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THE DEBTOR'S LIABILITY FOR THE LOADING OF PERSONAL SECURITY IN INDONESIA

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Abstract

This study aims to find out the legal liability as well as the judge's consideration of personal guarantees in the case of debtors who are declared bankrupt based on act number 37/2004. The research method used is the normative juridical method, using library data. The results of this study indicate that in personal guarantee liability, there are two different agreements but closely related to each other, namely the guaranteed principal agreement and the personal guarantee agreement as a guarantee of the main agreement. In the personal guarantee agreement, besides the main agreement, there is also an accessory agreement where a personal guarantee serves the obligations. Personal guarantee in this bankruptcy case is the debtor from the obligation to pay off the debt. The personal guarantee assets will only be used to the return of the debts to creditors when the property has been confiscated and auctioned. However, the proceeds are not sufficient to pay the debt. This could be due to the debtor having two or more creditors and not paid off at least one overdue debt and can be collected.

Keywords: Bankruptcy; Debtor; Personal Guarantee

1. INTRODUCTION

Juridically, the meaning of Personal Guarantee is included in Article 1820 of the Civil Code. It states that a guarantor is an agreement whereby a party for the benefit of the creditor binds himself to fulfill the obligations of the debtor.[1] This intended guarantee is a contract between both the creditor and the debtor in which the debtor and offers part of his assets as a collateral if there is delayed problem the debt repayment in within a stipulated period based on the applicable legislative regulations.[2] Individual guarantees can be provided either by a person or by legal entities. Creditors prefer material guarantee agreements rather than

[1] Vincent Leonardo Tantowie and others, 'Legal Position Agreement with Personal Guarantee at Bank Medan Branch', in *Proceedings of the International Conference on Culture Heritage, Education, Sustainable Tourism, and Innovation Technologies* (Scitepress - Science and Technology Publications, 2020), pp. 408–16 < https://doi.org/10.5220/0010312804080416 > .

[2] Gracia Ravina Moselle, 'Penerapan Jaminan Perorangan Dalam Perjanjian Kredit Oleh Lembaga Pengelolaan Dana Bergulir Koperasi, Usaha Mikro Kecil Dan Menengah (LPDB – KUMKM)', *Jurist-Diction*, 5.6 (2022), 2227–46 < https://doi.org/10.20473/jd.v5i6.40126 > .LPDB - KUMKM certainly requires guarantees that must be submitted by LPDB - KUMKM partners. This loan guarantee and / or financing can be in the form of material guarantee and / or immaterial guarantee. This material collateral can be in the form of, among others, movable objects, immovable objects, pawning deposits, etc. Meanwhile, this immaterial guarantee can be in the form of individual guarantees and / or corporate guarantees as stated in Article 13 Permenkop 4/2020. The purpose of this research is to analyze how the implementation of individual guarantees at LPDB - KUMKM. This study uses the juridical normative method using 2 (two

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individual guarantee agreements. Identifying which things are bound in the collateral agreement, it can give creditors a sense of confidence and increase certainty since the material guarantee agreement specifically lists certain assets that are bound to the agreement and these objects are supplied to prevent any bad loans. Credit agreements are created based on a promise between the debtor and the creditor to obligate themselves to a contract for a specific amount of time.[3]

Credit distribution by creditors is a common business practice of the community which is an inseparable part of credit guarantee. The existence of credit guarantees is an effort to minimize risk, while guarantees are a means of protection for creditor security, and legal certainty in paying off the debts or carrying out an achievement by the debtor. The provision of material guarantees always isolates a part of the guarantor's wealth and provides it to fulfill the debtor's obligations. The existence of material guarantees that determine certain objects bound to obtain prepayment from other creditors by executing collateral objects through auctions or public sales.

In general, lending activities often require the delivery of debt guarantees by the debtor to the creditor. The guarantee of debt can be in form of an object called material guarantees and in the form of debt guarantees called personal guarantees.[4] A personal guarantee is an arrangement between a debtor (or creditor) and a third party, who ensures that the debtor will fulfill their obligations. It may even be conducted without the debtor's consent. A personal guarantee is a unique kind of contract unto itself.[5] A personal guarantee is a statement of ability given by a third party to guarantee the fulfillment of the debtor's obligations to the creditor if the concerned debtor is in the problem of contract.[6]

Principally, an agreement consists of a series of words that are agreed upon by both parties. To decide the content of an agreement, it is necessary to carefully and thoroughly set the things by saying or writing the words. The agreement can help to provide legal certainty to every party. The economic function can also be referred to as the upgrading of property rights or resources from a lower usage value to a higher one. If the debtor is billed but unable to pay, the creditor may take alternative action by requesting payment from the guarantor. If the debtor and guarantor do not fulfill their obligations, the creditor can submit a lawsuit for compensation to the debtor and guarantor. When the debtor and guarantor owe money to two or more creditors, and one of those creditors has passed away, the creditor has good grounds to petition the

[3] Madeleine Celandine, 'Hak Regres Penanggung Pada Jaminan Perorangan Dalam Kepailitan', *Jurist-Diction*, 4.5 (2021), 1815–34 < https://doi.org/10.20473/jd.v4i5.29820 > .

[4] M. Bahsan, *Hukum Jaminan Dan Jaminan Kredit Perbankan Indonesia* (Jakarta: PT RajaGrafindo Persada, 2012).

[5] Nur Intan Yunianti, 'Efektivitas Jaminan Perorangan (Personal Guarantee) Dalam Menunjang Penyelesaian Kredit Bermasalah Di Bank Bri Cabang Surakarta Dan Bank Bni Syariah Cabang Surakarta', *Jurnal Privat Law*, 8.1 (2020), 111–16 < https://doi.org/10.20961/privat.v8i1.40383 > .

[6] Supianto, *Hukum Jaminan Fidusia-Prinsip Publisitas Pada Jaminan Fidusia* (Yogyakarta: Garudhawaca, 2015).

commercial court for bankruptcy. Law Number 37/2004 concerning Bankruptcy and Suspension of Debt Payment Obligations regulates bankruptcy.

Submission of a bankruptcy application can be made by the debtor itself (voluntary petition) or by creditors. A debtor can file a bankruptcy petition against himself (voluntary petition) if he fulfills the conditions that the debtor has two or more creditors (more than one creditor), and the debtor at least does not pay the debt that has been collected. Bankruptcy is a joint effort to obtain payments for all creditors for justice, therefore, every creditor receives payments based on the size of their respective receivables without overlapping with each other.[7] Based on the debt agreement, the debtor often uses a debt guarantee. The guarantee is divided into two, a general guarantee and a special guarantee. Based on this regulation, it can be concluded that every debtor's wealth can be used as a debt guarantee, even in the debt agreement is not followed by a guarantee agreement. Moreover, there is a special guarantee, which consists of two: a personal guarantee and an object guarantee.[8]

Inside the development of the law company, they offer to assure the creditor in form of company and personal guarantee. The immaterial guarantee consists of a corporate guarantee or personal guarantee as a debt guarantor. Related to the distribution of guarantee within the bankruptcy constitution, a guarantor who provides a personal guarantee often experiences contract deviation as a result of the creditor's request in a court to file a personal guarantee or borgtocht. In Civil Code, the guarantor is regulated in Articles 1831-1850.

In several cases, the position of personal guarantee may change to the main debtor which is initially a third party who can be held accountable directly to the creditor without having to confiscate the assets of the main debtor bankruptcy.

Based on the description above, the purpose of writing this article is to find out the legal liability of Personal guarantee if the debtor is declared as bankrupt based on Law Number 37/2004 concerning on Bankruptcy and Suspension of Debt Payment Obligations in Decision Number 808 K/Pdt.Sus-Pailit/2017. Moreover, it has the purpose to find out the judge's consideration regarding the personal guarantee who was declared bankrupt against the debtor's debt based on Decision Number 808 K/Pdt.Sus-Bankrupt/2017.

The approach method used in this research is normative juridical, library research or document study carried out aimed only at written regulations or other legal materials.[9] Normative legal research is research conducted by examining literature/library materials or library legal study.[10] In this study, the approach used statute and conceptual

[7] Abdul R. Saliman and others, *Hukum Bisnis Untuk Perusahaan : Teori Dan Contoh Kasus*, 2005.

[8] Ismi Hariyani and R. Serfianto, *Bebas Jeratan Utang-Piutang* (Yogyakarta: Pustaka Yustisia, 2010).

[9] Sanne Taekema, 'Theoretical and Normative Frameworks for Legal Research: Putting Theory into Practice', *Law and Method*, 2018 < https://doi.org/10.5553/REM/.000031 > .

[10] Maurice Rogers and others, 'Existence of Pancasila as a Stats Fundamental Norm of the Nation and State of Indonesia in Facing Economic Globalization Challenges', *Journal of Advanced Research in Dynamical and Control*

approach. This study uses primary legal material data sources in form of the Civil Code, the Republic of Indonesia Constitution Number 37/2004 concerning Bankruptcy and Suspension of Debt Payment Obligations, Law Number 42/1999 concerning Fiduciary Guarantees and Supreme Court Cassation Decision Number: 808 K/Pdt.Sus-Pailit/2017. Secondary legal material in form of general opinions of scholars from literature books related to the debtor's liability for the imposition of personal guarantees as collateral for debtors who are declared bankrupt. Tertiary legal materials are obtained from dictionaries, bibliographies, encyclopedias, and others. The data obtained from research results will be analyzed using qualitative normative analysis methods, in the form of regular sentences, logically coherent, non-overlapping, and effective. A discussion of the research result will be provided by the end of this essay.

2. ANALYSIS AND DISCUSSION

2.1. The Theory of the Welfare State

There is a lot of discussion and controversy about the welfare state notion in economic literature, and there isn't a single definition that can be used for all situations. It is widely acknowledged that the idea of "The Welfare State," which first emerged in the 1940s, provides a more comprehensive explanation of the state's role in the area of social and economic policy.[11] The welfare state is defined in numerous ways in the literature. The scope of this study does not allow for the evaluation of all of these definitions. This makes it important to highlight the central ideas of the welfare state's conceptualization. The welfare state has been seen as a reaction to the notion of individualism that starting at the turn of the 19th century left people and societies defenseless.[12] The concept of the *Welfare State* becomes an interesting problem within the development of the globalization era and the development of capitalism and liberalism understanding plays significant roles in economic behavior within the market mechanism. The concept of the *Welfare State* is familiar in the scope of the law, economics, and politics. However, due to the wide scope of the subject, legal studies will be different from economic and political studies regarding the meaning of the welfare state. Several views are different from one another as the concept of the Welfare State in various countries. The welfare state is an essential institution in all modern communities.[13]

The characteristics of social service policies and social transfers offered by the state to its residents, such as education services, employment possibilities, and poverty reduction are frequently used to define the welfare state. Therefore, it often identified the welfare

Systems, 12.6 (2020), 589–95 < https://doi.org/10.5373/JARDCS/V12I6/S20201067 > .

[11] Ágnes Orosz, 'Development of Welfare State Theory : A Review of the Literature', Pro Publico Bono – Magyar Közigazgatás, 2.1 (2017), 176–91.

[12] Mehmet Atilla Güler, 'The Concept of the Welfare State and Typologies of Welfare Regimes- A Review', *Problemy Polityki Społecznej: Studia i Dyskusje*, 47.4 (2019), 1–19 < https://doi.org/10.31971/16401808.47.4.2019.

[13] Jørgen Goul Andersen, *Welfare States and Welfare State Theory*, ed. by Per H. Jensen (Centre for Comparative Welfare Studies (CCWS), 2012).

state and social policies. According to the welfare state theory, the government must extend its mandate to include the socioeconomic issues that many people experience. The theory of the Welfare State is a theory that is related to the basis of Indonesian regulation that government guarantees people's welfare. Owing to that, the country vividly to notice the welfare of its people. Moreover, it should be based on the five pillars of the state, called: Democracy, Law Enforcement, and the Protection of Rights, Human Rights, Social Justice, and Anti-Discrimination.

2.2. Covenant Law Theory

Theoretically, the definition of a covenant is mentioned in Article 1313 of the Civil Code, which states that "an agreement is an act by which one or more people bind themselves to one or more other people.".[14] Alliance is part of the agreement, the contract will have the meaning of a legal relationship or legal act that binds two people or more, one side has the right to the achievement while the other side has the right to fulfill the achievement. If one of the parties of the agreement does not carry out the agreement (wanprestasi), then the party who is betrayed can claim compensation in form of fees and interest, and the repayment is obtained from the debtor's property.[15] A legal relationship among two parties (first and second parties) or more within the area of money and property is referred to as an alliance in terminological terms. One of these parties, or two individuals, has the right to demand, and the other is obligated to satisfy that requirement.[16] Contracts are a crucial aspect of business activities, both among individuals in the same country and among firms that cross national borders. These covenants are created by an agreement of at least two parties.[17] Based on this definition, it can be seen that a relationship arises between the two people which is called a covenant that builds an engagement between two people.

2.3. Liability Theory

An entity's current duty for a resource outflow resulting from historical events is known as a liability. If an entity assumes a duty or responsibility to others in connection with the provision of products or services, the transfer or use of assets, or any other type of economic settlement, that entity will be held liable.[18] The theory of responsibility emphasizes more on the meaning of responsibility which is come from the provisions of Law and Regulations.[19] Therefore the theory of responsibility is interpreted in a sense of

[14] Lia Amaliya and others, 'Kekuatan Hukum Perjanjian Utang Piutang Yang Dibuat Dalam Bentuk Akta Di Bawah Tangan', *Justisi Jurnal Ilmu Hukum*, 7.1 (2022), 1–12 < https://doi.org/10.36805/jjih.v7i1.2292 > .

[15] Dhaniswara K. Harjono, *Aspek Hukum Dalam Bisnis* (Jakarta: Pusat Pengembangan Hukum dan Bisnis Indonesia, 2009).

[16] Faridy, 'Klaim Perjanjian Asuransi Melalui Ex Gratia Dalam', *Jurnal Das Sollen*, 7.1 (2022), 158–71.

[17] PL Tobing, 'Asas Keseimbangan Dalam Hukum Perjanjian Kerja', *HERMENEUTIKA*, 6.1 (2022), 112–20 < https://doi.org/DOI: http://dx.doi.org/10.33603/hermeneutika.v3i2 > .

[18] Ifac, 'Intrduction to IPSAS', in *Ifac* (US, 2020), pp. 5–6.

[19] G. P. Fletcher, 'The Theory of Criminal Liability and International Criminal Law', *Journal of International Criminal Justice*, 10.5 (2012), 1029–44 < https://doi.org/10.1093/jicj/mqs086 > .

liability.[20] It is a concept related to the legal obligation of a person who is legally responsible for certain actions that can be subject to a sanction when his actions are against the law. According to civil law, basic liability is divided into two types, namely errors and risks. Thus, it is known as liability without based on fault and liability without fault which is known as risk liability or strict liability.[21] By holding the party that caused the damage strictly accountable, liability law can provide incentives for effective behavior by pricing an externality.[22] According to the law, liability is a consequence of a person's freedom regarding his actions related to ethics or morals in acting.[23]

According to Titik Triwulan, accountability should have a basis, it gives a legal right for a person to sue another person and provide another person's legal obligation to give accountability.[24] Liability mentioned in Civil Code requires an element of error, in which a person should be guilty (liability based on fault).[25] Furthermore, the liability is indicated as a bunch of specific principles. The view that strict responsibility is a single type of obligation; it defines strict liability as culpability for the inherent hazards in an activity.[26] The concept of accountability in error is founded on the principle that under the branch of law known as tortious liability or liability based on fault. This principle means no accountability if there is no element of error. The concept of accountability in error was developed based on the principle upon the tortious liability or liability based on fault. There is no liability if there is no element of error.

2.4. Liability of Personal Guarantee Law regarding the Bankruptcy of Debtor

In a case, a debtor who has a personal guarantee or borgtocht has liability in bankruptcy case addressed to its principal debtor. Inside the provisions of Article 1820 Civil Code, the guarantor of debt or *borgtocht* enters into an agreement in which a third party for the benefit of the creditor binds himself to fulfill the obligations of the debtor if the debtor failed to repay the debt. In contrary, regarding the loan agreement, if the obligation to repay the debt has implemented well, it is certainly not a problem. The problems will arise if the debtor has difficulty repaying the debt, in other words, the debtor stops paying his debt.[27] According to Indonesian Civil Code Article 1826, a personal guarantor's heirs will inherit any contracts he enters into. In essence, if the debtor defaults, the personal

[20] Busyra Azheri, *Corporate Social Responsibility Dari Voluntary Menjadi Mandotary* (Jakarta: Raja Grafindo Press, 2011).

[21] Titik Triwulan and Shinta Febrian, *Perlindungan Hukum Bagi Pasien* (Jakarta: Prestasi Pustaka, 2010).

[22] Robert D Cooter, 'Economic Theories of Legal Liability', *Journal of Economic Perspectives*, 5.3 (1991), 11–30 < https://doi.org/10.1257/jep.5.3.11 > .

[23] Soekidjo Notoatmojo, *Etika Dan Hukum Kesehatan* (Jakarta: Rineka Cipta, 2010).

[24] Notoatmojo, Soekidjo, Etika Dan Hukum Kesehatan (Jakarta: Rineka Cipta, 2010)

[25] Arman Anwar, 'The Principles Of Liability On Telemedicine Practices', *Pattimura Law Journal*, 1.1 (2016), 13 < https://doi.org/10.47268/palau.v1i1.6 > .conceptual approach and comparative approach, as well as the approach to the case approach. According to Article 24 paragraph (1

[26] Gregory C. Keating, 'The Theory of Enterprise Liability and Common Law Strict Liability', *Vanderbilt Law Review*, 54.3 (2001), 1285–1335 < https://doi.org/10.2139/ssrn.277312 > .

[27] Man S. Sastrawidjaja, *Hukum Kepailitan Dan Penundaan Kewajiban Pembayaran Utang* (Bandung: PT Alumni, 2010).

guarantor's heirs must take the place of the deceased guarantor and obligated to pay the loan. Additionally, they could face legal action from creditors or even file for bankruptcy if they don't fulfill their responsibilities as personal guarantors. As long as they comply with the bankruptcy requirements outlined in Article 2 paragraph (1) of the Indonesian Bankruptcy and Insolvency Law, they may be submitted by the creditors or they may be included in a bankruptcy petition by the creditors.[28]

The state of stopping paying debts can occur because the debtor is unable to pay and doesn't want to pay. Those two causes are similar which can cause losses for the concerned creditors. On the other hand, the debtor will find it difficult to proceed to the next steps, especially regarding financial problems. To overcome the problem of stopping paying the debt, many ways can be done; it can be by legal methods or illegal methods. However, because Indonesia is a country of law, every problem should be resolved through legal methods.

The inability to pay debts in its due, in at least one creditor when the debtors possess more than one creditors, then the debtors are declared banckrupt.[29].Practically, credit or financing facilities are a form of trust by a bank or non-bank financial institutions (creditors) to debtors (customers), in which the given loans will be returned related to the period of interest.[30]

The existence of an individual guarantee agreement between creditors and debt agreements emerges a legal consequence in the form of rights and obligations between creditor and guarantor.The obligation of the guarantor is to return the debt he has borne for the benefit of the creditor. However, in a legal relationship, it is considered as the rights of the guarantor which can be called special rights. Nowadays, the bank

[28] Nuruzzhahrah Diza and Imas Rosidawati Wiradirja, 'The Bankruptcy of Personal Guarator'S Heirs Under Indonesia Legal System', *Jurnal Reformasi Hukum : Cogito Ergo Sum*, 1.1 (2018), 1–8 < https://e-journal.umaha.ac.id/index.php/reformasi/article/view/198 > .banks will not easily grant the loans to just anybody since there would be a probability that banks meet with the default risk. To reduce the impact of the risk, they require a guarantee. For banks, the guarantee shall legally provide them a protection, security and certainty in getting their loan repayment. As a common form, banks usually ask for property as collateral, but sometimes banks meet difficulty to execute it. Hence, nowadays, the banks will also ask for a personal guarantee. Personal guarantee is an agreement in which a third party agrees to fulfill the obligation of the debtor if debtor himself fail to do so. The personal guarantor has big responsibilities, even into the realm of bankruptcy. Even though a personal guarantor is not a debtor, a creditor may file him a bankruptcy petition to the Commercial Court if he meets the bankruptcy requirement. Problems then arise when a personal guarantor dies and it causes the creditors to lose a person who guarantees the debtor's obligation. This research tackles with the problems by using a normative juridical approach with descriptive analysis of secondary data which consist of primary law materials and secondary law materials. The study shows that the death of personal guarantor causes the rights and obligations of personal guarantor upon the agreement are passed to his heirs. Consequently, his heirs as the party who do not involve in the loan agreement and the personal guarantee agreement may be filed the bankruptcy petition by the creditor as it is usually filed to the personal guarantor.","author":[{"dropping-particle":"","family":"Diza","given":"Nuruzzhahrah","non-dropping-particle":"","parse-names":false,"suffix":""},{"dropping-particle":"","family":"Wiradirja","given":"Imas Rosidawati","non-dropping-particle":"","parse-names":false,"suffix":""}],"container-title":"Jurnal Reformasi Hukum : Cogito Ergo Sum","id":"ITEM-1","issue":"1","issued":{"date-parts":[["2018"]]},"page":"1-8","title":"The Bankruptcy of Personal Guarator'S Heirs Under Indonesia Legal System","type":"article-journal","volume":"1"},"uris":["http://www.mendeley.com/documents/?uuid = 1bdb2ab2-b80d-4f99-a438-46bfa6a352df"]}],"mendeley":{"formattedCitation":"Nuruzzhahrah Diza and Imas Rosidawati Wiradirja, 'The Bankruptcy of Personal Guarator'S Heirs Under Indonesia Legal System', < i > Jurnal Reformasi Hukum : Cogito Ergo Sum < /i > , 1.1 (2018

[29] Sastrawidjaja, Man S., Hukum Kepailitan Dan Penundaan Kewajiban Pembayaran Utang (Bandung: PT Alumni, 2010).

[30] Iswi Hariyani and R. Serfianto, *Bebas Jeratan Utang Piutang* (Yogyakarta: Pustaka Yustisia, 2010).

as a creditor or the debtor as a guarantor are often not aware that it can have further legal consequences if the guarantor does not carry out his obligations. Regarding special privileges, the personal guarantee should relinquish its privileges. Furthermore, if the debtor breaks his promise, the creditor will easily take the debt payment directly to the personal guarantee. This guarantee agreement will not harm the personal guarantee as a shareholder and debtor of the company, therefore it indirectly possesses an interest in the company.

Regarding the legal liability of personal guarantee as the Guarantor has turned into a Debtor, it turns out that the main debtor has been negligent because he has not paid off all the investment credit facilities/debts from the bankruptcy within the due date. In view of the author, a guarantor also has the position of a debtor based on a personal guarantee agreement that is responsible for all of his assets as the fulfillment of the principal agreement between the creditor and the debtor. Therefore it can be said that after the debtor breach the contract, the creditors of two debtors can be billed for all debts and payments that will release other payments.

The main principle of bankruptcy, following the principles of paritas creditorium, pari passu prorate parte dan structured prorata.[31] The principle of paritas creditorium (equality of position of creditors) means creditors have equal rights to every debtor's property. In other words, all assets of the debtor, whether fixed or intangible assets, immovable or moveable possessionsare owned by the debtor and will be owned by the debtor, which is bound by the settlement of the debtor's obligations.[32]

It can be concluded that the liability of personal guarantee are divided into two different but closely related agreements, namely the guaranteed principal agreement and the personal guarantee agreement as a guarantee of the main agreement. The debtor is responsible for the performance obligations of an engagement on every asset in which the debtor's assets can be forced to be sold and confiscated as repayment. In a personal guarantee agreement, there is also an accessor agreement where a personal guarantee party will serve the obligations. Personal guarantee in this bankruptcy case is the debtor from the obligation to guarantee the debt. Personal guarantee assets will only be used to fulfill debts to creditors when the debtor's property has been confiscated and auctioned but the proceeds are not sufficient to return the debt.

2.5. Judge's Consideration of the Personal Guarantee Party that Declared as Bankrupt

Court decisions are marked by certain norm systems, which is technicallydriven by several people who can observe the rigid law. It is seen to serve the justice by the court

[31] Hadi Subhan, *Hukum Kepailitan Prinsip Norma Dan Praktek Di Pengadilan* (Jakarta: Kencana Perdana Media Group, 2012).
[32] *Ibid*.

that has an impersonal characteristic. Judges as the subject executors who functionally carry out judicial power are obligated as regulated in various applicable laws and regulations.

Bankruptcy is a condition in which the debtor is unable to make payments on the debts of creditors. The condition of being unable to pay is usually caused by financial distress from the debtor's business that has experienced a setback. Bankruptcy is a court decision that caused in general confiscation of every tangible asset of the bankrupt debtor. The management and settlement of bankruptcy carried out under the supervision of the supervisory judge with the main objective of using the proceeds from the sale of such assets to pay all the debts on a prorate parte and related to the creditor structure.[33]

In adjudicating a case, the judge should perform three stages of action, namely:

2.6. Constating

It means observing, acknowledging, and confirming the occurrence of the proposed event. The judge should have certainty of the truth with evidence to obtain certainty about the truth of the presented event. Therefore, constating an event means proving or assuming that the related event has been proven to be true.

2.7. Qualifying the Event

The judge should assess the occurred events including finding the law system for the events that have been constrained. To find the law, judges often apply the law to the events. In general, the term qualifying means finding the law by applying the legal rules of an event or incident. However, sometimes the judge's regulation is not only finding the regulation but also has to create its regulation. Judges should have the courage to create laws that do not conflict with the entire legal system and meet the requirements of the community.

2.8. Constructing

The judge should provide the constitution, which means creating the law for the related event.[34] This research indicated that the judge's consideration in deciding the case is already related to the legal considerations. Which based on the personal guarantee, the guarantor has legally changed to a debtor. Changing from the guarantor to the debtor is mentioned in the provisions of Article 2 paragraph (1) of Law Number 37/2004 concerning Bankruptcy and Postponement of Obligation to Pay Debt. As it has been considered, based on article 1836 of the Civil Code, if several people have bound themselves as guarantors for the same debtor with the same debt, then each guarantor is bound for the entire debt. Related to the characteristics or principles of a subsidiary guarantor outlined in Civil Code article 1820, the debtor and principal can be sued

[33] Amiruddin and Zainal Asikin, *Pengantar Metode Penelitian Hukum* (Jakarta: PT Raja Grafindo Persada, 2012).
[34] Sudikno Mertokusumo, *Teori Hukum* (Yogyakarta: Universitas Atma Jaya, 2011).

together with the guarantor. This method will guarantee the interests of creditors that have the right to choose which guarantors to withdraw and hold the responsibility.

2.9. Analysis of the Cassation Decision Number 808 K/Pdt.Sus-Pailit/2017

The essence of capitalism is ownership, competition, and rationality. It is in contrast with feudalism where capital and the source of class formation depend on land ownership and tradition. In capitalism, the source of class distinction and division is capital and ownership of industrial assets. Understanding Capitalism is basically an economic system that emphasizes the role of capital in all types, including its use in activities to produce other materials.[35]

Capitalism is an ideology which directs the owner of capital to maximize his/her business for maximum benefits as well.[36] Based on this principle, the capitalist develops his network of production enterprises by maximizing the circulation of capital or commodities which is the desire to obtain more profits and more surplus value through business expansion. Therefore, it can be explained that Limited Liability Companies and Cooperatives are examples of many forms of Economic Capitalism.

A limited liability company is a company formed from partners who are not recognized by the public. The founder of the company is each person who makes the first company transaction. The first transaction is what makes the perpetrators to be bound by certain activities to realize a common goal of the company. Meanwhile, to be registered in the company, it requires someone to buy one certificate or more for the company's project shares, as compensation to the value of the company. The compensation is a form of involvement to manage personal wills. It means that to become a partner, it only needs to buy a few shares of stock, whether the other partner accepts it or not.[37]

From the description above, limited liability companies entered the system of capitalism, which stated that companies' stocks are transactions between company capitals, and there is no intervention of humans. Therefore, each company is not recommended to lead the company's activities regardless of the number of shares, the only person who is entitled to lead the company is called the director, who is elected or appointed by the board of commissioners. This board of commissioners will have to choose among the shareholders, where everyone has the right to vote, based on the level of capital ownership, not based on the personal factor.

Shares in a stock company are securities that reflect the company's price at the estimated shares. Stock certificates do not reflect the company's capital at the establishment time. After the company begins to operate, the shares will be released as capital and turn

[35] Lorens Bagus, *Kamus Filsafat* (Jakarta: Gramedia, 1996).

[36] Boike Rehbein, 'Capitalism and Inequality', *Sociedade e Estado*, 35.3 (2020), 695–722 < https://doi.org/10.1590/s0102-6992-202035030002 > .capitalism is a market economy governed by immutable laws and inequality is the result of competition between free and equal individuals on that market. This paper argues that capitalism, as developed in Western Europe in modern times, has more in common with organized crime than with a system of natural laws. It is rooted in the sale of church and common lands, the privatization of finance (especially public debt

[37] *Ibid*.

into a valuable paper that had a certain value. Etymologically, cooperative comes from the English "co" and "operation". *Co* means together dan *operation* means work. Thus, cooperation means working together. In this case, the cooperative means an economic forum consisting of people or agencies that work voluntarily and aim to fight for the welfare collectively.[38]

The idea of cooperatives was born in a capitalist country. Cooperatives are intended as an alternative to the capitalist system. However, until now apart from the capitalist system, cooperation is not a separate system. Basically, cooperatives want to replace the relations of production and exchange based on competition with cooperation. However, nowadays, cooperatives have not yet replaced the capitalist system.

The existence of understanding of capitalism can have a positive impact and a negative impact. The positive impact of the capitalist economic system is to significantly encourage economic activity; liberal competition will bring production and prices to a reasonable and rational level and encourage the motivation of economic actors to achieve the best presentation.[39] The negative impact of the capitalist economic system is the accumulation of wealth, which will lead to excessive individualism, and a lack of cooperation among people. Furthermore, the welfare state may notice as the influence of human desires that are expected to ensure a sense of security, tranquility, and prosperity. Therefore, they will not fall into misery.

In principle, every debt seems to contain risks in its implementation so that the creditors must apply the principle of prudence. To anticipate the risk, the money was given as a loan. Usually, creditors require the debtor to provide guarantees. Collateral is an affirmation from the debtor to carry out his obligations, to do or not to do what has been specified in the agreement.[40] What is meant by "the due-debt and can be collected" is the obligation to pay debts that have passed the payment deadline, either it has been agreed upon or the debtor did not pay on time as what is written in the agreement, which is caused by the imposition of fines by the competent authority, and the court decisions, arbitrators, or arbitral tribunals.

The legal consequence of a signed guarantee agreement within the release of special rights means that if the main debtor did the breach of contract (wanprestasi) to the creditor, the guarantor is allowed to directly ask for compensation from the creditor without asking for any compensation from the debtor. Wanprestasi is a condition in which a debtor customer does not carry out the agreement as stated in an agreement.

In the process of giving the decision, the judges need to notice the due debt, then the personal guarantee agreement needs to be collected and declared as bankrupt. Based on the description above, the author believe that the debt guarantor or borgtoch is an

[38] Abdul Basith, *Islam Dan Manajemen Koperasi* (Malang: UIN Malang Press, 2008).
[39] Gerard Delanty, 'The Future of Capitalism: Trends, Scenarios and Prospects for the Future', *Journal of Classical Sociology*, 19.1 (2019), 10–26 < https://doi.org/10.1177/1468795X18810569 > .
[40] *Ibid*.

agreement as a third party for the benefit of the creditor binds himself to fulfill the obligations of the debtor. This view is related to the Civil code provisions of Article 1820, The decision on Cassation Number 808 K/Pdt.Sus-Pailit/2017 is also related to Article 2 paragraph (1) of Law Number 37/2004 concerning Bankruptcy and Suspension of Debt Payment Obligations, the fulfillment of the elements of bankruptcy and the accountability of personal guarantee party that has bound themselves as guarantor for the payment of debt. It is regulated in the civil code article 1820.

3. CONCLUSION

Based on the results of the research and discussion above, it can be concluded that Personal Guarantee stated the ability provided by a third party to guarantee the fulfillment of the debtor's obligations to the creditor if the debtor experienced wanprestasi. A personal guarantee is responsible for two different but closely related agreements, the guaranteed principal agreement, and the personal guarantee agreement. In a personal guarantee agreement, besides the main agreement, there is also an accessor agreement where there is a personal guarantee of who will be responsible for the obligations. Personal guarantee in this bankruptcy case is the debtor's obligation to pay the debt.

The judge's consideration of the personal guarantee who was declared bankrupt against the debtor's debt based on Decision Number 808 K/Pdt.Sus-Pailit/2017. In this case, judge consideration refers to the statutory regulations; therefore, Judex Juris interpreted that in giving a systematic and easy-to-understand consideration. the judge sorts and selects relevant and irrelevant facts by an object he handles. Which legally, a personal guarantee makes the guarantor change to a debtor. As has been considered in article 1836 of the Civil Code, if several people have bound themselves as guarantors for the same debtor and the same debt, each guarantor is bound for the entire debt. Related to the characteristics or principles of a subsidiary guarantor outlined in civil code Article 1820, the debtor and principal are allowed to be sued together with the guarantor. This method guarantees the fulfillment of the creditor's interests to be able to choose which guarantor to be withdrawn and be held accountable.

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