A Comparative of Indonesian Bankruptcy Law and the Netherlands Bankruptcy Law on the Conditions of Bankruptcy Petition from the Perspective of the Protection of Debtor's Legal Interest

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Abstract

The legal interest of debtor in bankruptcy law is the protection for himself against improper bankruptcy, the protection for the viability and sustainability of his business as well as the protection for ensuring the proper division of his wealth among his creditors. Meanwhile the legal interest of creditor in bankruptcy law is to have a certainty from the repayment of all debts owned by debtor.

In Indonesia bankruptcy law, the Law Number 37 of 2004 concerning Bankruptcy and Suspension of Obligation for Debt Repayment, the conditions of bankruptcy petition are made very simple that it could open broad opportunity for creditor to easily petition bankruptcy against his debtor. There is no requirement that the debtor should be in the state of insolvency before he can be petitioned for bankruptcy. The requirement for bankruptcy petition is more focused on the debtor’s willingness to repay rather than his ability to repay. As long as the debtor does not pay off of only one of his debts and provided there are at least two creditors then he can be filed for bankruptcy petition. Hence, in practical this could open up opportunities that a solvent debtor to be declared bankrupt and the bankruptcy law is used merely to force debtor to repay his debts and deter debtor from non-paying his debts. Moreover, in addition to the inexistence of insolvency test, the Law 37/2004 does not accommodate the fresh start or discharge philosophy as well as does not distinguish bankruptcy for individual and corporate debtor. These things could be deemed as shortcomings that the Law 37/2004 has especially on the conditions of bankruptcy petition that less protective to the legal interest of debtor. Therefore, the Indonesia bankruptcy law should be improved in the future to provide equal protection for creditor, debtor and also the stakeholders.

Preface

I would like to thank God for His never ending blessings that He has given to me since the day I got the opportunity to pursue my master degree at Tilburg University until I finished my master thesis, I have sensed that His blessings is always abundant for me. What a great experience that I have spent almost a year since the first day I arrived in Tilburg, the Netherlands. I am always grateful for the education, leisure, new friends and new horizon I experienced in Tilburg University that really enriched my life. The Tilburg University's motto "Understanding Society" has taught me the needs of a broader scope and a higher aim to live my life in the society.

I love this country, the Netherlands and that is also the reason why I have chosen the topic of my thesis that I would like to write something about the Netherlands the place where I pursue my further study and compare it to legal issues of my lovely home country, Indonesia. However, my journey in Tilburg University will come to an end shortly and I would like to thank certain people because without their help and guidance I would not be able to complete it. Therefore, I would like to thank Professor Dr. Erik P.M. Vermeulen and Priyanka Priydershini LL.M for being my thesis supervisor. I would like also to thank my parents, sisters, brother and my family in Indonesia for always praying for me, supporting and believing in me. I want to thank as well all of the Indonesian students in Tilburg, friends and housemates for being such a family here in Tilburg.

This thesis is the final requirement to be graduated from the International Business Law master programme as well as the final step of my preparation to pursue another new dream awaited for me. Therefore, herewith I would like to invite you to read my thesis.

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Chapter 1

Introduction

1.1. Background

Nowadays, the significant advancements of economy that have taken globally had brought an impact on the nations including Indonesia and in line with it also adds to the nation's consciousness to take an active role in this global development. However, the advancement of economy could arise a lot of debt related troubles in the society. The problems of debt could arise due to the fact that most entrepreneurs owned capitals not only from local investment, banks, notes, and other diverse sources but also from abroad. As a matter of fact, in the mid 1998 Indonesia had suffered economic difficulties as an impact from the advancement of economy which caused monetary crisis in Asia at that time. Business community and entrepreneurs therefore crucially need to settle their debt obligation in efficiently, effectively and fairly manner as possible. As a consequence, bankruptcy law as a legal instrument which could provide legal protection and certainty as well as enforcement that suit to their interests is undoubtedly needed. In principal, the development of the law of a nation is being affected by the aforementioned global economic developments as well. It is arguable that the development of law will lead to a harmonization and convergence[1] in which legal regulations of developing countries regarding economic areas including as well bankruptcy law approaching to the developed countries.[2]

According to Levinthal, all bankruptcy law has at least three main purposes[3]; that the bankruptcy law is aimed to prevent debtor perform detrimental acts to creditors, to ensure proper distribution of debtor's

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[1] Larry Cata Backer, ed., *Harmonizing Law in an Era of Globalisation: Convergence, Divergence, and Resistance*, Carolina Academic Press, November 5, 2007.

[2] Erman Radjagukguk, *Peranan Hukum Dalam Pembangunan Pada Era Globalisasi*, Jurnal Hukum, No. II Vol 6, p. 114.

[3] Louis E. Levinthal, *The Early History of Bankruptcy Law*, in the book of Jordan, Robert.L, *Bankruptcy*, New York: Foundation Press, 1999, p.17.

wealth and to provide opportunity to obtain debt relief. However, in principal the aim of bankruptcy law is to liquidate the assets of the debtor for the benefit of its creditors as to the principle of *pari passu pro rata parte* which guarantee the rights of creditors to debtor's wealth.[4] Thus, a general confiscation is performed after the verdict of bankruptcy against the debtor which aimed to prevent the debtor acts against and detrimental to the interests of creditors and performed directly on all assets owned by the debtor for the benefit of all creditors.[5] On its development, the bankruptcy law has become an important instrument for reorganizing the business especially in the situation where the debtor experiencing financial difficulties.[6] The instrument for reorganizing the business applies to the bankruptcy of company and the developments can be seen in several Bankruptcy Acts such as in the Britain, United States of America and Germany where this mechanism leads to a process for maximizing the prospective of business value and maintains the social benefits of the existing business that in the end could increase returns to its creditors.[7]

Subsequently, the developments showed that the objective of bankruptcy law is to protect honest debtors by freeing its debts or discharge which attached to individual bankruptcy.[8] It can be seen from the common law countries like England and United States bankruptcy law with the fresh start philosophy, which is forgiveness in bankruptcy that focuses on relief for an individual debtor from his debts and to give him a

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[4] Prof. Dr. Sutan Remy Sjahdeini, SH, *Hukum Kepailitan Memahami Undang-Undang No. 37 Tahun 2004 Tentang Kepailitan*, PT Pustaka Utama Grafiti, Jakarta, 2009, p.30.

[5] Thomas H. Jackson, *The Logic and Limits of Bankruptcy Law,* Cambridge, Harvard University Press, 1986, p.7. in Siti Anisah, *Studi Komparasi terhadap Kepentingan Kreditor dan Debitor dalam Hukum Kepailitan*, Fakultas Hukum Universitas Islam Indonesia, Jurnal Hukum Edisi Khusus Vol. 16 Oktober 2009, p. 30-50.

[6] W. W. McBryde, et. al., eds, *Principle of European Insolvency Law,* Deventer, Kluwer, 2003, p. 488; Roy M. Goode, *Principles of Corporate Insolvency Law*, London, Sweet & Maxwell, 1997, p. 25. In Siti Anisah., *Ibid*.

[7] Philip R. Wood, *Principles of International Insolvency,* London, Sweet & Maxwell, 1995, p. 4-7. In Siti Anisah, *Ibid*.

[8] The aim of individual insolvency is to provide the opportunity for debtors who cannot pay their debts to be free of all debts burden as long as the debtor performs honest and appropriate acts and indeed to fairly distribute the assets of debtor who is unable to pay its debts among creditors. Lewis D. Rose, *Australian Bankruptcy Law,* Sydney: Law Book Co, 1994, p.1. In Siti Anisah, *Ibid*.

fresh start opportunity by obtaining discharge.[9] The Netherlands has also introduced Debt Restructuring for Natural Person Act on 1 December 1998 in which a debt relief can be obtained by individual debtor freeing him from long imprisonment of his debts.[10]

However, there is no separation for corporate and individual bankruptcy as well as no mechanism for debt relief in the Indonesia bankruptcy law. As a matter of fact, the bankruptcy law in Indonesia has not been based with a global philosophy that should exist in the bankruptcy law which is the philosophy that the debtor in a solvent financial state should not be declared bankrupt.[11] Based on this philosophy, the debtor who can be declared bankrupt should be the insolvent debtor where his debts exceed his assets or a debtor who in a state cannot afford and stop paying his debts. Therefore, it can be argued that the aforementioned developments of bankruptcy law have not been applied in the Indonesia bankruptcy law. The conditions of bankruptcy petition under the Indonesia bankruptcy law, the Law Number 37 of 2004 on Bankruptcy and Suspension of Obligation for Payment of Debts is stipulated in Article 2 paragraph 1. It states that the Court must declare bankruptcy in case where the debtor has two or more creditors as well as he does not pay off at least one debt that has matured and collectible whether by his own petition or by his creditor's petition.

There is no requirement that the debtor should be in insolvency state to be declared bankrupt in the Indonesia bankruptcy law. Further, there are no differences between the conditions of bankruptcy petition stated in the previous Indonesian bankruptcy law, on Article 1 paragraph 1 the Law Number 4 of 1998 and in the new bankruptcy law, on Article 2 paragraph 1 the Law Number 37 of 2004. Moreover, the provision in

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[9] Vesna Lazic, *Insolvency Proceedings and Commercial Arbitration*, Kluwer Law International, T.M.C. Asser Instituut, The Haque, The Netherlands, 1998, p. 26 and 33.; Prof. Dr. Sutan Remy Sjahdeini, SH, *Op. Cit*, p.30.

[10] Peter J.M. Declercq, *Netherlands Insolvency Law: The Netherlands Bankruptcy Act and the Most Important Legal Concepts*, T.M.C. Asser Press, The Hague, The Netherlands, 2002, p. 3.

[11] Siti Anisah, *Op. Cit*., p .36. ; Prof. Dr. Sutan Remy Sjahdeini, SH, *Op. Cit*., p. 39.

Article 8 paragraph 4 the Law Number 37 of 2004 states that the bankruptcy petition should be granted if there are facts or circumstances that prove simply that the conditions to be declared bankrupt as referred to in Article 2 paragraph 1 have been satisfied. Thus the judge could have a narrow judgment because the judge has to declare bankruptcy instead of may declare bankruptcy as long as the conditions already met. Simply prove in this Article only requires that there are two or more creditors and debtor does not pay off at least one debt has matured and became payable, meaning that if the conditions have been proven, the judge should grant the petition for bankruptcy without considering the financial condition of the debtor. Therefore, it is arguably that a solvent company can be declared bankrupt under the provision of Article 2 paragraph 1 of the Law 37/2004. There is an interesting case in Indonesia as an example where the Commercial Court declared bankruptcy to a solvent company based on a simple examination that the debtor does not pay his debt to only one particular creditor in Indonesia. It is the decision of the Central Jakarta Commercial Court No. 10/PAILIT/2000/PN. NIAGA.JKT.PST of PT. Asuransi Jiwa Manulife Indonesia (Debtor) *v.* PT. Dharmala Sakti Sejahtera (Creditor). The bankruptcy petition is the first stage in bankruptcy proceedings thus to comply with the conditions is very important. Nevertheless, the inexistence of requirement for insolvency debtor on the conditions of bankruptcy petition in the Law 37/2004 can be argued as an example of shortcomings that it has. It could give broad opportunity for creditors to easily file bankruptcy petition against his debtor and the legal interest of debtor is less protected as a bankrupted party. Hence, the legal protection for debtor's legal interest in the bankruptcy Law 37/2004, especially on the conditions of bankruptcy petition essential to be further discussed.

By taking into account the consideration above, to identify and discuss the shortcomings of the Law 37/2004 and compare it to the Netherlands bankruptcy law particularly on the conditions of bankruptcy petition is the aim of this thesis. This thesis is aimed also to contribute

ideas on the development of bankruptcy law in Indonesia. Thus, Chapter 2 of this thesis shall provide in general the Law Number 37 of 2004 of the Indonesian bankruptcy law. Subsequently, the Chapter 3 shall discuss in general the Netherlands bankruptcy law. The Chapter 4 of this paper shall provide a brief analysis while Chapter 5 shall conclude the thesis.

1.2. Research Questions

What are the differences of the conditions of bankruptcy petition between the Law Number 37 of 2004 on Bankruptcy and the Netherlands Bankruptcy law and to what extent these regimes accommodate and protect the legal interest of debtor?

Chapter 2

The Indonesian Bankruptcy Law Overview

2.1. The Indonesian Bankruptcy Law

The regulation of bankruptcy in Indonesia has existed since the days of the Netherlands-Indies Government were set in Bankruptcy Ordinance, *Verordening op het Faillissement en de Surseance van Betaling de Europeanen in Nederlands Indie* (*Faillisements Verordening*/FV), *Staatsblad* (State Gazette) 1905 Number 217 *juncto Staatsblad* Number 348.[12] Prior to independence, *Faillisements Verordening* applies only to people who belonged to Europe, in accordance with the principle of legal discrimination imposed by the Dutch Government.[13] After the Indonesia gained its independence, Indonesia still adopted all regulations under the former Dutch administration. This is because the provision of Article II of transitional rules of the Constitution of Republic of Indonesia 1945 which states that as long as it has not been amended, revoked and revealed, all existing regulations automatically become laws of the Republic of Indonesia. The development started in the mid 1998 when Indonesia had suffered economic difficulties as an impact from monetary crisis in Asia at that time. The International Monetary Fund (IMF) urged Indonesia to improve or change the existing bankruptcy law at that time as a means to settle the debts of Indonesian debtors to its creditors.[14] Thus the *Faillissemetsverordening* was revoked by Government Regulation in lieu of Law Number 1 of 1998 and on 9 September 1998 it was ratified by the Parliament and enacted to become the Law Number 4 of 1998 as the new bankruptcy act. However, the Law Number 4 of 1998 only changed and added some articles from the *Faillisements Verordening*. The new rules only changed 93 articles, repealed 6 articles and added 10 new articles

[12] Prof. Dr. Sutan Remy Sjahdeini, SH, *Op. Cit.*, p. 19.
[13] *Ibid*.
[14] *Ibid*. p. 23.

from *Faillisements Verordening*.[15] Further, the Law Number 4 of 1998 had several weaknesses on its applications. The weaknesses among others are that there is no exact description about the concept of the debt so that it makes different interpretation in making the definition of the debt and also there is also no definition of debtor and creditor in the Law 4/1998, thus these weaknesses could make a legal uncertainty in the practice.[16]

Accordingly, the Government of Indonesia revised and improved its bankruptcy law to suits the need of society and thus the Indonesian Government enacted the Law Number 37 of 2004 on Bankruptcy and Suspension of Obligation for Payments of Debts. The bankruptcy stipulated in Law 37/2004 is the realization of two important articles in the Indonesian Civil Code (*Burgerlijk Wetboek/BW*), namely Article 1131 and Article 1132.[17] It concerns about all the assets of the debtor no matter movable or immovable shall be the guarantee or securities for his personal agreements, also the assets shall be joint guarantees for his creditors that the sale of the assets shall be divided among his creditors in accordance to his loan proportion except that there is a legal order to take precedence of priority over the others.

2.2. Principles and Aim of Bankruptcy Law

On the elucidation of the Law Number 37 of 2004 concerning Bankruptcy and Suspension of Obligations for Payments it is explained that there are several factors considered as the necessity to regulate the Law, *inter alia,* firstly the bankruptcy law is aimed to avoid the seizure and illegally claims of the debtor's property if at the same time there are some creditors who collect receivables from debtors. Secondly, it is aimed to avoid the situation where the creditors holding of security rights demand their rights by selling the debtor's property without taking into account the debtor's and other creditors' interests. A third object is to

[15] *Ibid*, p. 26.
[16] Ibid, p. 72-73.
[17] Article 1131 and 1132 Indonesian Civil Code; Prof. Dr. Sutan Remy Sjahdeini, SH, *Op. Cit.*, p. 5.

avoid any fraud committed by one of the creditors or by the debtor itself, for instance, the existence of fraudulent debtor to escape all of his property with the intent to relinquish his responsibilities to the creditors.

It can be argued that the legal principles are crucial for it has important role as the foundations in every regulations. The use of legal principles as a fundamental and ground for judges to rule on cases in bankruptcy can be seen in the Law Number 34 of 2004 which explicitly states that the source of unwritten law including the principles of law in bankruptcy can be used as the basis for the judge to decide. This is well explained in the Article 8 paragraph 6 of the Law 37/2004 that the Court decision shall contain a particular section of the legislation in question and / or sources of unwritten law that formed the basis for the judge to decide.

One of the important principles in the bankruptcy law is the Principle of *Paritas Creditorum*. This principle actually can be found in the Indonesian Civil Code Article 1131 and 1132 known as the principle of securities which determines that the creditors have the same rights to all of the debtor's property. This principle provides assurance that although the assets of the debtor are not immediately connected to the debt, yet by law the assets serve as guarantee of his debts. Moreover, the Law is aimed also to ensure that the distribution of debtor's wealth among the creditors in accordance with the principle of *pari passu pro rata parte* (proportional share of debtors assets to the concurrent creditors or unsecured creditors based on consideration of the claims respectively).[18] The *pari passu* means that all creditors are jointly together obtain a settlement without precedence. The *pro rata* which is also known as proportional means that in the division of the debtor's assets, creditors will get a proportional division based on the size of the individual creditor's receivable compared to overall creditors' claims upon the whole assets of the debtor. The

[18] *Ibid*, p. 30.; Also can be seen at Jerry Hoff, *Indonesia Bankruptcy Law*, Tata Nusa, 1999, p. 10 on Fritz Edward Siregar, *Protection of Creditors under Bankruptcy Law and Company Law (Comparative Study between Indonesia and the Netherlands Court Practice)*, Erasmus Universiteit Rotterdam, The Netherlands, p. 8.

Paritas Creditorum principle aims to provide fairness and equality to all creditors but not treated the same, meanwhile the principle of *Pari Passu Prorata Parte* provides the creditors legal certainty with the proportional fairness. Furthermore, through the Chapter III of the Law 37/2004 about the Suspension of Obligation for Payments of Debts, the Law is aimed also to provide an opportunity for debtors and their creditors to negotiate and make a deal on the restructuring of debtor's debts.[19]

Additionally, there are also some principles explicitly mentioned in the elucidation of the Law Number 37 of 2004,[20] namely The Principle of Integration, The Principle of Business Continuity, The Principle of Justice and The Principle of Balance. However, besides the principles mentioned explicitly in the law, in order to meet the needs of the business, both nationally and internationally, the Indonesian bankruptcy law should also contain globally accepted principles.[21] For instance, the principle to prompt investment and business, the principle of providing equal benefits and protections for creditors and debtors, the principle of the bankruptcy decision cannot be imposed against the solvent debtor and so on.

2.3. Conditions of Bankruptcy Petition

From the provisions of Article 2, paragraph 1 the Law 37/2004, it can be concluded that a bankruptcy petition against a debtor may only be made if it meets the specified conditions. The applicant for bankruptcy petition should necessarily meet the conditions of bankruptcy petition first in order of his application to be granted by the commercial court.[22] The conditions for bankruptcy petition among others: a. Proved the existence of debt, at least there is a debt due and collectible; b. The debtor must have at least two creditors or in other words to have more than one creditor; c. The debtor failing to pay (does not pay off) at least one debt to one of its

[19] Prof. Dr. Sutan Remy Sjahdeini, SH, *Op. Cit*., p. 51.
[20] *Ibid*, p. 51.
[21] *Ibid*, p. 32.
[22] *Ibid*, p. 52.

creditors; d. Debts that are not paid for the time, it must be matured and became payable (due and payable).

As it can be seen above that one of the conditions must be met is the debtor must have at least two creditors or more. The conditions regarding the necessity of two or more creditors are known as *concursus creditorum*. If a debtor has only one creditor, the bankruptcy law would lose its *raison d'etre* (reason or justification) since if there is only one creditor then it can be argued that there will be no competition in dividing debtor's assets and also the creditor can perform an ordinary lawsuit not to the commercial court.[23] If there is only one creditor, then there is no doubt that the only one creditor will get all of the results from the sale of the debtor's assets. In general, creditor classification can be divided into three. First the separatist creditor (secured creditor) who holds a security interest material. Second, the preferred creditor because of the special nature of his receivable that has a privileged position and have the right to obtain from the first settlement of the bankruptcy estate sales, but is under mortgage and lien holders. The last one is the concurrent creditors who has the same status and are entitled to the sale of assets of the debtor after deducting the payment of debts to the separatists and preferred creditors.

Another important condition for the occurrence of bankruptcy is a debt which strictly regulated in Article 2 paragraph 1 of the Law Number 37 of 2004. The definition of debt can be found in the Article 1 paragraph 6 the Law Number 37 of 2004, that the debt is the obligations stated or can be expressed as a sum of money in the currency of both Indonesian and foreign currency, either directly or that will arise later in the day or contingent, arising from the agreement or and laws that must be met by the debtor and if not met entitles the creditor to obtain fulfillment of debtor assets. In the terms of "the debtor does not pay off" on the conditions of bankruptcy could be interpreted that even though the debtor still able to

[23] *Ibid.*, p. 53. Can be seen also at Setiawan "Ordonansi Kepailitan Serta Aplikasi Kini". In Lontoh, Rudy A., dkk, *Penyelesaian Utang-piutang: Melalui Pailit atau Penundaan Kewajiban Pembayaran Utang*, Bandung: Alumni, 2001, p. 122.

pay or in solvent condition but when he does not pay off his debt then the debtor can still be filed for bankruptcy. Meanwhile, according to the explanation of Article 2 paragraph 1, the understanding of a debt that has matured and can be billed (due and payable) is an obligation to pay a debt that has matured, both as contracted, accelerating time billing as agreed, the imposition of sanctions or penalties by the competent authority, as well as the decision of the court or arbitrator. In addition to the debt, the requirement of the presence of at least two or more creditors is also have to be fulfilled meaning that those conditions must be met as a whole to file for bankruptcy.

2.4. The Bankruptcy Process and the End of Bankruptcy

There are several parties given the right to file for bankruptcy to the specific debtors pursuant to Article 2 the Law 37/2004, namely the debtor itself, one or more creditors, the Public Prosecutors, the Bank Indonesia, the Capital Market Supervisory Board and the Minister of Finance. The debtor has an authority to file for bankruptcy on itself, while for creditors there could be one or more creditors file for bankruptcy to the debtor. As regards to the bankruptcy filed by Public Prosecutors, it is a situation where Attorney General may file for bankruptcy petition on the ground of public interest as long as the conditions for filing the bankruptcy have been satisfied. The bankruptcy petition for banks is wholly under the authority of Bank Indonesia and solely based on an assessment of financial condition and the condition of the overall banking. The bankruptcy petition that can be filed by the Capital Market Supervisory Board which is the watchdog over the activities related to public funds invested in securities, is that the petition for the debtor as in the form of depository and settlement institution, clearing institutions, stock exchange as well as securities companies. Meanwhile, if the debtor filed for bankruptcy is for instance insurance companies, pension funds, or state-owned enterprises engaged in the public interest, then the authority to file for bankruptcy is the Minister of Finance.

The bankruptcy petition is to be submitted to the commercial court which is located in the commercial area of law that covers the area where the general position of the debtor or as stated in its Articles of Association if the debtor is a legal entity.[24] If the debtor has left Indonesia, then the bankruptcy petition is filed in the area of law that covers the latest legal position debtor. The designated commercial court as a court that has competence to examine the case of bankruptcy is stipulated in Article 1 paragraph (7) of Law 37/2004.

Further, a simple examination of the bankruptcy petition shall be performed by the bankruptcy Judge of the Commercial Court pursuant to Article 8 paragraph 4 the Law 37/2004. It means that if there is a fact or circumstance simple proving that the conditions for the declaration of bankruptcy has been satisfied, thus the Court shall grant the petition. It describes that the meaning of a fact or circumstance simply proving is when there is a fact of two or more creditors and the fact that the debt is due and unpaid. Meanwhile, the difference in the number of the large amount of debt claimed by the applicants and the defendant does not preclude the bankruptcy ruling. A decision on a bankruptcy petition statement must be uttered in the hearing open to the public and can be implemented in advance, although a legal action filed against the verdict.[25] It is stipulated that no later than twenty days after the filing of petition is dated then the hearing on the bankruptcy petition is to be held[26] as well as the time period of no longer than sixty days after the date of a bankruptcy petition is filed, the Court should made a decision on a bankruptcy petition.[27] Upon the decision of bankruptcy declaration the supervisory judge and curator are appointed by the Judge of the court as stipulated in Article 15 paragraph 1 the Law 37/2004. Supervisory judge has an obligation to supervise the settlement of the bankruptcy estate carried out by curator. As stipulated in Article 69 paragraph 1 the Law 37/2004,

[24] As provided for in Article 3 paragraph (1), the Law Number 37 of 2004.
[25] See the Article 8 paragraph (7) of the Law Number 37 of 2004.
[26] See the Article 6 paragraph (6) of the Law Number 37 of 2004.
[27] See the Article 8 paragraph (5) of the Law Number 37 of 2004.

performing maintenance and settlement of bankruptcy estate are the main task of a curator.

The legal consequence arising after the bankruptcy decision is a general confiscation of all property of debtor. According to Article 24 paragraph 1 and 2 the Law 37/2004, debtor shall lose his right to take control and manage their wealth since 00.00 of the bankruptcy decision. Further, the *Actio Pauliana* shall also apply after the bankruptcy decision based on Article 41 until 45 of the Law 37/2004. It is a mechanism provided by the law to every creditor to apply for cancellation of all acts by debtor which can be detrimental to creditors because there is opportunity for debtor before the bankruptcy decision with his bad faith to transfer his assets to third party. Moreover, there is opportunity of legal remedies for debtor after the bankruptcy decision declared upon them which are in the form of cassation and judicial review to the Supreme Court. An appeal is not accommodated in a bankruptcy case by the Law 37/2004. Only two of these remedies are known and the provisions can be found in Article 11 paragraph 1 and Article 14 paragraph 1 of the Law 37/2004. Despite any submission of cassation or judicial review from the said decision pursuant to Article 16 paragraph 1 the Law 37/2004, however, the decision on bankruptcy can be performed in advance pursuant to Article 16 paragraph 1 the Law 37/2004 and on paragraph 2 it states that although the bankruptcy verdict is later canceled through legal measures, curator deeds shall remain valid and binding on the debtor.

The bankruptcy can be ended by the reconciliation made among the parties that have to be approved by the commercial court pursuant to Article 167 the Law 37/2004. Further, pursuant to the Article 17-19 the Law 37/2004, the bankruptcy can also be ended by the cancellation of bankruptcy decision by the Commercial Court in case the bankruptcy estate is not sufficient to pay the cost of bankruptcy, thus the court upon the recommendation of the supervisory judge and after hearing the creditors committee may decide revocation of bankruptcy decision.

Chapter 3

The Netherlands Bankruptcy Law Overview

3.1. The Netherlands Bankruptcy Law

In the Netherlands, the regulation of bankruptcy at the beginning was set in *the Code de Commerce* or Commercial Code which came into force in 1811 and distinguished the status of trader with not a trader. This status differences were continued to be applied in bankruptcy laws that substitute *the Code de Commerce,* which was *Wetboek van Koophandel Nederland* and came into force in 1838 (the Netherlands Commercial Code).[28] Subsequently, the regulation of bankruptcy in the Netherlands Commercial Code was substituted with the *Faillissementswet 1893* (The Netherlands Bankruptcy Act) which applies to all people not just traders and came into force on 1 September 1896.[29] The application of the present Bankruptcy Act due to the reason that there were several criticisms against bankruptcy provision in the Commercial Code, such as:[30]

a. Formalities that must be followed are seemed complicated.
b. A long time process in the settlement of the bankruptcy estate.
c. The high cost of undergoing bankruptcy proceedings including the administrative costs in court.
d. Scheme of arrangement that facilitates the parties were concluded.
e. The limited role of creditors in the bankruptcy process.

The Netherlands Bankruptcy Act/*Faillissementswet* (the NBA) had undergone various changes but in essence it remains the same until now and it is nowadays becoming the main source for the Netherlands bankruptcy regulation. The Netherlands Bankruptcy Act regulates various

[28] Prof. Dr. Sutan Remy Sjahdeini, SH, *Op. Cit*., p. 16.

[29] Wessels, B., C.J.J.C. Van Nispen, M.PH., Van Sint Truiden, *Faillissementswet Executie- en Beslagrecht*, Kluwer, Deventer, 1996, p. 1.; Prof. Dr. Sutan Remy Sjahdeini, SH, *Op. Cit*., p. 17.

[30] AKD Prinsen Van Wijmen, *"Bankruptcy and a Fresh Start: Stigma on Failure and Legal Consequences of Bankruptcy"*, *The Dutch Report,* February 28, 2002, p. 3.

aspects and consists of three chapters each of which with a different type of insolvency procedure and applicable to both private persons and legal entities:[31]

1. The first procedure is The Bankruptcy procedure. This is applicable not only to legal entities and sole proprietorships but also to natural persons. The key concept in a bankruptcy is liquidation. The purpose of a bankruptcy is a general attachment and to liquidate all assets of the debtor for the benefit of his creditors which ordered by the judgment of the district court.[32] A bankruptcy is declared where a debtor has ceased to pay its debts.[33]
2. The second procedure is The Suspension of Payments or Moratorium procedure (*Surseance Van Betaling*). With taking into account the debtor's and his creditors' interests in order to avoid bankruptcy then the suspension of payments will be ordered by the court for a specific period of time.[34] The purpose of a suspension of payment is to give the debtor an opportunity to search for ways of financing its debts or to reorganize and continue its business as well as to propose a composition to the creditors.[35] Therefore, continuation is the key concept in the suspension of payment. A suspension of payment can be requested if a debtor foresees that when his debts become due and collectible, he will not be able to pay all of his debts to the creditors.[36]
3. The third insolvency procedure is *Wet Schuldsanering Natuurlijke Personen* or Debt Repayment Scheme Act or known also as Debt Reorganization of Natural Persons. This is the biggest change in the Netherlands Bankruptcy Act which was made on 1 December 1998 and applicable to private person only. The purposes of this procedure are to elevate the willingness of creditors to conclude settlements with

[31] Karen Harmsen, Marius W. Josephus Jitta, *The Insolvency Laws of The Netherlands*, Juris Publishing, Inc., New York, USA, 2006, p. 8.
[32] Vesna Lazic, *Op. Cit.*, p. 28.
[33] Peter J.M. Declercq, *Op. Cit*., p. 2. Also see Article 1 Fw/NBA.
[34] Vesna Lazic, *Op.Cit.*, p. 29.
[35] Peter J.M. Declercq, *Op. Cit.*, p. 2.
[36] Article 213 Fw/NBA.

natural person debtors and minimize the amount of bankruptcies of natural persons.[37] There is no discharge in NBA so that debtor remains liable for any unsatisfied claims after the proceedings unless a composition is made between debtor and his creditors (Art. 195 NBA).[38] Hence, another purpose of this Act is to release the debtor from the burden of debt of a bankruptcy delivering a clean slate for the debtor.[39]

Besides the changes in the Debt Repayment Scheme, there are some others which considered as the most important changes.[40] The changes are the recognition of the cooling down period or the suspension of the security rights execution mechanism, the introduction of the anti abuse law of the provisions on sanctions against those who against the law causing the company to bankruptcy, and also the recognition for a company in a situation after the state of insolvency to possibly continue its activity has become the major changes in the Netherlands bankruptcy act.[41]

3.2. Aim and Principles of Bankruptcy Law

There are several leading principles of the Netherlands Bankruptcy Law which are The Principle of The Equality of Creditors (*Paritas Creditorum*), The Principle of Fixation, The Principle of Universality, and The Principle of Territoriality.[42]

1. The Principle of Fixation

The Principle of Fixation means that starting from the date of the adjudication of the bankruptcy or the suspension of payments, the legal

[37] Peter J.M. Declercq, *Op. Cit.*, p. 3.
[38] Vesna Lazic, *Op.Cit.*, p. 30.
[39] Reinout D. Vriesendorp, Joseph A. McCahery, Frank M.J. Verstijlen., *Comparative and International Perspectives on Bankruptcy Law Reform in the Netherlands*, Boom juridische uitgevers, Den Haag, p. 16.
[40] AKD Prinsen Van Wijmen, *Op. Cit.*, p. 3.
[41] *Ibid*.
[42] Peter J.M. Declercq, *Op. Cit.*, p. 4.

position of each party to the bankruptcy or suspension of payments is fixed with retroactive effect as to 00.00 hours of that date.[43] It means that starting from the day of bankruptcy declaration the debtor shall lose his right to take control and take care of his wealth and the application of this principle can be seen at Article 228 NBA concerning suspension of payments and Article 23 NBA concerning bankruptcy.[44] However, this retroactive effect does not apply to certain financial institutions such as insurance companies, banks, and that insolvencies of financial institutions are normally not governed by the Netherlands Bankruptcy Act.[45]

2. The Principle of the Equality of Creditors

The Principle of the Equality of Creditors well known as the principle of *Paritas Creditorum* means equal treatment of creditors in bankruptcy unless parties created a contractual subordination before the bankruptcy or there is a preference or security rights occurs from a statutory provision.[46] The basis for the *Paritas Creditorum* principle can be seen in Article 3:277 paragraph 1 BW or the Dutch Civil Code[47] which states that after the creditors have equal rights where the creditor has the right to obtain payment from the proceed of debtor's assets in accordance with the size of the individual receivable, unless there are other reasons which are legitimate in before the law. As the consequence of this principle is that creditors are treated equally in respect of their respective priorities and preferences, yet not all creditors is treated the same.[48] This principle of *Paritas Creditorum* is also applied in the Indonesia Bankruptcy Law and in principal can be found in Article 1131 and 1132 of the Indonesia Civil Code as already explained in Chapter 2 above.

3. The Principle of Universality

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[43] *Ibid*.
[44] *Ibid*.
[45] Karen Harmsen., Marius W. Josephus Jitta, *Op. Cit*., p. 10.
[46] *Ibid*.
[47] Peter J.M. Declercq, *Op. Cit*., p. 11.
[48] *Ibid*.

The Principle of Universality is in principle inversely or oppositely related to The Principle of Territoriality. Nevertheless, both are attached and legitimate when the insolvencies have international aspects.[49] According to this principle, all assets of the debtor no matter where situated, shall fall within the bankruptcy estate in the Netherlands.[50] However the jurisdictions and sovereignty of other States become a barrier and limitation for this principle. Furthermore, the bankruptcy decision handed down by a court of an EU member states could be recognized and enforceable in the Netherlands.[51] This is due to the fact that since 31 May 2002 the European Union Insolvency Regulation on insolvency proceedings came into force which regulates that any judgment of insolvency proceedings handed down by a court of an EU member state shall be recognized in all the other EU member states.[52]

4. The Principle of Territoriality

This principle determines that the decision of the bankruptcy handed down outside the Netherlands is not recognized in the Netherlands except agreed by prior agreement/treaties or the provisions of the European Union Insolvency Regulation concerning the insolvency process applies.[53] Nevertheless, basically pursuant to this principle, it does not allow the court to execute a foreign judgment or in other words a foreign insolvency proceeding has no effect in the Netherlands.

3.3. Conditions of Bankruptcy Petition

The conditions of bankruptcy petition are regulated In Article 1 *Faillissementswet* or the Netherlands Bankruptcy Act. The following are the excerpt in the origin Dutch language and its translation:

[49] *Ibid*, p. 13.
[50] *Ibid*.
[51] *Ibid*.
[52] *Ibid*, p. 31.
[53] Ibid, p. 17.

"*De schuldenaar, die in de toestand verkeert dat hij heeft opgehouden te betalen, wordt, hetzij op eigen aangifte, hetzij op verzoek van een of meer zijner schuldeisers, bij rechterlijk vonnis in staat van faillissement verklaard*."[54]

"*A debtor in a situation where he has ceased to pay his debts as they fall due shall be declared bankrupt by a court order either on his own application or on the petition of one or more of his creditors*."[55]

From the above article's definition it can be seen that both the debtor can petition its bankruptcy and its creditors can file for the bankruptcy of the debtor, even the Dutch Public Prosecutor can also file for the bankruptcy for the reason of public order.[56] It is crucial for a petitioner to state facts and circumstances that constitute *prima facie* evidence that the debtor has ceased to pay its debts. If the petitioner is a creditor, besides the *prima facie* test that the debtor has ceased to pay its debts, the court will have to ensure as well whether there is also at least *prima facie* evidence that the creditor petitioner has a right to claim against the debtor.[57]

The court then shall declare bankruptcy when it is ascertained that the debtor has ceased to pay[58] and that there is more than one debt unpaid as well as the petitioner has proven that he possess a valid claim and complied with formalities.[59] Thus, the minimum requirement is the presence of at least two creditors and the confirmation of at least one of the debts is due and collectible.[60]

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[54] Mr. N.J. Polak, bewerkt door Mr. M. Pannevis, *Faillissementsrecht*, elfde druk, Kluwer Deventer, Amsterdam, 2008, p. 2.; Also in Robert J. Blom, *Kernboekje faillissement, surseance en schuldsanering 2004/2005*, Kluwer, Deventer, p. 16.

[55] Karen Harmsen., Marius W. Josephus Jitta, *Op. Cit*., p. 161.

[56] See Article 1 paragraph 2 Fw/NBA.

[57] Peter J.M. Declercq, *Op. Cit*., p. 63.

[58] See Article 6 paragraph 3 Fw/NBA.

[59] Vesna Lazic, *Op. Cit*., p. 30.

[60] *Ibid*.

Moreover, according to the Article 4 paragraph 1 NBA, if the individual debtor filed for bankruptcy himself thus the clerk of the court must immediately inform the debtor that he is entitled to apply for a Debt Repayment Scheme as contained in Article 284 NBA and without prejudice to the provisions of Article 15b paragraph (1) NBA.[61] Furthermore, there is no special bankruptcy court exist in the Netherlands.[62] A petition for bankruptcy has to be filed in the district court of the residence of the debtor[63] and in the case of a company, where it has its official seat or as mentioned in the articles of association[64], meanwhile a bankruptcy can also be declared to a foreign debtor whose business in the Netherlands by the competent district court in which located the foreign company's principal office.[65]

Pursuant to Article 6 paragraph 1 NBA, the court may order the debtor to be summoned either in person or by proxy to be heard after the petition is filed.[66] In the process of examination by the court, the bankruptcy petition may be granted if the court ascertained that there is a cessation of payment by the debtor according to the Article 6 paragraph 1 NBA and also that there is more than one debt unpaid as well as the petitioner has shown to possess a valid claim and complied with formalities.[67] Thus, the presence of at least two creditors and the confirmation of at least one of the debts is due and payable serve the minimum requirement.[68] Debtor who has been declared bankrupt has the right to appeal within eight days after the bankruptcy decision handed down, as stipulated in Article 8 paragraph 1 NBA.[69] However, the Article 13 paragraph 1 NBA states that all the works that have been done by the curator of the bankruptcy estate settlement remain valid and binding on the

[61] Karen Harmsen., Marius W. Josephus Jitta, *Op. Cit*., p. 162.
[62] Peter J.M. Declercq, *Op. Cit*., p. 63.
[63] See Article 2 paragraph 1 Fw/NBA.
[64] See Article 2 paragraph 2 Fw/NBA.
[65] Peter J.M. Declercq, *Op. Cit*., p. 63.
[66] Karen Harmsen., Marius W. Josephus Jitta, *Op. Cit*., p. 163.
[67] Vesna Lazic, *Op. Cit*., p. 30.
[68] *Ibid*.
[69] Karen Harmsen., Marius W. Josephus Jitta, *Op. Cit*., p. 163.

debtor although there is action, appeal or cassation or even the bankruptcy order is nullified.[70] If the bankruptcy petition is granted, the court shall subsequently appoint trustee/curator and also a bankruptcy judge who will supervise the proceedings.[71] After the bankruptcy ordered, the commencement of proceedings has to be published either in the Netherlands Official Gazette (*Nederlandse Staatscourant*) or daily newspapers.[72]

3.4. Consequences and the End of Bankruptcy

The bankruptcy declaration indicates the commencement of bankruptcy proceedings and as consequence the court decision shall appoint the supervisory judge and curator. The main task of the curator is to administer and liquidate the bankruptcy estate. Curator is acting under the supervision of the supervisory judge (*Rechter-Commissaris*) who has a role and duty to oversee the administration and settlement/liquidation of the bankruptcy estate by the curator.[73] Assets of the debtor which are included as the bankruptcy estate is all the property of debtor at the time the debtor filed for bankruptcy, including assets situated outside the Netherlands and all property acquired by debtor during the bankruptcy process.[74]

In general, the main consequence of the bankruptcy decision is that the debtor's assets are confiscated and liquidated for the benefit of creditors and under the control of the trustee/curator. With the decision of the bankruptcy thus the debtor loses the right to organize, administer and sell their wealth since 00.00 on the day it declared bankruptcy retroactively.[75] The Curator is obligated to administer the settlement of the bankrupt estate based on Article 68 paragraph 1 NBA. The NBA provides

[70] *Ibid*, p. 165.
[71] Vesna Lazic, *Op. Cit.*, p. 30.
[72] *Ibid*.
[73] Peter J.M. Declercq, *Op. Cit.*, p. 74. See Article 64 NBA.
[74] Ibid, p. 62.
[75] *Ibid*, p. 7.

that the bankruptcy estate sales conducted by public auction sold to the highest bidder.[76] Nevertheless, in practice curator can also sell the bankruptcy assets with other parties via private sales and it is subject to approval by the supervisory judge.[77] Further, the NBA does not provide "discharge" in the bankruptcy proceedings that, unless a debtor enters into a composition with his creditors, he still liable for any unsatisfied claim after the termination of proceedings pursuant to Article 195 NBA.[78]

The bankruptcy may terminate if the court approves the composition entered into between the debtor and his creditors during the bankruptcy proceedings. It is an agreement offered by the debtor to the creditor on payment of his debts. A plan for composition made by debtor must be filed eight days before the creditors' meeting pursuant to Article 139 paragraph 1 NBA.[79] Moreover, if there is no composition made thus in accordance to Article 193 NBA, the bankruptcy will be terminated by the liquidation of debtor's assets that the curator has distributed all assets to the debtor's creditors.[80] Furthermore, according to AKD Prinsen Van Wijmen, there are several ways in which a bankruptcy may be terminated in the NBA: they are in the case where the lack of assets so that the bankruptcy is closed, in case the decision of bankruptcy is reversed by the Court of Appeal and in case where the debtor reached conclusion with the creditors of a scheme of arrangement.[81]

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[76] *Ibid*, p. 83.
[77] *Ibid*. See Article 101 and 176 NBA.
[78] Vesna Lazic, *Op. Cit.*, p. 30.
[79] *Ibid*.
[80] *Ibid*, p. 31.
[81] AKD Prinsen Van Wijmen, *Op. Cit.*, p. 5.

Chapter 4

Analysis

4.1. The Case of PT. Asuransi Jiwa Manulife Indonesia

The case of Manulife provides an example where a solvent company declared bankrupt simply on the ground that the company does not pay its obligations to only one particular creditor. It was the decision of the Central Jakarta Commercial Court No. 10/PAILIT/2000/PN. NIAGA.JKT.PST dated 13 June 2002 of PT. Asuransi Jiwa Manulife Indonesia (Debtor) *v.* PT. Dharmala Sakti Sejahtera (Creditor) which stated the PT AJMI bankrupt. Debtor is an insurance company founded by Manulife Financial Corporation of Canada, PT. Dharmala Sakti Sejahtera and the International Finance Corporation with the composition of shares of 51%, 40% and 9% respectively. The applicant is the curator of the Creditor of a company which already bankrupted previously as a former shareholder with 40% shares. The Creditor argues that based on the "Deed of Joint Venture Agreement", if the Debtor has earned profit and surplus to be distributed to shareholders, thus the Debtor has to pay dividends at least 30% from the amount of surplus. In this case the Creditor argues that the amount of Debtor's unpaid debt is Rp.32.789.856.000 billion rupiah, which is the dividend of the company's profits in 1998. The consideration taken by the Commercial Court was that based on legal facts, it is simply proven that there is a debt to the Creditor which already matured and can be billed; also it is proven that the Debtor has another debt to other creditors. Then based on these considerations, the Commercial Court declared the Debtor bankrupt. The Article 8 paragraph 4 of the Law Number 37 of 2004, the same content in Article 6 paragraph 3 of the former bankruptcy law of the Law 4/1998, states that the bankruptcy petition should be granted if there are facts or circumstances that prove simply that the conditions to be declared bankrupt as referred to in Article 2 paragraph 1 have been satisfied. Therefore, if there are facts simply

proving that the Debtor does not pay off at least one debt which is matured and collectible and also the fact of at least two creditors, thus the Court has a narrow judgment where it must declare bankrupt instead of may declare bankrupt. There is no requirement that the financial state of Debtor should be insolvent before he can be petitioned for bankruptcy in the Law 37/2004 also in the previous bankruptcy law, the Law 4/1998. This life insurance company, categorized as one of the largest in Indonesia at the time declared bankrupt, had a good financial condition with assets valued at 1.3 trillion rupiah and 400 thousand policyholders or approximately US$ 400 million while its debt only US$ 1,5 million.[82] In spite of the fact that the company is still solvent and able to pay its debts, however the commercial court declared bankruptcy to the company instead. This case indicates the shortcomings that the Indonesian bankruptcy law has. The provision of simple examination in the Article 8 paragraph 4 of the Law 37/2004 should be revised so that the Court could have a broad judgment in determining bankruptcy. Moreover, the conditions of bankruptcy petition should be improved so that only the insolvent debtor can be declared bankrupt, thus it could better protect the legal interest of debtor. Hence, the conditions of bankruptcy petition in the Law 37/2004 shall be further discussed in the next section.

4.2. The Conditions of Bankruptcy Petition in Indonesia

4.2.1. Condition for the Existence of Debt

Basically, the ground of bankruptcy is the compliance of debtor's obligations in a form of the fulfillment of the debt owed to creditors. Under Article 2 paragraph 1 of the law 37/2004, the most important conditions for the bankruptcy is a debt. The Law 37/2004 given a broad

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[82] http://www.tempo.co/read/news/2002/06/19/05613362/Pemerintah-Kanada-Menaruh-Perhatian-Besar-Pada-Manulife accessed on February 10, 2013. http://www.thejakartapost.com/news/2002/06/15/400000-policyholders-manulife-face-uncertainty.html accessed on February 25, 2013; Prof. Dr. Sutan Remy Sjahdeini, SH, *Op. Cit.*, p. 63.

definition of debt set forth in Article 1 paragraph 6, which states that the debt is the obligations stated or can be expressed as a sum of money in the currency of both Indonesian and foreign currency, either directly or that will arise later in the day or contingent, arising from the agreement or and laws that must be met by the debtor and, if not met entitles the creditor to obtain fulfillment of debtor assets. This is suitable with the broad understanding of debt under Article 1233 of Indonesia Civil Code that a debt is an obligation that must be made to the other party that the obligation can be born from legislation or from agreements. The definition of debt in the Law 37/2004 is an improvement of the definition of debt set out in the previous bankruptcy Law, the Law 4/1998. Previously the definition of debt in the Law 4/1998 was very narrow giving rise to multiple interpretations that debt is only form of debt obligation to pay a sum of money arising from the agreement borrowing money. Therefore the definition of debt in the Law 37/2004 is already good and accommodated the both interest of debtor and creditor.

There should be a provision regulating the minimum debt on the conditions of bankruptcy petition in the Law 37/2004. Thus, a debtor should has debts which serves the minimum limit or the minimum threshold to make sure he is eligible to be petitioned for bankruptcy. The debt limitation is one of the mechanisms of legal protection for debtors and creditors. It is arguable that the nominal limits of debt can be used to prevent creditors with very little claims, compared to assets owned by the debtor or compared to the higher nominal claims by other creditors, can file a bankruptcy petition and can be granted by the judge. For instance, it can prevent a creditor who has claim of only 50.000 euro (fifty thousand euro) to file a bankruptcy petition to a debtor who has 5.000.000.000 (five billion euro) of overall debt to the other or majority creditors. However, the definition of debt in the Law 37/2004 does not accommodate the minimum limit of the requirements of nominal debt that may be filed for bankruptcy. It can be seen also from the elucidation of Article 8 paragraph 4 which states that the bankruptcy petition will be granted when the facts

regarding the existence of two or more creditors and the debt that has matured and unpaid fulfilled, while the amount of debt that is argued by the parties not become a barrier for the ruling of bankruptcy. The limitation of nominal debt is deemed necessary as well for the protection of the majority creditor from any acts of minority creditor who has receivables below the minimum limit who wants to apply for bankruptcy. The Law should provide or constitute that the debtor does not pay most of his debts, for example more than 50% of his debts. This provision could protect the debtor that if he does not pay more than 50% of his debts, he can be considered to be insolvent and can be filed for bankruptcy. The regulation concerning the limitation of nominal debtor's debt is necessary also to protect debtor so that bankruptcy is not easily applied without regard to debtor's assets. Hence, the nominal debt limit can be considered as an important bankruptcy conditions and also fundamental to be addressed for the improvement of the conditions for bankruptcy petition in the Law 37/2004. Therefore, with the addition of the limitation of nominal debt in the conditions of bankruptcy petition, it could provide a more real legal protection for debtors.

Moreover, the provision concerning insolvency test is deemed important to be regulated and implemented on the conditions of bankruptcy petition in the bankruptcy law regime in Indonesia. In accordance with its philosophy that the bankruptcy must be preceded by testing whether a debtor has been in a state cannot afford to pay his debts or in the insolvent state. The insolvency test provision is necessary in Indonesia bankruptcy law in order to prevent solvent debtors or whose assets are more than the debts declared bankrupt by court. In general, there are two simple mechanisms to determine a state of insolvency. The first one is balance sheet insolvency which an accounting concept that the book value of a company's assets are less than its liabilities.[83] Secondly, the cash flow insolvency or financial distress where a company is unable to

[83] Reinout D. Vriesendorp, Joseph A. McCahery, Frank M.J. Verstijlen., *Op. Cit*., p. 100.

pay its debts as they fall due because the difficulties experienced in paying its creditors.[84] The insolvency test should be included in the Indonesia bankruptcy law, the Law 37/2004, for granting protection against the debtor as well as to determine whether the inability of the debtor to pay due to financial problems or because of the debtor just does not want to pay its debts for some reason. This is a weakness in the conditions of bankruptcy petition that can be viewed as a legal loophole that could affect the legal protection for debtors that the bankruptcy judgment is not based on strong evidence. It is possible that bankruptcy is used only as a reason to punish the debtor or force the debtor to pay without considering at the debtor's situation and conditions. Therefore, it can be said that the conditions for bankruptcy petition in the Law 37/2004, especially in the absence of insolvency test, do not accommodate the legal interest of debtor that they need an adequate legal protection and this condition need to be revised for improvement in the future.

4.2.2. The Conditions of at least one debt that is due and can be billed

It is arguable that term of debt that is due has a different events and understanding with the debt that can be collected so it cannot be combined. Both of them can be distinguished in the banking credit agreement. It is possible for a debt to be collected though has not yet matured. A debt is due when the time under the agreement has come for the debt to be repaid by the debtor and the creditor has the right to collect it. Meanwhile, it could happen in practical that even before maturity of the debt repayment that a debt can be collectible because there has occurred one of the events referred to events of default, which entitles the bank to declare client default/breach of contract when one of the events listed in the events of default occurs. Thus it is possible that a debt can be collected, but not yet due billing/has not yet matured and this means that the two terms of the debt cannot be combined using the word "and" between words "due" and "collectible". Therefore, it is necessary to

[84] *Ibid*.

revised the sentence to become “debt that can be collectible either the debt has matured or not”.[85]

4.2.3. The conditions of Debtor who does not pay off at least one debt

The Article 2 paragraph 1 of the Law 37/2004 states the conditions that the debtor has to be not paid off at least one debt due and collectible. It can be interpreted that the debtor who does not pay off their debts but are still able to pay even with installment or already past due, can still be applied for bankruptcy. Hence, the application of the provisions of the debtor does not pay off at least one debt, could bring considerable loss to the debtor especially for a corporate debtor that deal with the interests of the wider community when facing financial distress. This can be detrimental to debtors who have problems with debt but can still be considered solvent. With the declaration of bankruptcy for a company that finances are still good, it could give a bad impact on the image and its subsequent performance. Thus it is very likely to occur where the debtor’s financial situation is still good but due to some circumstances cannot pay off debt, he may be imposed bankruptcy decision. It can be argued that with the term of “debtor does not pay off” and without the insolvency test could open broad opportunity for creditor to file bankrupt against debtor. Supposedly, the debtor can be only declared bankrupt if the debtor is in insolvent circumstances or when he is unable to pay all or most of his debts instead of only one debt. Further, if there is only one creditor who is not repaid its debt while to the majority of other creditors the debtor remains to repay its debts then the bankruptcy petition should be rejected and the concerned creditor should file a lawsuit through the ordinary civil courts.[86] It means that the debtor is still solvent because he still able to pay to the other creditors and this is really important to protect the solvent debtor. The conditions of bankruptcy petition should be made more balanced that encompass aspects from the debtor’s legal interest.

[85] Prof. Dr. Sutan Remy Sjahdeini, SH, *Op. Cit*., p. 59.
[86] *Ibid*, p. 63.

Moreover, there is a need for difference regulation between the individual debtor and corporate debtor in Indonesia bankruptcy law regime because the Indonesia bankruptcy law does not distinguish the bankruptcy petition by individual debtor or corporate debtor. The purposes and benefits of bankruptcy law are different from each other. As for the individual debtor, the purpose of bankruptcy law is for a fair distribution of the bankruptcy estate of the debtor among its creditors as well as to provide an opportunity to obtain a fresh start for insolvent debtor.[87] Meanwhile, the role of bankruptcy law for the corporate debtor is to promote the reorganization for the company by providing sufficient time for the company to make improvements.[88] However, in Indonesia due to there is no difference between the two types of debtors, the principles of legal protection for both debtors are not accommodated in Law 37/2004, such as the principle of debt forgiveness or fresh start principle for individual debtors and the principle of commercial exit from financial distress or reorganization principle for the corporate debtor. Therefore the separation of bankruptcy rules for individual debtors and debtor legal entities is important to be realized for the sake of a balanced legal protection between the two debtors in the Indonesia bankruptcy law regime. Hence, it can be concluded from above discussions that normatively the conditions of bankruptcy petition under the Law 37/2004 still has many weaknesses which became a legal loophole that can be resulted in the reduction of protection for the parties concerned including the debtor, thus it needs to be improved in the future.

4.3. The Conditions of Bankruptcy Petition in the Netherlands

4.3.1. The Existence of debt

There is an obligation for the bankruptcy applicant to provide early evidence (*prima facie*) regarding the conditions of the debt specified in Article 1 (1) NBA. Thus not a random debtor can be filed for

[87] Lewis D. Rose, *Op. Cit.*, p. 1.
[88] Roy M. Goode, *Op. Cit*., p. 25.

bankruptcy and the NBA prioritize tests on the evidence submitted by the applicant. The *prima facie* evidence constitutes that the debtor has ceased to pay its debts and in addition to that if the petitioner is creditor the court will assess whether the creditor petitioner has a right to claim against the debtor.[89] Meanwhile, the Law 37/2004 does not mention the obligation of the applicant to include evidence that support the fulfillment of the conditions of bankruptcy petition, as outlined in the NBA explicitly. Practically in Indonesia, such evidence will only be examined further in a simple examination of the commercial court. In this case the legal protection given by NBA to the debtor in terms of debt is good enough. However, the definition of debt is not clearly stated in NBA as well as the minimum limit of nominal debt. These are the same weaknesses that could be found in the Law 37/2004 and it is worried that creditors will be easier to file bankruptcy and do not think about the interests of debtors on the other side. Moreover, the NBA stated that "the debtor has ceased to pay its debts". The understanding of the sentence "the debtor has ceased to pay its debts" is when the debtor cannot pay, refuses to pay or simply does not pay.[90] Therefore, this is the same situation with the Law 37/2004 that the NBA also does not explicitly recognize insolvency test on the conditions for bankruptcy petition in its bankruptcy law. This can be resulted in a situation where the debtor does not have legal certainty regarding the debt that he did not pay.

However, it can be argued that the conditions for bankruptcy petition in the Netherlands is better than the Indonesian regime that the NBA provides more protection and legal certainty to the debtor rather than the Law 37/2004. It can be seen from the formulation of the sentence "the debtor has ceased to pay his debts" in the NBA compared to the formulation of the sentence "the debtor does not pay off at least one debt" in the Law 37/2004. It is arguably that the sentence "the debtor has ceased to pay his debts" in the NBA provide more protection and legal certainty

[89] Peter J.M. Declercq, *Op. Cit.*, p. 63.
[90] *Ibid*.

to debtor because it requires the debtor to be really ceased from paying his debts not only does not pay off one debt like in the Law 37/2004. Further it is more to the consideration of debtor's financial condition and ability to repay whether the debtor is still able to pay or not because it requires that the debtor has to be in the state cease paying his debts. Conversely, in the Law 37/2004 the sentence of "debtor does not pay off at least one debt" seems provide less certainty and legal protection to debtor. It can be argued that the sentence "debtor does not pay off" is more emphasized on the debtor's willingness to repay rather than the debtor's ability to repay or the debtor's financial state. Further, the sentence "debtor does not pay off at least one debt" has weaknesses in terms of the minimum debt and minimum limitation of nominal debt. If debtor does not pay its debt to only one of his creditor, especially when the creditor does not hold majority of debtor's debt or more than 50% of debtor's debt, then the creditor should not petition for debtor's bankruptcy instead he should file a lawsuit through the ordinary civil courts.

4.3.2. Requirements for Corporate Debtor

The NBA provides some additional requirements in order to complete the bankruptcy petition filing requirements that already exist, especially for corporate debtors. Some additional requirements that must be met in filing for bankruptcy by the corporate debtor itself include[91] the copy of the Articles of Association of the company, the copy of the shareholders' register, the company official registration from the relevant Chamber of Commerce and Industry, the General Meeting of Shareholders' approval of the bankruptcy petition and the latest list of assets and liabilities of the company. Meanwhile, there is a weakness in the Law 37/2004 because it is not clearly regulated about the bankruptcy petition filed by the corporate itself. In Indonesia if the bankruptcy petition filed by corporate debtor for itself, then the petition must comply with the provisions of article 104 the Law Number 40 of 2007 concerning Limited

[91] *Ibid*, p. 64.

Company, which states that board of directors has to get approval from the General Meetings of Shareholders in order to file bankruptcy petition on behalf of the company itself.[92] Moreover, the Netherlands bankruptcy regime has put forward a reorganization for businesses or companies experiencing financial difficulties with procedures outside of the court or known as informal reorganization.[93] Informal reorganization is a reconciliation agreement between the creditor and the debtor made out of the court which aims to avoid bankruptcy for the company, thus for a company that still has possibility to continue the process of reorganizing its business it is important to implement this mechanism. It is arguably that the Law 37/2004 should regulate more clearly about the bankruptcy petition filed by the corporate debtor itself because there is a different aim and benefits of individual and corporate bankruptcy. Individual and corporate debtor have also different legal consequences of bankruptcy, therefore, it should be regulated differently the specific requirements, process and implementation of each bankruptcy respectively.

4.3.3. *Wet Schuldsanering Natuurlijke Personen* or Debt Reorganization of Natural Persons Act

On its development, there is a biggest change in NBA where the concept of the Netherlands bankruptcy laws has started to play a role in the function of the bankruptcy to accommodate the principle of a fresh start for the debtor.[94] This reformation began in 1998 when the Debt Restructuring for natural persons (*Wet Schuldsanering Natuurlijke Personen* or Debt Repayment Scheme) implemented in the Netherlands. This Act applies only to private individuals who have or do not have a business and he is the only one who can petition for the application of this act.[95] Article 288 paragraph 1 NBA states that there are some requirements must be met by the private individual debtor in order to benefit from this

[92] Prof. Dr. Sutan Remy Sjahdeini, SH, *Op. Cit*., p. 105.
[93] AKD Prinsen Van Wijmen, *Op.Cit.,*p. 14-18.
[94] Peter J.M. Declercq, *Op. Cit*., p. 1.
[95] AKD Prinsen Van Wijmen, *Op.Cit.,* p. 7.

debt repayment scheme; firstly the debtor is no longer able to pay its debt, secondly the debtor has a good faith, and the debtor has to fulfill all its obligations under the debt reorganization scheme. After the debtor fulfill all of its obligations and the debtor's assets has been liquidated and divided to creditors, the remaining debts of the debtor are no longer enforceable by creditors,[96] then the fresh start is obtained by the debtor. The essence of this Act is liquidation resulting in a fresh start for debtor and releasing him from life-long imprisonment by his debts in a clean slate for debtor.[97] It is arguably that this mechanism could increase the settlements between creditors and debtor as well as decrease the quantity of the bankruptcy of individual debtor.[98] The implementation of debt repayment scheme in the Netherlands bankruptcy regime could provide better legal protection for debtors specifically individual debtors. Compared to Indonesia, the Law 37/2004 has not separated the bankruptcy for individual debtor and corporate debtor whereas actually each debtor has different effect and benefit of bankruptcy law.

4.4. Comparison to the Debtor Oriented Bankruptcy Law Model

The bankruptcy law of the common law countries is well known for its debtor oriented bankruptcy law model. For instance, the Bankruptcy Reform Act of 1978 which is also called as the US Bankruptcy Code that can be considered as one of the more advanced bankruptcy law compared to mostly bankruptcy laws especially from the civil law jurisdictions. Unlike the uniformity of regulation in the Law 37/2004, the US Bankruptcy Code regulates separately the bankruptcy regulation for individual and corporate debtor. It can be seen from the Chapter 7 with the title of Liquidation that can be filed by both individual and corporate debtor. The Chapter 7 is a simple liquidation procedure where the assets of debtor are liquidated to provide funds to repay the creditors. The Chapter 11 of Reorganization can be filed by both debtors as well but it is mostly

[96] Peter J.M. Declercq, *Op. Cit.*, p. 3.
[97] *Ibid*.
[98] *Ibid*.

suitable for corporate debtor. Through this Chapter 11, the US Bankruptcy Code already accommodates the principle of commercial exit from financial distress for corporate debtor that more focus on the going concern of the business prospective rather than to liquidate. Thus, the business is reorganized to pay the creditors and provide the possibility for the business to continue. In Indonesia, the reorganization as implemented in Chapter 11 of the US Bankruptcy Code cannot be found in the Law 37/2004. The Law 37/2004 only gives opportunities for debtor to reach agreement with the creditors in order to restructure his debts which regulated in the Chapter III of the Law 37/2004 concerning Suspension of Obligation for Debt Repayment.[99] Moreover, the US Bankruptcy Code accommodates the principle of discharge or fresh start for the individual debtor which provides a debt relief for individual debtor where it can be seen from the Chapter 13 with the title Adjustment of Debts of an Individual with Regular Income. This Chapter is special to accommodate the needs of individual debtor. Meanwhile, the Law 37/2004 does not recognize the fresh start principle to debtor[100] where in Article 204 of the Law 37/2004 states that even after the proceedings have been done by the curator, the debtor remains liable for any remaining debt that he has. In the future, the Law 37/2004 should make different bankruptcy rules for different types of debtor to accommodate the different legal interest of each type of debtor as regulated in the US Bankruptcy Code. Moreover, the Indonesia bankruptcy law does not regulate any provision of what is meant with insolvency or provide any provision for insolvency test in the Law 37/2004. This is really important to provide legal certainty for the debtor's legal interest so that only the insolvent debtor can be declared bankrupt. The US Bankruptcy Code explicitly regulates provision about insolvency in the Section 101 (32) (A) which states that "*insolvency is a financial condition such that the sum of an entity's debt is greater than all of the entity's property*". This is well known as the balance sheet

[99] Prof. Dr. Sutan Remy Sjahdeini, SH, *Op. Cit.*, p. 31.
[100] *Ibid*.

insolvency test that if the liabilities exceed the debtor's assets then the firm is insolvent. Furthermore, for creditor he has to prove that his claim is already due and payable if he wants to file a bankruptcy petition against the debtor. Besides that, for a creditor to file a bankruptcy petition against a debtor, the Section 303 (b) requires that there should be at least three creditors without collateral rights (concurrent creditor) with the cumulative amount of debts of at least US$ 10.000 greater than the value of the collateral objects of the debtor held by the separatist creditor.[101] Moreover, according to the Section 303 (h) (1) it is necessary to show that the debtor is generally not paying debts as they fall due where the non-payment of a single debt will not be sufficient.[102] In the Law 37/2004, it is sufficient if the debtor does not pay at least one debt as it falls due, he can be petitioned and even declared for bankruptcy. It can be argued that the provision of the minimum number of creditors, the cumulative debts as well as the limitation of nominal debts of minimum $10.000 in the US Bankruptcy Code provides legal certainty and sufficient legal protection for debtor as the bankrupted party. Whereas in the Law 37/2004, there is no requirement of the minimum amount of debts or collective debts as well as the minimum number of creditors in order to file bankruptcy petition. In the Law 37/2004, it is so simple to file a bankruptcy petition provided that the debtor does not pay off of only one debt and also the debt is matured and collectible. If these conditions have been met through a simple examination by the court, thus the court must declare bankruptcy. Therefore, the Law 37/2004 is still less protective to the debtor's legal interest. In the future, the development of Indonesia bankruptcy law should consider improving the conditions of bankruptcy petition and also clearly regulating the provision of insolvency test in its bankruptcy law in order to serve sufficient legal protection for debtors.

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[101] George M. Treister, J. Ronald Trost, Leon S. Forman, Kenneth N. Klee, Richard B. Levin, *Fundamentals of Bankruptcy Law*, Fourth Edition, USA: The American Law Institute, 1996, p. 127.

[102] Reinout D. Vriesendorp, Joseph A. McCahery, Frank M.J. Verstijlen., *Op. Cit*., p. 101.

Chapter 5

Conclusion

Basically, the Indonesian bankruptcy law is derived from the Netherlands bankruptcy law and it can be argued that both regimes are in principal more to the creditor oriented. Nevertheless, both regulations have undergone significant changes in its developments. Especially, there is a significant difference on the conditions of bankruptcy petition in both regulations as the first stage in bankruptcy proceedings which certainly has effect on the legal protection for debtor's legal interest. The formulation of the sentence on the conditions of bankruptcy petition in NBA emphasizes on the debtor's ability to repay compared to the Law 37/2004 which emphasizes on the debtor's willingness to repay. The formulation of the sentence on the conditions of bankruptcy petition in NBA is better and provides better legal protection rather than the formulation of the sentence on the conditions of bankruptcy in the Law 37/2004. In addition to this, the inexistence of insolvency test on the conditions of bankruptcy petition, can be considered as shortcomings and legal loopholes in the Law 37/2004 that in practice it could open up opportunities that bankruptcy is only used as a means to force debtors to pay their debts even though the debtor is solvent or debt is much smaller than his assets.

Moreover, the Indonesia bankruptcy law regime has not set up separately on the bankruptcy of individual and corporate debtor in the Law 37/2004. The separation of bankruptcy rules for individual debtor and corporate debtor in the Netherlands bankruptcy law regime contributes adequate legal protection for debtor's legal interest. Meanwhile, the uniformity of rules between individual debtor with corporate debtor in the Indonesian bankruptcy law could bring negative implications for the protection of the debtors' legal interests. Thus, the existence of separate regulation for individual and corporate debtor is necessary in the Law 37/2004. From the perspective of debtor's legal interest, the conditions of

bankruptcy petition in NBA offers fairly good protection compared to the Law 37/2004. Normatively, there are still many shortcomings and loopholes on the conditions of bankruptcy petition in the Law 37/2004 which can be detrimental to debtor as the bankrupted party. Therefore, in the future the Law 37/2004 is essential to be revised and improved especially on the conditions of bankruptcy petition by providing clear provision about insolvency test, limitation of nominal debt, and also distinction between bankruptcy rules for individual and corporate debtor. The improvement and development of bankruptcy law in Indonesia should refer to the more debtor oriented bankruptcy law model such as the US Bankruptcy Code which serves sufficient legal protection for debtor's legal interest as well as to the recent bankruptcy law developments in the world. The improvement of a good bankruptcy law regime in Indonesia should be able to promote and encourage the foreign investments to support the economy of the country. The improvement is indispensable in order to meet the needs of the business, both nationally and internationally as well as to positively provide sufficient and balance legal protection not only for debtor's legal interest but also for the interest of all stakeholders.