EFFECTIVENESS OF INDONESIA’S SIMPLE PROOF TEST IN COMPARISON TO THE US CODE

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ABSTRACT

Objective: This paper aims to analyze (1) simply proving the elements for bankruptcy under Article 2(1) jo. 8(4) Law No. 37 of 2004 (“Bankruptcy Law”), and (2) its effectiveness in comparison to bankruptcy in the US. This paper assesses also distinctive judgement between the bankruptcy system of Indonesia and the US even when relying on the same forms of evidence. Legal experts and advocates recognize Indonesia’s Simple Proof Test for bankruptcy as ineffective and ‘too simple’ where Courts turn a blind eye to rule out matters requiring a thorough legal and factual assessment, hence the current Bankruptcy Bill basing future revisions on United States (“US”) practices. However, the simple proof test remains.

Methods: This research is a normative legal research with applying the statutory and comparatives approach to analyze the research questions concerned with descriptive qualitative.

Conclusions: The result of this research found that applying the same standards in an entirely different regime would not reap the benefits intended. Therefore, a thorough assessment should replace the simple proof test entirely.

Keywords: bankruptcy, simple proof test, reorganization, liquidation, insolvency.

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EFICÁCIA DO TESTE DE PROVA SIMPLES DA INDONÉSIA EM COMPARAÇÃO COM O CÓDIGO DOS EUA

RESUMO

Objetivo: Este documento visa analisar (1) simplesmente comprovando os elementos de falência nos termos do artigo 2.º, n.º 1, jo. 8(4) Lei n.o 37 de 2004 (“Lei de Falências”), e (2) a sua eficácia em comparação com a falência nos EUA. Este documento avalia também o julgamento distintivo entre o sistema de falência da Indonésia e dos EUA, mesmo quando se baseia nas mesmas formas de prova. Especialistas jurídicos e defensores reconhecem o Teste Simples de Prova de Falência da Indonésia como ineficaz e ‘muito simples’, onde os tribunais fecham os olhos para descartar questões que exigam uma avaliação legal e fatual completa, daí
1 INTRODUCTION

The Simple Proof Test under Article 8(4) Bankruptcy Law automatically declares Bankruptcy to confiscate the Debtor’s assets for the Curator and Supervising Judge to manage and liquidate [1]. Legal precedence indicates the narrow scope to simply prove the elements for Bankruptcy [2]. Only 5 Commercial Courts across Indonesia (Jakarta, Medan, Semarang, Surabaya, and Makassar) are authorized to assess facts/circumstances that are prevalent and shown in short. Its disregard to differences in debt value limits inherently complicated case and gives rise to legal uncertainty [3]. The Constitutional Court and the Ministry of Law and Human Rights (MOLHR) acknowledge the ineffectiveness of Bankruptcy. Doting on the legislative gap after the first legal reformation in 1998-2004, the simple proof test, incompetence of Judges, lack of rehabilitation, abuse, and disproportionate ratio of bankruptcy cases to its petition [4]. Hence, the current Bankruptcy Bill #211 in the 2020-2024 National Legislation Program [5].

Every country legally reforming their legislation refers to practices of other more developing countries to improve their World Bank Ease of Doing Business Index ranking. Indonesia’s Bankruptcy Bill is based on US practices where the MOLHR Academic Paper suggests revising the simple proof test to increase the minimum value of the Debt and number of Creditors [6]. They further recommend revising the wording in Article 8(4) Bankruptcy Law from shall to may for Court’s to freely exercise judgment to declare just bankruptcies, instead of automatically, declaring Bankruptcy. Because of once the elements for bankruptcy of Article 8(4) jo. Article 2(1) are fulfilled, namely the debtor has two or more creditors and failing to pay at least on debt which has matured and became payable, shall be declared bankrupt through a court decision without considering the conditions of the debtor whether it is solvent or insolvent. This is what we called a
simple proof test. The court may decide that the bankruptcy petition is granted when the elements of Articles 8(4) met but conversely the court also may reject the bankruptcy petition even though likely its elements of Article 8(4) met. So, there is no legal certainty to what the understanding of simple proof test.

Legal experts and advocates recognize Indonesia’s Simple Proof Test for bankruptcy as ineffective and ‘too simple’ where Courts turn a blind eye to rule out matters requiring a thorough legal and factual assessment, hence the current Bankruptcy Bill basing future revisions on United States (“US”) practices. However, the simple proof test remains. As such, this paper aims to analyze (1) simply proving the elements for bankruptcy under Article 2(1) jo. 8(4) Law No. 37 of 2004 (“Bankruptcy Law”), and (2) its effectiveness in comparison to bankruptcy in the US. The comparative analysis will strictly focus on US Bankruptcy as a Chapter 11 (reorganization), the most common and efficacious plan, and Chapter 7 (liquidation), the alternative where the Debtor is unlikely to repay their debt. This paper assesses also distinctive judgments between the bankruptcy system of Indonesia and the US even when relying on the same forms of evidence. The result of this research found that applying the same standards in an entirely different regime would not reap the benefits intended. Therefore, a thorough assessment should replace the simple proof test entirely. Revisions based on state practices must consider the entirety of their legal system and whether implementing its practices will replicate similar effects.

2 THEORITICAL FRAMEWORK

It is an essential principle of the legal system that laws must be unambiguous, predictable, and consistent. It is founded on the notion that people need to be able to comprehend the law so they can adjust their behavior accordingly. Legal research has extensively studied the idea of legal certainty, which is thought to be necessary for the legal system to operate as intended. The idea of the rule of law serves as the foundation for the legal certainty theory. For there to be a rule of law, laws must be written in a way that is predictable and unambiguous, and they must also be applied consistently. This guarantees that everyone, regardless of status or position, is treated equally under the law. Legal certainty is crucial for fostering confidence in the legal system because people are more inclined to follow the law if they are aware of what is expected of them. Along with a legal certainty is followed by legal protection theory which is applied in this paper. The
law has a role to protect the rights of legal subjects, for instance, the protection of debtor and creditor as well as the third party etc [7]. In this regard, when providing legal protection, the law shall aim for justice, certainty, as well as utility in the society. According to Satjipto Rahardjo, legal protection is an effort to protect individual interests by allocating a human right the power to act in the frame of that interest [8]. According to Soerjono Soekanto, legal protection is the protection given to legal subjects as a form of legal instrument [9]. Given the definition above, the implementation of bankruptcy law itself as a branch of law in a society must provide legal protection to the parties involved as a manifestation of the legal subject rights. A good bankruptcy law must be based on the principle of balance in providing equal protection for both debtors interest (debtor friendly) and creditors interest (creditor friendly) [10]. One of its manifestations in providing a balance protection, is through providing a balanced opportunity to file the bankruptcy petition. Notwithstanding, the law must also recognize other parties' interests such as its stakeholder and the overall society by the impact of bankruptcy declaration. An ideal bankruptcy law must be based upon the principle of providing balanced benefits and protections to all the related and interested parties of the bankruptcy [11]. The legal effort to declare bankruptcy shall depend on who needs legal protection for the bankruptcy decision against a debtor.

3 METHODOLOGY

This article's method of analysis is outlined to thoroughly analyze how one could satisfy or disprove the simple proof standard in practice. The second portion of the analysis assesses the critical differences between Indonesia and America's bankruptcy system, from its legal foundation to its execution, rather than the mere standards for bankruptcy. Albeit the two legal systems are intrinsically different, such an analysis would be incomparable. However, it is these integral differences that will illuminate how effective Indonesia's Bankruptcy Bill will be with the simple proof test intact when most of the articles rely on US practices.

The methodology of research is used the normative legal research [12] to deduce indicators of the simple proof test sufficient to meet the elements for Bankruptcy based. The analysis is deduced with the Statute and Comparative approach by reviewing and interpreting all laws in its literal meaning to understand the scope of the simple proof test [13]. The key indications of the simple proof test are then compared with Chapters 7 and
11 to conclude factors that could improve the simple proof test [14]. The data and information within are gathered from primary, secondary and tertiary research, i.e., case precedence, and legislative and judicial texts [15]. The data will be analysed descriptive qualitative.

4 RESULT AND DISCUSSION

4.1 SATISFYING THE ELEMENTS OF INDONESIA’S BANKRUPTCY

The first legal reformation in Indonesia’s Bankruptcy applicable to all citizens came through the 1997 monetary crisis, with Bankruptcy's essence found in Articles 1131-1132 of the Indonesian Civil Code (KUHPer). Any agreement requiring an obligation equivalent to a monetary value between the Debtor and another, guarantees the Debtor’s assets as a form of liability and must be conducted in good faith being legally binding to both parties unless stated otherwise [16]. In breaching their obligations, the Debtor's assets will consequently be auctioned and distributed to the owed Creditors proportionately based on the available assets or in full of the amount depending on the rights attained. Rather than a plea for insolvency, Bankruptcy petitions become a legal strategy directing pending legal claims of Debtor’s having more liabilities than assets, thus failing to prevent dishonest practices [17].

The simple proof test complements this statement. Legal scholars and precedence posit the Court's reliance on simply proving (1) two or more Creditors and (2) the Debtor failing to pay at least one debt due and payable [18]. Parties claiming a fact or circumstance bear the burden of proof to substantiate their claims based on prima facie evidence in forms of letters, witnesses and experts [19].

On the first element of having two or more Creditors, Bankruptcy law recognizes Creditors as those having receivables based on agreement or law and are entitled to collect such receivables through Commercial Court [20]. There are three ways to prove the Creditor’s existence, i.e., both Creditors filing the petition together, the Second Creditor filing amidst or after proceedings or during the verification of claims before reaching an amicable settlement [21]. The first Creditor may provide legal documentation proving the other Creditor, whom will be summoned and questioned before the Commercial Court [22]. Examples of legal documentation are Creditor's data obtained through OJK, mutually agreed purchase order (PO), insurance policy, mortgages, deeds, or other bank instruments (bonds and shares) [23].
The validity of a Creditor hinges on the existence of the debt and should not be disputed as such legal assessment almost instantly fails the simple proof test. In the 2015 *Shareholders to PT HI*, the Court rejected GPF’s petition to claim their debt under a *cessie* (transfer of rights) agreement. They posit to assess the validity of the debt, timeliness of notifying the Debtor of the *cessie*, and, indirectly, GPF as a Creditor, warrants a complicated assessment [24]. The numerical threshold of having two Creditors to declare Bankruptcy is strict, as Bankruptcy fails if even one of the Creditors' debts is settled amidst proceedings to protect the equal interest of Creditors to retrieve their loans in appropriate amounts [25]. While the MOLHR recommendations of increasing the numerical threshold would reduce inaccurate bankruptcies; it would counterproductively shelve petitions requiring Bankruptcy [26]. If there are more Creditors with guaranteed rights compared to non-guaranteed but with substantial amounts, the Creditor’s risk of not retrieving their loan is high [27].

Legal scholars opt to erase the definition of a person that includes corporations not in liquidation because it contradicts Article 142 LLC Law, where companies dissolve when they are insolvent or unable to cover court fees, annulling Bankruptcy decisions [28]. They opt for the simple proof test further hinders implementing Article 1(11), then perhaps the simple proof test itself should be revised to allow the settlement of debts. Instead, the Bankruptcy Bill should require a thorough or sufficient assessment of evidence and the rule of law to decide on Bankruptcy or alternative means for rehabilitation.

The second-prong test of the simple proof test requires petitioners to prove the (1) debt simply and (2) Debtor's failure to pay at least one due and mature debt. Before the 1998 legal reformation, Bankruptcy was merely a formality, rarely used due to its high costs, time consumption, and little chance for Creditors to partake. This stagnancy persists throughout the reformation due to the absent definition of debt. As such, Article 1(6) Bankruptcy indicates progressiveness in the legal system. Contrarily, current legal practices prove not all monetary obligations are justified debts.

*Indebtedness is a monetary obligation the Debtor must fulfil that exists, incurs, or is contingent on agreement or law, e.g., Articles 1338 jo. 1340 KUHPer or Article 1457 jo. 1458 KUHPer (Sales and Purchase Agreement or “SPA”) [29]. The Debtor is obliged to maintain products-to-be-delivered in appropriate conditions or pay for the delivery of the products [30]. The use of authentic and copies of deeds, corporate documents, letters,
witness statement, and expert opinions can prove the transfer of a claim/debt [31]. The 2012 ILCF recognizes indebted obligations of a transactional nature, e.g., SPA, property, and cessies are effective once agreeing on the object and price rather than its performative action [32]. Agreements containing collateral rights (fiducia and mortgages), taxes, wages, and employment rights (unclaimed annual leaves), can amount to a debt [33]. Whereas, invoices and POs are merely a confirmation and implementation of the umbrella agreement and will only amount to an indebted obligation in the absence of said agreement [34]. Thus, Creditors filing a petition since the Debtor failed to repay the due and mature types of debt aforementioned fulfills the elements of Article 2(1) Bankruptcy Law.

The simple proof test is crucial due to the absence of rehabilitative means under Bankruptcy Law [35]. However, the 2015 Shareholders and 2012 Telkomsel proves the assessment of debt requires a thorough evaluation when the debt is terminated for the Creditor's incompliance or is procedurally correct [36]. The Commercial Decision declaring Bankruptcy without such factor implies failing to consider the rule of law and Debtor’s financial capabilities to pay the debt [37].

To ensure Bankruptcy, the petitioner must prove the due and mature debt the Debtor fails to pay. Proving the existence of a debt and the Debtor’s failure to pay said debt simultaneously proves the element of the two or more Creditors. This can be done through written evidence, e.g., Court Decision or Arbitration Award, agreements, POs, insurance policies, invoices, or deeds referencing the maturity date [38]. Alternatively, debts mature based on the collection period and subpoenas in the absence of such documentation [39]. The Debtor’s (negligent) behavior during this period simultaneously proves their failure of paying the debt, e.g., ignoring subpoenas, direct correspondences with the Creditor or failing to be present themselves at the Commercial Court [40]. Corroborated with witness and Debtors testimonies acknowledging their negligence and inaction of making any payment until the maturity date or throughout proceedings, then the simple proof test is met.

4.2 DECLARING BANKRUPTCY IN THE US AND INDONESIA

Bankruptcy in the US was first regulated to reorganize Debt under the 1978 Bankruptcy Reform Act (“Bankruptcy Code”), followed by the Bankruptcy Abuse Prevention and Consumer Protection (BAPCPA) [41]. Currently, Bankruptcy is regulated
as Title 11 US Code, entailing the Bankruptcy Code and Federal Rules of Bankruptcy Procedure (“Bankruptcy Rules”) divided into six chapters [42]. Ch. 7 is the most filed to liquidate a Debtor; Ch.9 reorganizes for governmental agencies; Ch.11 reorganizes for operating businesses failing to not qualifying for Ch. 13 [43]; Ch. 12 to reorganize for farmers and fisherman is infrequently filed; Ch.13 reorganizes individual assets where Ch. 15 manages international debt, insolvency, and cross-border Bankruptcy.

Per Article 1 §8 of the US Constitution, the division applies for all states to provide a just, speedy, and inexpensive proceeding [44]. Practices thereof have been relied on in reforming legal Bankruptcy systems of Hong Kong, Singapore, and Indonesia (Bankruptcy Bill) [45]. While Indonesia relies on the simple proof test to accede Bankruptcy as a form of liquidation, the US Code recognizes Bankruptcy as both liquidating or reorganizing the Debtor’s assets. Additionally, unlike the simple proof test, the US Code relies on thorough assessments of the Debtor’s financial circumstances. Chapter 11’s standard is the Court and Creditor’s acceptance of the Debtor’s reorganization plan to restructure their assets to settle debt and continuously operate. The standard for liquidation (Ch.7) relies on a two-prong test under §707(b), Title 11 USC applicable to consumer debt [46]; The (i) mean of the Debtor’s total financial income, and (ii) totality of circumstances, must be proven in good faith to prevent misuse of proceedings. The standards rooted in the foundation of its legal systems (civil and common law) do not hinder the holistic comparative analysis as Bankruptcy in both States rely on one uniform law. Allowing US and Indonesia to (1) relies on the same form of evidence yet undergo (2) dissimilar levels of assessment.

4.3 USE OF EVIDENCE

Absent any procedural Bankruptcy Law, Indonesia resorts to five forms of evidence regulated in Article 163-164 HIR and KUHPem: written evidence, witness, suspicion, recognition, and oath to simply prove the elements for Bankruptcy where its weight varies between cases. Documents like authentic deeds serve as prima facie evidence sufficient to establish a fact, whereas other forms of evidence are admissible for the Court to decide on their relevancy to the case [47]. Conversely, US Bankruptcy has a specific evidentiary standard and exceptions under Rules 43-44.1 Federal Rules of Civil Procedure, Section 2075 Federal Rules of Evidence, and Bankruptcy Rules. The US acknowledges the same form of prima facie evidence, i.e., deeds, documented certified
sound recordings, or proceeding transcripts. Courts apply the preponderance standard to determine clear and convincing evidence, i.e., relevant and holding probative value to prove a fact peril to the Debtor’s financial state and causing Bankruptcy rather than their failure to repay the debt [48].

Evidence is not to prove the specific behavior of either party and is excluded if its probative value is substantially outweighed by dangers of (i) conflation; (ii) undue delay; (iii) unfair prejudice; (iv) misleading the jury; or (v) needlessly presenting cumulative evidence [49]. The law and weight of evidence are clear in providing parameters for relevance to the case whereas Indonesia lacks any procedural guard for Bankruptcy in its entirety. Several scholars and government institutions cite the urgent need to establish a procedural code, which legislators should consider providing clarity for the parties and ensure accurate declarations [50].

4.4 LEVEL OF ASSESSMENT

Despite the similar use and standard of evidence in both States, their distinctive procedures are factored by (1) time limit, (2) declaring different forms of bankruptcy, and (3) based on their respective assessments. Providing a deadline for Bankruptcy permits a just and speedy proceeding balancing the interest of all parties and, if feasible, the Debtor’s rehabilitation [51]. The standards are particularly polarizing due to the nature of the assessments. The US relies on the acceptance of a payment plan contrasts with Indonesia assessing the failure to pay a due and mature debt under the simple proof test.

4.5 TIME LIMIT OF THE COURTS TO DECLARE BANKRUPTCY

Courts only declare Bankruptcy per the Court and Creditor’s approval of the Debtor’s payment plan. Ch.11 US Code declares Bankruptcy when the Court and Creditor accept the Debtor’s reorganization plan within 180 days or at the latest 20 months (with extension) pending the swiftness of the parties [52]. The parties often expedite the process by cooperating beforehand to conclude prepackaged/prenegotiated payment plans to declare bankruptcy in less than 30-60 days [53]. As such, the petitioner no longer needs to file Schedules of assets, liabilities, and statement of their financial affairs already accommodating the Debtor’s tax affairs [54]. Moreover, pre-negotiated plans are beneficial to the Creditor because they shorten proceedings into two to three hearings without litigation, thus mitigating the risk of control and disruptive business operations.
The Courts retain ample time to conduct a thorough assessment of any possible impairment of general unsecured debts and ensure the Debtor’s survival post-restructuring. Ch.7 is shorter than Ch.11, taking four to six months in the absence of a plan as Courts instead appoint a trustee to distribute the Debtor’s assets back to the Creditor [55].

Indonesia’s Commercial Court determines Bankruptcy within 60 days in three hearings to assess the parties’ legal standing, simple proof test, and reading the decision [56]. Courts only rely on evidence submitted in the second trial to decide Bankruptcy. Indonesia’s Bankruptcy Law does not require financial statements nor the list of Debtor assets and dependents to determine Bankruptcy, merely to organize the assets thereafter. Consequently, parties are dissatisfied and opt to appeal the Court’s previous assessment, often finding that bankruptcy was indeed wrongfully declared, e.g., Telkomsel, Shareholders to PT HI v. GPF.

Per Bankruptcy Guidelines, parties can only prove their claims by submitting evidence in the forms of letters/documents, witness testimonies, and expert opinions in which the Judge will make a decision thereof in the next proceeding [57]. Since Bankruptcy no longer acknowledges exceptions, reply/replik, rebuttal/duplik, interventions and counterclaims, parties’ defenses are limited as they cannot disprove counterclaims [58]. Even disputing such claims at Civil Court prior to the Commercial Court only incapacitate the function of the latter Court to handle Bankruptcy. The parties would most likely settle their dispute only before the Civil Court until rendering a decision. Conversely, the US still assesses these exclusions as a separate proceeding to amend the plans or revoke the Debtor’s discharge once administering the settlement plan [59]. Shortening the proceedings with due disregard, and the simple proof test weakens accurate bankruptcy decisions and does not protect the interest of all parties. Alternatively, the Bankruptcy Bill could include a pre-requisite of parties concluding a pre-packaged/pre-negotiated plan prior to filing for Bankruptcy with the aid of an independent party provided by the Court other than a Curator. This would allow the simple proof test to remain intact with a full and thorough assessment already in place. Nevertheless, failing any thorough assessment of such exclusion of rebuttal and of the factual circumstances as practiced in the US renders the simple proof test high probability of inaccurate Bankruptcy decisions. Thus, the simple proof test is insufficient for Commercial Courts to accurately declare bankruptcy.
4.6 THE LEGAL SYSTEM’S ACKNOWLEDGMENT OF THE VARIOUS FORMS OF BANKRUPTCY

The US recognizes Bankruptcy in three separate forms: reorganizations, liquidations, and cross-border settlements, all of which entail the common consequence of selling Debtor’s assets to settle the debts based on a thorough assessment of their finances. Bankruptcy under Chapter 7 is akin to Indonesia’s Bankruptcy as an independent person liquidates and manages Debtor’s assets, assuming the Debtor’s insolvency or inability to pay its debts. Additionally, Chapter 11, applicable to actively operating businesses, is the most frequent petition because it protects financially troubled businesses from insolvency and ensures financial stability after settling their debts under the payment plan [60]. This is the most distinct form of Bankruptcy in comparison to Indonesia as the latter does not acknowledge Bankruptcy as a reorganization. Rather, restructurings are mere legal strategies outside court supervision subject to contract law under the Indonesian Civil Code [61]. Alternatively, restructurings also take place under the suspension of payment obligation (PKPU) as a last resort where the Debtor is then bankrupt should the Court reject the PKPU composition plan [62]. While this would meet the simple proof test noting the required plan and thorough assessment of circumstances, not all petitioners undergo PKPU beforehand as PKPU accounts for 78% total Bankruptcy/PKPU cases in 2019 [63].

The US’ legal strategy as a last resort to Bankruptcy is to exhaust the credit counseling prerequisite under Ch. 11 assessing Debtor’s (1) assets and liabilities; (2) current income and expenditure; (3) executory contracts and unexpired leases; and (4) financial affairs [64]. Further, the Court applies an automatic stay on the Debtor once filing the petition, to prevent enforcement of judgments and or security without leave of the court [65]. Under the stay, parties negotiate to resolve the issues on the Debtor’s finances until making a motion or lifting/modifying the stay [66]. MOLHR Academic Paper endorses implementing these practices in the Bankruptcy Bill as it provides legal certainty and conclusive evidence of the Debtor’s insolvency and needs to declare bankrupt. However, such recommendations entail a thorough assessment contradicting the entirety of the simple proof test. Thus, if Bankruptcy Bill and its final amendments intend to rely on US practices, the presence of the simple proof test is ineffective.
4.7 THE STANDARD FOR BANKRUPTCY

Since the passing of BAPCA amendments in 2005, petitions for Bankruptcy in the US have been more difficult [67]. The standard for Bankruptcy under Ch.11 relies on the reorganization structure to repay the debts with the condition there is still cash to pay administrative expenses and most priority claims [68]. The plan further entails the nominal, confirmation and class of each Creditor, the guidelines of administering the plan and assurance the plan will not lead to the Creditor’s liquidation [69]. Accepting the reorganization plan is an alternative mode to a liquidation, preventing loss of jobs and misuse of economic resources whilst protecting the Creditor [70]. For instance, the Wickes corporation, under strong reorganization management, reduced operating expenses, closed unprofitable stores, and renegotiated/rejected building leases of its stores post-Ch.11. This is a rare case as within four years, Wickes received a net gain of at least USD 30 million in their attempted takeover tenders of other companies [71]. Hence, the thorough nature of the assessment on the Debtor’s financial circumstances and fair administration of the plan presumes the Court’s accuracy and justified decision to declare Bankruptcy.

Alternatively, parties opt to file a Chapter 7 when failing to achieve a Chapter 11 Bankruptcy, where the person will receive regular income to adjust their debts [72]. Parties filing a Chapter 7 must meet the two prong, means and totality of circumstances, tests to rebuke the presumption of abusing proceedings. The means test combines the Debtor’s monthly income over the past six months in accordance with the US Census Bureau data and IRS collection standards [73]. Such income derives from all sources regardless of economic unit taxability to determine the length of the liquidation plan [74]. The James P. Woldstad case affirms the economic unit as a householder member who resides more than a minimum portion per month at the Debtor’s house and is financially dependent to the Debtor [75]. The means income is met when it is less than the median income of the household unit within their State. Conversely, the Debtor fails the test when there is a leftover income of >60-month time-period, $12,850 or 25% of unsecured debt. The Debtor could instead achieve a Chapter 13 Bankruptcy to reorganize debts [76]. Courts require a thorough assessment to declare Bankruptcy irrespective of justifying the nominal under special circumstances or as a disposable monthly income [77].
Moreover, on the second-prong element, the Totality of Circumstances Test under Section 707(b)(3) USC refers to the financial situation of the Debtor and possible abuse. Grogan and Re James, 345 BR 664 acknowledge instances abusing Bankruptcy when Debtor fails to take appropriate action of repaying their debt. This includes making luxurious/excessive purchases, compliance to the law, resort to reorganization (Ch. 11 or 13), and willingness to work outside their industry and area to repay the debt [78]. Courts further consider when the Debtor rejects personal service contracts and the financial need for such rejection [79]. Thus, the Debtor’s good faith and behavior towards their financial circumstances is necessary to assure Bankruptcy.

In the case of Indonesia, Courts automatically declare Bankruptcy when the simple proof test under Article 2(1) jo. 8(4) Bankruptcy Law is met. The Commercial Court failing to consider the Debtor’s financial circumstances and their genuine behaviour in repaying their debt weakens their accuracy and justification for Bankruptcy. Government institutions, advocates, experts, and case precedence support this sentiment where assessments on the rule of law or facts deems the case ‘complicated’, thus failing Bankruptcy [80]. While the Constitutional Court affirms instruments like wage as debts having higher priority than taxes, the simple proof test hinders such instruments equitable to a debt even when conducted in good faith [81].

Further, the automatic declaration without considering the public interest weakens the Debtor’s protection from Creditors [82]. While the Supreme Court in Telkomsel attempts to rectify this notion, Telkomsel is publicly known as a highly profitable company contributing to the State’s security development and sustainable investment. Their mere drop of 3% after the First Court’s decision for Bankruptcy by allocating 5 trillion rupiah to buy back their class B shares indicates their financial capacity and the err of the simple proof test [83]. The MOLHR Academic Paper recommends revising the automatic declaration giving Courts flexibility to determine Bankruptcy as the appropriate step. Such pragmatic approach could be counterintuitive if the simple proof test remains since Court’s would nevertheless make a thorough assessments of the law or facts. Conversely, the risk of unjust Bankruptcy remains with Court’s discrediting pertinent facts that ought to fail the simple proof test, e.g., photocopies proving complete payment to a Second Creditor over alleged debts [84]. Thus, a thorough assessment should apply in lieu of the simple proof test.
In contrast to the US Chapters that cancel petitions when there are alternative viable means, Indonesia fails to refer the appropriate forums having jurisdiction over certain matter and would instead declare Bankruptcy [85]. For instance, in PT. Asuransi Jiwa Manulife, the Court threatened Bankruptcy despite OJK (Financial Service Authority) being solely responsible for sanctioning and revoking licenses of insurance companies for wrongfully collecting premiums [86]. In PT. DI, Bankruptcy was declared in disregard of Article 2(5) Bankruptcy Law that vests the Ministry of Finance authority to petition against State-Owned Entities wholly owned and not divided into shares. While PT. DI’s distribution of shares to the Ministry of SOE and Finance were to comply to Law No. 40 of 2007 where inevitably PT. DI’s basic capital fully derives from State wealth, the Court allowed the SOEs employees to file a petition [87]. They noted Article 2(5) as a mere formality to simply prove Bankruptcy while declaring SOE’s bankrupt goes against public interest of economic activity[88]. The logical inferences within these decisions may provide a strategic loophole for Creditors to use Bankruptcy as a mere debt collection tool by virtue of the simple proof test. Hence a thorough assessment equivalent to Ch.7 and 11 is needed to ensure just declarations of Bankruptcy.

The MOLHR and several government institutions recommend increasing the minimum requirement of Creditors with applying a minimum value of debt to counteract the debt collection risk [89]. However, US, UK, Hong Kong, and Singapore apply this test with requiring the debtor’s financial information and preliminary meetings with the Creditors to accept the Debtor’s repayment plan [90]. While Hong Kong requires prerequisite submission of the Debtor’s finances (schedules, liabilities), Singapore only permits filing after the Debtor fails to settle the debt within 21 days of being served [91]. Indonesia’s application of this practice would only replicate similar effects with a thorough assessment rather than the simple proof test as Courts would have ample opportunity to provide a necessary outcome [92]. Thus, the thorough assessment should prevail in comparison to Indonesia’s simple proof test.

The exhaustive assessments within Chapters 7 and 11 emits punctilious in successfully reorganizing 6,871 Debtor’s finances and liquidating 335,886 Debtors assets as of June 30 2020-2021 of whom filed Bankruptcy as a last recourse [93]. Supposedly, Indonesian Courts were scrupulous for declaring Bankruptcy 61x aggregated in the same period [94]. However, the reasoning of rejecting other cases being ‘complex’, and conversely accepting for simply proving the elements for Bankruptcy, is obscure. The
inefficiency of the simple proof test without placing any amendment to the test provides a low threshold to achieve Bankruptcy in comparison to the standards of Chapters 7 and 11.

4.8 THE LEGAL CONSEQUENCES OF BANKRUPTCY

The legal consequences of accepting Bankruptcy in Indonesian and US are similar insofar that the value owed to the Creditors is respectively settled, either through liquidating or restructuring the Debtors assets. Debtors declaring Bankrupt under Chapter 7 are assumed insolvent and consequently, will not be legally nor financially responsible over their assets as the Court-appointed-trustee will liquidate all assets and settle the payments owed to the Creditor. Thus, the consequence of declaring Bankruptcy under chapter 7 is high.

There is a lower degree of consequences to companies filing for Bankruptcy under Chapter 11 as they retain responsibility over their assets, including the selling and reorganizing of the assets to repay the Creditors, under the close supervision of a judge. The reorganizing plan that accedes to Bankruptcy is subject to a post-confirmation before administering a substantial amount of the plan in case of increased payments or extended/reduced payment periods [95]. Once the Debtor (in possession) report on its progress thereafter and completely administers the plan, the Court will deem the Debtor’s estates as ‘fully administered’[96]. Unless there is a unsecured lien on properties debt, the Debtor is discharged of the remaining unsecured debts not required under the plan [97]. Bankruptcy for Debtors in Indonesia undergo a unique process that ostensibly combines Ch.7 and 11. For instance, the Court will appoint a Curator to conduct a general confiscation (as opposed to a special or revindicatio, conservatio, and ecsecutor, beslag) of the Debtor’s total wealth to then liquidate and settle the debts owed [98].

The only means for rehabilitation occur after declaring Bankruptcy subject to the Curator’s understanding and request, reasonably implying the lack of rehabilitations from the Court during proceedings before accession. This process is deemed effective and efficient for insolvent proceedings yet presumes the Debtor’s inability to operate after settling the debts [99]. Assuming there are remaining assets/shares after settling the debts, they will be distributed among the shareholders to the Debtor (a company) or returned to individual Debtor. This weakens the effectiveness of Bankruptcy law because the simple proof test only assesses the failure of the Debtor to repay the debt rather than their
financial capabilities and the possibility of resuming operations. Article 104 Bankruptcy Law confirms this as the Curator will continue operating the company (Debtor) post-Bankruptcy if the temporary Creditors Committee approves [100]. Once completing the payments, the Bankruptcy decision will be terminated, and the Debtor (individual) is legally responsible over their assets. In addition, Creditors repossess the right of enforcement against the Debtor’s assets over unpaid claims, if any [101]. Indonesia’s Bankruptcy presumes conducting business in Indonesia a dangerous slippery slope for companies. Once failing to pay and the Creditor successfully argues a case even though the facts are not clear cut yet is simply proven runs the high risk of Courts inaccurately declaring Bankruptcy.

The EODB ranks Indonesia 12th in resolving insolvency, implying the effectiveness of its Bankruptcy Law. However, the simple proof test is disproportionate to the legal consequences of Bankruptcy in Indonesia. Following US and Singapore practices, Legislators should consider replacing the simple proof test with an insolvency test since Bankruptcy Law already assumes Debtor’s inability to operate when petitioning and post-Bankruptcy. When the Debtor holds more liabilities than assets, the petition itself is not an admission of insolvency, rather a legal strategy to exit from distress and directing all pending legal claims to the Bankruptcy Court [102]. Given the severe legal consequences of liquidating all assets, a thorough assessment embedded in the insolvency test would give Judges more flexibility and certainty in declaring Bankruptcy. Thus, the US thorough assessment prevails over the simple proof test.

5 CONCLUSION

After comparing Indonesia’s bankruptcy standard for declaration with the US, the ineffectiveness of the simple proof test is clear. First, under Indonesian law, parties can indeed simply prove the elements for Bankruptcy, though this is not without distorting the legal implications of declaring unjust Bankruptcy decisions. Courts will only declare Bankruptcy when there is factually, (1) two or more Creditors, and the (2) existence of at least a debt the Debtor fails to pay that is due and mature. This formula succeeds in the absences of disputing the Debtor’s indebtedness and in-depth assessments on the rule of law and factual circumstances. Second, that the simple proof test within the upcoming Bankruptcy Bill is not effective in comparison to the US Bankruptcy Code. The articles for Bankruptcy purported in the Bill from US practice assumes that Courts will make a
thorough assessment of the evidence, rule of law, public policy, and most importantly the factual circumstances, *e.g.*, Debtor’s financial capabilities.

The thorough assessment curtails the likelihood of abuse and bad faith whereas the simple proof test is a legal loophole for some to do so. Legislators should consider implementing principles of insolvency instead of the simple proof test as emanated in US standards. Alternatively, they should consider providing parameters and allowing legal and factual assessments to support Article 2(1) jo. 8(4) Bankruptcy Law, *i.e.*, considering Debtor’s financial conditions, requiring pre-packaged negotiations, declaring for public interest, and means for rehabilitation. plan. Leaving the Debtor unprotected absent any means of rehabilitation post-Bankruptcy under Indonesian law lies severe consequence where cases are proliferating during pandemics.
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[19] Article 1865 KUHPer; §5.1.2.e, Bankruptcy Guidelines, p.21.


[25] Elucidation to Bankruptcy Law, p.3; Article 1540, KUHPer; Telkomsel MA, pp. 38-39.


[29] Article 1(6) Bankruptcy Law; Elucidation to Bankruptcy Law, p.104; Bankruptcy Guidelines, p.22.


[31] Article 1865 KUHPer; Article 163 HIR; §5.1.2.e. Bankruptcy Guidelines, p.21; Telkomsel District Case, p.56; Telkomsel MA, pp.40-41.


[36] Articles 1338, 1342, KUHPer.


[38] §5.1.3.e, Bankruptcy Guidelines, p.22; Telkomsel MA, p.5.


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[50] Dirjen AHU, op cit.,


[52] §1121, Title 11 USC.


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[56] Article 8(5), Bankruptcy Law.


[59] Rule 7002, Bankruptcy Rules.


[61] The Law Reviews, op. cit.,


[64] §§301,303, Chapter 11.

[65] Rule 8013(d), Bankruptcy Rules.


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[75] James P. Woldstad Case, pp.3-5.


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[96] 106(a)(7) and 1107(a) Title 11 USC; Rule 3022, Bankruptcy Rule.

[97] §727(a)(1), Title 11 USC; US Court Ch. 7.

[98] Article 21, Bankruptcy Law.


[101] Article 204, Bankruptcy Law.