become insolvent.

The things mentioned above that can be learned from the United States legal system will be needed by Indonesia in the future. However, it may be difficult or impossible for Indonesia to apply what it can learn from the United States. Differences in legal systems can cause to incompatibilities; the United States adopts common law while Indonesia uses civil law. Due to differences in economic power, there may also be obstacles in terms of

²¹³ Siti Anisah, *Op.cit*, p.420

what Indonesia can learn from the United States to improve the regulations and bankruptcy system, namely:

1. Chapter 11 on Reorganization in the United States can be said to be similar to PKPU in Indonesia which allows debtors to restructure. PKPU is basically for the good of both debtors and creditors. However, in Indonesia, in many cases, creditors appeared to be pro-restructuring and submitted the PKPU, but at the time of voting, they refused.²¹⁴ Implementing reorganization provisions as applicable in the United States is actually possible as long as Indonesian provisions regarding the PKPU are to protect and benefit both parties, both creditors and debtors. However, problems may arise with the emergence of a lot of debate if there is a change to PKPU. This is because PKPU is an action that has a material impact on creditors and debtors. For example, when the Constitutional Court (MK) issued the Decision on Reviewing Laws of the Constitutional Court Number 23/PUU-XIX/2021, which allowed for legal remedies in the PKPU. This problem became debatable because it raises significant changes to the implementation of PKPU in the aspect of legal action.²¹⁵

²¹⁴ Hamalatul Qur'ani, *Hak Kreditur Ajukan PKPU: Salah Kaprah Memaknai Chapter 11 US Bankruptcy Code*, <https://www.hukumonline.com/berita/a/hak-kreditur-ajukan-pkpu--salah-kaprah-memaknai-chapter-11-us-bankruptcy-code-lt5b4dc4c0dea5a?page=2>, accessed on January 25, 2023

²¹⁵ Satrio Alif, *Penundaan Kewajiban Pembayaran Utang, Siapa Untung?*, <https://www.ui.ac.id/penundaan-kewajiban-pembayaran-utang-siapa-untung-lkhkru-fh-ui-kaji-upaya-hukum-pkpu/>, accessed on March 20, 2023

2. Debt relief (discharge) may be allotted for unilateral legal actions, such as those initiated by creditors, or for reciprocal legal actions (agreement). As long as the debtor has good faith, this discharge is permissible. As long as both parties agree, there are no problems with applying this in Indonesia. As a result of the debtor's inability to pay the remaining debt, many benevolent people forgive debts. In Indonesia, however, there is no mechanism that is clearly regulated. Individuals can also declare bankruptcy in Indonesia, but there is no clear separation between corporate and individual bankruptcy, as there is in the United States, where consumers can declare bankruptcy. Individual bankruptcy may be difficult to implement in Indonesia because there will be much debate. The positive aspect, however, is that if an individual declares bankruptcy, there is a PKPU, which allows the debtor to repay the debt through a peace proposal.
3. The “automatic stay,” which is valid in the United States but does not yet apply to Indonesia. Implementing an automatic stay can be useful for preventing creditor or debtor fraud. Therefore, the implementation of this automatic stay system can be advantageous for both parties and is not harmful to anyone, as it secures bankruptcy assets and preserves their value until creditors obtain their rights to get the payment. Consequently, automatic stay can be considered to not too difficult to be applied in Indonesia. This automatic stay system, however, must be strictly regulated so that it applies to those who file for bankruptcy.

Once they file for bankruptcy, the automatic stay applies. This is due to the possibility of fraudulent parties, such as creditors who collect the debt outside the court or debtors who fraudulently wish to transfer their assets, if it is not strictly regulated.

4. There is an insolvency test that can determine whether the debtor is eligible to file for bankruptcy or, to prevent abuse of the bankruptcy system, whether the debtor can still pay his debts. Implementing insolvency tests in Indonesia is debatable because it can have a significant impact. Even according to the Chairman of the Certification Board of the Indonesian Curators Association (AKPI), Ricardo Simanjuntak, the insolvency test cannot be applied in Indonesia. The reasons are:

- a. In legal perspective, according to Article 1865 of the Civil Code and Article 163 of the HIR, which state that as a bankruptcy applicant, the burden of proof is imposed. Problems arise when creditors as bankruptcy applicants find it difficult to obtain proof of the debtor's balance sheet, and it is also difficult to build argumentative arguments for bankruptcy petitioners stating why the debtor meets the requirements for being declared bankrupt.
- b. In technical perspective, in general, creditors do not have financial reports from debtors. For example, if the debtor is a closed limited liability company, it will be difficult for the creditor to obtain the

debtor's balance sheet, which can be used as evidence in filing for bankruptcy.

- c. This can also happen if the creditor is a bank as the applicant for bankruptcy, so even though usually a bank or financial institution (non-bank) receives financial reports from the debtor, in general the debtor no longer provides financial reports when the debtor is in default or has difficulty continuing to pay their debts.
- d. If the creditor can prove the debtor's balance sheet, showing that the debtor's assets are less than the debts, this evidence does not automatically state that the debtor is insolvent.
- e. Even if the debtor can be proven through the balance sheet, which shows that debtor is still in a solvent state, often the assets are not in the form of cash but in the form of goods such as land and buildings. Therefore, the debtor still cannot pay their debts.
- f. If the debtor is an individual, it is difficult to prove because the debtor does not have a balance sheet.
- g. The valuation of the value of the debtor's assets in accounting is susceptible to debate, whether based on book value, actual value based on market price, fair price, liquidated price, or calculation of the value of assets in the condition that the debtor is still doing business activities (going concern value) or based on the value of unit assets or retail sales.

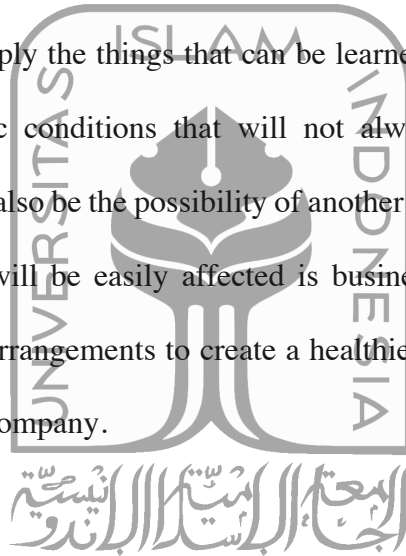
- h. The definition of “stop paying” can be multiple interpretations and debated because debtor could still pay but not in the agreed amount.
- i. The insolvency test may cause the panel of commercial judges to be trapped in the accounting theory debate as the basis for determining “insolvency” and may also violate simple evidence in bankruptcy cases.²¹⁶

Therefore, from the obstacles of implementing insolvency test above, implementing could mean Indonesia need to change many aspects such as simple evidence, requires anyone and any business to make financial report and determine what the valuation of the value of debtor’s assets and also which test is used to test insolvency whether use balance-sheet test, cash-flow test, or equity test.

From the possible difficulties listed above that will be faced by Indonesia in order to be able to apply what can be learned from the United States, Indonesia can apply it by harmonizing it with the conditions in Indonesia and also the existing regulations in Indonesia. Obviously, not every lesson learned in the United States is applicable in Indonesia. This is due to the fact that if Indonesia wishes to implement some of the aforementioned measures, it may need to overhaul many aspects, including its existing regulatory system. Obviously, it is hoped that improvements to

²¹⁶ Fitri Noviana Heriani, *Sembilan Alasan Insolvency Test Tak Cocok di Indonesia*, <https://www.hukumonline.com/berita/a/sembilan-alasan-insolvency-test-tak-cocok-di-indonesia>, accessed on March 21, 2023

bankruptcy law in Indonesia will benefit both parties, both the debtor and the creditor, particularly in emergency situations like the COVID-19 pandemic. Alternately, the lessons that can be learned are adapted to the Indonesian regulations, which do not apply 100 % but will be modified and improved in accordance with Indonesian conditions. In addition, further studies are needed to apply the things that can be learned from the United States above. Economic conditions that will not always be in a good condition and there will also be the possibility of another crisis in the future, one of the things that will be easily affected is business bankruptcy, so Indonesia needs better arrangements to create a healthier business without having to bankrupt the company.



CHAPTER IV

CLOSING

A. Conclusion

1. The similarities in the comparison between bankruptcy law in Indonesia and bankruptcy law in the United States are the condition of a person or business in applying for bankruptcy where the debtors cannot pay their debts to creditors, and also bankruptcy is indicated as the beginning of a legal proceedings. Both legal systems have similar definition of creditor and debtor. Additionally, bankruptcy filings must be conducted through the courts as well as a declaration of bankruptcy based on a court decision. Besides that, parties who can file for bankruptcy are creditors and debtors. Although the two countries both adopted policies during a pandemic, the policies that cover the wider community and their impact on bankruptcy issues are different. In the United States, according to data during the pandemic, CARES Act can help small businesses and individual debtors. These two types of debtors did not show a significant increase in bankruptcy cases. Apart from that, through other policies, the government has also assisted large businesses or large corporations in dealing with a pandemic with many programs that provide many facilities for obtaining loans. Indonesia also issued a regulation through the Financial Services Authority (OJK) that focuses on communities affected by COVID-19. However, the purpose of this regulation is only for banks to their debtors.

Another difference is that having an automatic stay in the United States can help debtors who are currently in bankruptcy proceedings, but the courts are closed due to the pandemic.

2. With the United States' experience in dealing with bankruptcy during the pandemic, Indonesia can learn that future bankruptcy arrangements are better prepared for crises and can better facilitate various parties in bankruptcy cases. During the pandemic, through government regulations and policies, data shows that the rate of bankruptcy filings has not actually increased significantly, especially for small businesses and individuals. As it turns out, economic power also affects the number of bankruptcy filings in the United States. Meanwhile, even though Indonesia cannot be able to adopt 100 percent of its bankruptcy arrangements, it needs some changes for the future. Due to the differences in economic development and legal system, Indonesia can learn by harmonizing the United States' regulations to Indonesia's circumstances. First, Indonesia could apply Chapter 11 on Reorganization of the United States Bankruptcy Law and courts specifically dealing with bankruptcy. This is because the duration of PKPU in Indonesia is short, and bankruptcies involving a fair PKPU should only be conducted by courts specifically dealing with bankruptcy matters. Second, In Indonesia, there is no separation between company and individual bankruptcy, and there is no mechanism for debt relief (discharge), so discharges are specifically for individual bankruptcy. Third, there is an "automatic stay" that applies in the U.S. bankruptcy

system, but it does not apply in Indonesia. During pandemic, it is very useful for debtors not to be charged outside the court. Fourth, the bankruptcy law in Indonesia needs to apply an insolvency test. This is in order to test the feasibility of debtors applying for bankruptcy and prevent abusing bankruptcy systems where debtors are still able to pay their debts. However, it may be difficult or impossible for Indonesia to apply what it can learn from the United States such as there will be debatable for applying the lesson from the United States' bankruptcy arrangements, especially implementing of insolvency test.

B. Recommendations

1. Indonesia may adopt regulations related to bankruptcy that cover a wider community such as individual debtors, small, medium and large businesses. In times of crisis, providing loan facilities will be very helpful. Apart from that, during a pandemic, policies related to health are indeed important, but policies related to bankruptcy also needed to be carried out because a healthy business without increasing of bankruptcy rates is also one of the pillars for maintaining the economy in times of crisis.
2. Indonesia may make regulatory changes in the future by implementing some similar regulatory substance that established in the United States such as such as means test, automatic stay, separation of individual and corporate bankruptcy, debt relief (discharge), and PKPU duration should be extended because the terms and conditions of bankruptcy in Indonesia

that are easy to bankrupt debtors tend to be irrelevant during a crisis. Besides that, consumer insolvency where consumers unable to pay their debts can use the bankruptcy system without going through ordinary civil lawsuits. In addition, it is also regulated not only for debt restructuring for companies but also for individuals.



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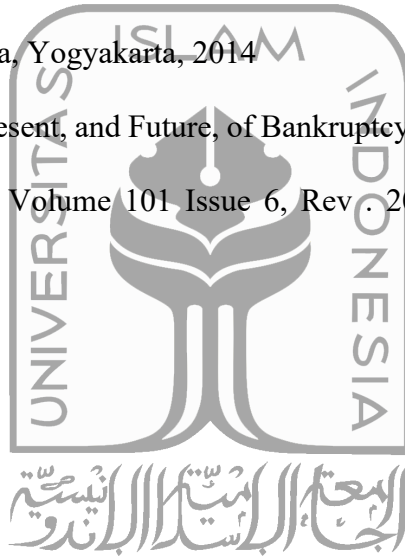
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2023

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THESIS

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Universitas Islam Indonesia**



By:
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