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A Dualistic Concept of Personal Guarantee Responsibility and Its Relevancy with Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligation A Dualism Of Personal Guarantee Responsibility In Indonesia Bankruptcy Law

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ABSTRACT

Indonesia's legal system recognizes the concept of personal guarantee, which is a promise or guarantee of an individual as a third party to fulfil the debtor's obligations. The concept of guarantee in Indonesia regulates the roles and responsibilities of personal guarantees if the debtor cannot pay his debts. However, the problem is a dualism in theory or approach to personal guarantee responsibility, especially in carrying out debt collection in the debt settlement process in Bankruptcy and Suspension of Debt Payment Obligations ("PKPU"). This dualism exists in the approach to justify actions for the creditor in determining who can be claimed to fulfil debt payment obligations - the debtor or personal guarantor. The main purpose of this journal is to analyze the existence of dualism problems in the concept of responsibility in personal guarantees and how to address the issues. In this journal, the author uses normative juridical research methods, which can be analyzed with conceptual and statutory approaches. This journal addresses an analysis that there are still inconsistencies in Indonesian legal practice in determining responsibility for the implementation of debt obligations, especially in deciding bankruptcy cases in Indonesia. Regarding whose debt responsibility is, there is still a dual approach, namely whether to use the "guarantor is always a guarantor" approach or the "guarantor is the debtor" approach. This journal concludes that there is a legal vacuum to resolve these circumstances. Regardless of the dualism of these circumstances, the author argues that it is necessary to unify the concept of responsibility for personal guarantees to provide legal certainty, especially concerning the implementation of debt collection in the bankruptcy process and at the time of PKPU.The dualism of personal guarantee theory has indicated that it is urgently needed to unify the concept of personal guarantee to provide legal certainty, especially concerning the implementation of debt collection in the process of settlement of debts in bankruptcy and at Suspension of Debt Repayment Obligation (Penundaan Kewajiban Pembayaran Utang/PKPU), where the creditor must determine who can be claimed to fulfill the debt payment obligations. In this paper, the author seeks who is responsible to pay the debt when there is a personal guarantor to guarantee the debtor, and also to examine the debt settlement process through PKPU or bankruptcy.

ABSTRAK

Di dalam sistem hukum Indonesia dikenal dengan adanya konsep jaminan pribadi, yaitu janji atau kesanggupan seorang individu sebagai pihak ketiga untuk memenuhi kewajiban debitur. Konsep jaminan di Indonesia mengatur mengenai peran dan tanggung jawab jaminan pribadi dalam hal debitur tidak dapat membayar utangnya. Namun yang menjadi permasalahan adalah, terdapat dualisme teori atau pendekatan atas tanggung jawab jaminan pribadi, terutama dalam hal pelaksanaan penagihan utang dalam proses penyelesaian utang dalam keadaan pailit dan pada Penundaan Kewajiban Pembayaran Utang ("PKPU"). Dualisme ini terdapat dalam hal pendekatan untuk menentukan upaya kreditur dalam menentukan siapa yang dapat dituntut untuk memenuhi kewajiban pembayaran utang, debitur atau pemberi jaminan pribadi. Tujuan utama atas penulisan ini adalah untuk menganalisis adanya permasalahan dualisme konsep tanggung jawab dalam jaminan pribadi dan bagaimana penyelesaiannya. Dalam penulisan ini, penulis menggunakan metode

penelitian yuridis normatif, yaitu permasalahan dapat dianalisis dengan pendekatan konseptual dan pendekatan hukum. Penulisan ini memberikan suatu analisis bahwa pada faktanya masih terdapat inkonsistensi dalam praktik hukum Indonesia dalam menentukan tanggung jawab atas pelaksanaan kewajiban utang, terutama dalam memutus perkara kepailitan di Indonesia. Dalam menentukan kewajiban utang siapa, masih terdapat dualisme pendekatan, yaitu apakah menggunakan pendekatan "penjamin adalah selamanya penjamin" atau pendekatan "penjamin adalah debitor". Penulisan ini berkesimpulan bahwa terdapat kekosongan hukum untuk menyelesaikan adanya keadaan ini. Terlepas dari adanya dualisme keadaan tersebut, penulis berpendapat bahwa sangat diperlukan unifikasi konsep tanggung jawab atas jaminan pribadi guna memberikan kepastian hukum, khususnya terkait dengan pelaksanaan penagihan utang dalam proses kepailitan dan pada saat PKPU.Adanya dualisme teori penjaminan pribadi menunjukkan bahwa sangat diperlukan unifikasi konsep jaminan pribadi untuk memberikan kepastian hukum, khususnya mengenai pelaksanaan penagihan utang dalam proses penyelesaian utang dalam keadaan pailit dan pada Penundaan Kewajiban Pembayaran Utang/PKPU, dimana kreditur harus menentukan siapa yang dapat dituntut untuk memenuhi kewajiban pembayaran utang. Dalam tulisan ini, penulis meneliti siapa yang bertanggung jawab membayar hutang ketika ada penjamin pribadi untuk menjamin debitur, dan juga untuk meneliti proses penyelesaian hutang melalui PKPU atau kepailitan.

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I. INTRODUCTION

In the framework of Indonesia's economic development, it is important to have substantial capital, which applies in any kind of area, such as trading, infrastructure, growth of industry, and so forth. With the economic development nowadays, the demand for loans will increase. Therefore, any business or economic activity must be familiar with the whole concept of guarantee or collateral. It is common for a capital loan or any financial scheme that requires a guarantee. With these grounds, Therefore, it is necessary for a guarantee mechanism to secure the lender for the purpose of security and legal certainty. The term guarantee law comes from the translation "Zakerheidesstelli" or Security of Law. In principle, Guarantee Law should be a juridical construction that allows the granting of credit facilitiesallowing credit facilities to be granted with a collateral. The guarantee law in essence must be sufficiently convincing and provide legal certainty for credit institutions (Wati, 2019). Thus, it can be interpreted that a guarantee is highly correlated with credit facilities, which are also then coherent with debt settlement issues.

In principle, the whole concept of a guarantee is divided into a two, general guarantees (jaminan umum) and a special guarantees (jaminan khusus). General guarantees are is regulated in Article 1131 of the Civil Code, which generally states that “all movable and immovable assets belonging to the debtor, both existing and future, serve as collateral for the debtor's individual agreements”. Based on this, a concept can be understood that all the debtor's assets can be used as collateral for the debt.

Furthermore, there are is also a special guarantees which consists of two types, namely personal guarantees and property guaranteesconsisting of two types: personal and property. In property

guarantees, the debtor gives collateral in a form ofin the form of tangible and intangible assets, movable or immovable assets, to the creditor, as collateral for the debt borrowed by the debtor. The property guarantees consist of the following type: (i) Pledge (pand), a right that the creditor obtains over a movable object, which is handed over to the creditor by the debtor, or by his attorney, as a guarantee for his debt. The pledge is which is regulated in Chapter 20 Book II of the Civil Code; (ii) Hypothec, which is regulated in Chapter 21 Book II of the Civil Code; (iii) Mortgage rights, which is a material right over immovable objects, to be taken from it for the settlement of an agreement, which is as regulated in under Law Number 4 of 1996; and (iv) Fiduciary guarantees, that is a transfer of ownership rights to an object provided that the object whose ownership rights are transferred remains in possession of the owner of the object. The main focus that distinguishes a fiduciary from a mortgage is that a fiduciary object is guaranteed to remain in the power of the creditor It is as regulated in Law Number 42 of 1999I (Setiono, 2018).

The problem that often occurs in manifesting guarantees or collateral in Indonesia is quite diverse. Broadly speaking, the main issue in implementing guarantee in Indonesia is the execution itself. For example, in a fiduciary guarantee, the object of guarantee must be registered at the Fiduciary Registration Office. In practice, many objects of guarantee still have not been registered. As stipulated under Law Number 42 of 1999 concerning Fiduciary Guarantee, a fiduciary recipient must register a Deed of Fiduciary Guarantee to obtain a certificate with an executorial title. This shows that implementing a guarantee in Indonesia in practice is still problematic. However, in this journal, the author focuses more on explaining a personal guarantee comprehensively.

In principle, if the debtor does not pay the debt when it is due, the creditor can demand the execution of the object that has been pledged by the debtor to pay off the debt ((Raden), 1989). In personal guarantees (borgtocht), there is a third party that provides guarantees to the lender (the creditor) and binds himself to fulfilfulfill the debtor's agreement where this individual is unable or failfails to fulfilfulfill the obligation to pay the debt. Personal guarantees are widely used in practice because with a guarantor, creditors feel that they have legal certainty about the repayment of their debts. Individual guaranteesPersonal guarantee (borgtocth) arise from collateral agreements between creditors and third parties (Wlliam, 2019). In other words, aA personal guarantee is basically an agreement between a debtor and a third party, which guarantees the fulfillment of the obligations of the debtordebtor's obligations. From this understanding, a guarantees from the contractual dimension between creditors and third parties are is guarantees given by third parties for their assets, either part or all of their assets (Hadisoeprapto, 1984).

Prof. Dr. Sri Soedewi Masjchoen Sofwan, S.H., in her book named Hukum Jaminan di Indonesia Pokok-Pokok Hukum Jaminan dan Jaminan Perorangan states that a personal guarantee is related to the existence of a third party (guarantor) who guarantees in order toto fulfilfulfill the debtor’s debt when the debtor default (Sofwan, 1980).

According to herBasically, creditors have the right to demand fulfilmentfulfillment of their receivables not only to the main debtor, but also to the guarantor. The personal guarantees can be applied if the creditor has a guarantor or if there is a third party who binds himself responsibly to the debtor. However, in practice, there are differences in understanding in terms of the responsibility of the guarantorguarantor's responsibility for paying off the debt to the creditor. Particularly in relation to debt collection in the process of settlement of debts in bankruptcy and Suspension of Debt Payment Obligations, (Penundaan Kewajiban Pembayaran Utang/PKPU), this becomes an urgent matter where the creditor must determine who can be demanded to fulfilfulfill the debt payment (Budi Purwaningsih, 2019).

A personal guarantee in practice is very important to give security from the debtor to the creditor. It is commonly used in lending and borrowing scheme because the guarantor has special rights as stated under Article 1831 of the Indonesia Civil Code, which will be further explained in this

journal. Personal guarantee agreements are widely used in practice, e.g, the director or the shareholder of a debtor acts as the personal guarantor. To illustrate how common a personal guarantee is in practice yet highly problematic, is the bankruptcy case between PT Humpuss Trading and PT Kasih Industri Indonesia based on Decision number 15/Pdt.Sus-PKPU/2021/PN.Niaga.Jkt.Pst. In brief, PT Humpuss Trading and PT Kasih Industri Indonesia signed a Coal Purchase Agreement, and to guarantee payment obligation; an individual has signed a Deed of Personal Guarantee to guarantee the payment obligation of PT Kasih Industri Industri Indonesia as a coal buyer.

Despite its problematic condition, there are several benefits to applying a personal guarantee in practice. Firstly, its simplicity makes any business actors prefer to use personal guarantee. Secondly, unlike fiduciary - a personal guarantee does not have to be registered in any kind of institutions and shall give a status to the creditor as a preferred creditor. Thirdly, its execution is deemed easy and can be exercised through many legal actions, such as civil lawsuits and bankruptcy or insolvency (Pangastuti, 2015).

Before explaining any further about the complexity of personal guarantee, In this journal, the author would address various theories that will be an analytical ground of this journal. This journal refers to various legal theories in Indonesia. The first theory shall be Guarantee Theory. The term guarantee comes from the Dutch language, namely "zekerheid" or "cautie" which in general mean as a way for creditors to be guaranteed as a fulfillment of their receivables, in addition to the debtor's general liability for its assets (Rizkia & Fardiansyah, 2022). According to J. Satrio, the guarantee law is considered as a legal regulation governing the guarantees of a creditor's receivables against a debtor (Satrio, 1996). Meanwhile, according to the type of guarantee, the guarantee is divided into two types. The first type is material guarantees, a guarantee in the form of absolute rights to an object, which has the characteristics to haveof having a direct relationship to a certain object, can be defended against anyone, always follows the object and can be assigned. The second type is immaterial guarantees, a guarantee that give a direct relationship with a certain person or individual, can only be maintained against certain debtors, and against the assets of the debtor in general (R. Muhammad, 2022).

From the description above, it can be stated the elements listed in the material guarantee, which are (i) an absolute right over an object; (ii) its characteristics have a direct relationship with certain objects; (iii) can be defended against anyone; and (iv) can be assigned to other parties.

Furthermore, there is aan immaterial guaranteesguarantee, which one of themone of which is personal guarantee. The personal guarantees is bear by the guarantor (borg), in which is defined as another person who can be demand and also borne by the guarantor (borg), defined as another person who can be demanded and responsible for the debt payment (joint responsibility). A personal guarantee (borgtocht) is a guarantee in the form of a statement of ability given by a third party to guarantee the fulfillment of the debtor's obligations to the creditor, if the debtor defaults. It is regulated under Articles 1820-111850 of the Civil Code.

The scope of the guarantee (borgtocht) may not exceed the main agreement whereas , an agreement guaranteed by a guarantor only covers as long as specified in the main agreement. Therefore, according to Article 1822 of the Civil Code, the obligations of the guarantor are no more than the obligationsthose imposed on the main debtor. Article 1832 of the Civil Code stipulates that guarantees can be held without being asked by the person who is boundbound person, even without their knowledge. In addition, guarantees can also be held not only for the debtor, but also for other guarantors. In order to hold a guarantee, it is not enough to be presumptiveIt is not enough to be presumptive to hold a guarantee, but according to Article 1824 of the Civil Code, it must be held expressly. The guarantee cannot be extended, but must be limited to the terms under which the guarantee was made. If an unlimited guarantee is provided, then in Article 1825 of the

Civil Code it is determined that the guarantee also covers all the consequences of the principal debt in question, thatwhich also concerns the costs of lawsuits against the debtor and costs incurred after the guarantor is warned. The characteristics of individual personal guarantees include: (i) Acessoir in nature, which is regulated in the provisions of Article 1821 of the Civil Code; (ii) It is firm in nature, which is regulated in article 1823 of the Civil Code; (iii) Can be transferred, if the guarantor dies then this is transferred to his heirs, this is regulated in article 1826 of the Civil Code, and (iv) Is general in nature which causes all collateral wealth to become credit collateral for the debtor, however, due to this general binding, then it does not give rights of preference for the collector of collateral objects to provide guarantees to creditors that cannot be more than what is the engagement of the debtor concerned (nemo plus principle) as stipulated under Article 1822 of the Civil Code (Arinova & Putu, 2022).

In practice, the security rights of the personal guarantee arise from collateral agreements between creditors and third parties. Personal guarantee agreements contain relative rights, which is a right that can only be preservepreserved by certain people involved in the agreement. In a personal guarantee agreement, a third-party act as a guarantor in fulfilling the debtor's obligations, meaning that the personal guarantee agreement is a promisepromises to fulfill the debtor's obligations, if the debtor breaks his/her promises.

In personal guarantees, there are no specific objects bound as the security, so it is deemed unclear what objects and which objects belong to third parties that can be used as collateral if the debtor breaks the promise (Yunianti & Budhisulistyawati, 2020). Therefore, the creditors which hold personal guarantee rights are only act as concurrent creditors. In the event of bankruptcy of the debtor or guarantor (third party), the provisions of personal guarantee under Articles 1131 and 1132 of Civil Code shall apply. The rights contained under personal guarantee do not give preference to which creditors so that all existing creditors will compete each other in fulfillingto fulfill debtor obligations. As the nature of the personal guarantee, its rights can only be preserved against an individual or third partiesan individual or third party who are bound by an agreement and do not bind everyone like a property guarantee which has an absolute right over an object. (Goode, 1975)

Moreover, The second theory that the author refers to isthe author refers to the second theory of Suspension of Obligations for Payment of Debt ("PKPU") PKPU and Bankruptcy Theory. Provisions regarding PKPU and Bankruptcy are regulated under Law Number 37 of 2004 concerning Bankruptcy and Suspension of Obligations for Payment of Debt (“Bankruptcy Law”). These provisions explain that the existence of PKPU and Bankruptcy as a method of paying debts for debtors to creditors is either paid in part or in whole to resolve bankruptcy disputes. As for PKPU and Bankruptcy, the submissions must meet the following requirements, which are (i) debtors who cannot, or at least predict that they will not be able to continue paying their debts which are due and payable; and (ii) There are 2 creditors who estimate2 creditors estimate that the debtor cannot continue paying his debts that are due and payable.

Like in Indonesia, the UK legal system also recognizes the concept of a personal guarantee. A personal guarantee in UK legal framework is known as a contract whereby a guarantor agrees to be liable for their own or the borrower's obligations or debt, in the best interest of the lender. This matter is regulated under the Consumer Credit Act 1974. In UK legal system, personal guarantee is categorized as unsecured debt for business since any specific collateral does not back it, but by personal assets that belong to the guarantor. A personal guarantee's liability depends on the underlying obligation entered into - this principle is called "co-extensiveness". The principle of co-extensiveness does not apply to indemnities. For this reason, lenders usually expect an indemnity and a personal guarantee to be signed together, as the indemnity affords more protection. If the primary underlying agreement (e.g. the loan agreement) is void or unenforceable, it will be easy to set the personal guarantee aside but more difficult to set the indemnity aside (Goode, 1975).

According to Kartini Mulyadi, PKPU is defined as an opportunity given to debtors to carry out debt restructuring, which includes paying all debts an opportunity given to debtors to carry out debt restructuring, which includes paying all or part of their debts to concurrent creditors (Mulyadi, 2001). Furthermore, Munir Fuady has his opinion thatbelieves PKPU is a period granted by law through a commercial court judge's decision, during which creditors and debtors are given the opportunityallowed to settle how to pay their debts in whole or in part, including restructuring the debt (Manurung et al., 2022). According to Sutan Remy Sjahdeini, PKPU is an attempt made by the debtor to avoid bankruptcy or an attempt to avoid the liquidation of assets when the debtor has been or will be in an insolvent state (Sutan Remy Sjahdeini, 2016).

In practice, the debtor's default can have a significant impact onsignificantly impact the guarantor. This is because in the case of a debtor breaking a promise, the Bankruptcy Law provideprovides an opportunity for cCreditors and dDebtors to make efforts to fulfill their rights through PKPU or bankruptcy, which has an impact on the guarantor who can also be the party being filed for bankruptcy together with the dDebtor. Provisions regarding guarantee are in fact also recognized within the scope of Bankruptcy and PKPU in Indonesia. In Article 141 of the Bankruptcy Law, it is statedArticle 141 of the Bankruptcy Law states that creditors whose receivables are guaranteed by an a guarantor can apply to match the receivables after deducting payments received from the guarantor. The meaning contained in these provisions is that creditors should not receive payments in excess ofabove what they are entitled to (unjust enrichment) (Fadila et al., 2022).

As a lex specialis, the Bankruptcy Law regulates more specifically regarding the guarantee. In Article 141 of the Bankruptcy, it is explained that creditors are required to submit payments to the guarantor first, then they. can submit matching receivables to the bankrupt debtor after deducting payments from the guarantor After deducting payments from the guarantor, they can submit matching receivables to the bankrupt debtor (DIANI, 2018). This means that there is a process that creditors need to go through in order toto obtain their rights, either through the guarantor or the bankrupt debtor, in a fair manner in accordance with the principles contained in the Bankruptcy Law. Within the scope of bankruptcy and PKPU, the guarantor who has relinquished privileges is sufficient to act as a party who is also responsible for the debtor's debts to creditors. In the event that the bankrupt debtor's assets are insufficient to settle his debts to creditors, then the guarantor for the debtor's debts can be qualified as a debtor who is obliged to pay off the main debtor's debts to creditors for debts that have matured and can be collected. The thing thatWhat can be of concern is if the guarantor from the Personal Guarantee experiences a PKPU phase and the Debtor is in a state of bankruptcy at the same timesimultaneously in different cases. The beginning of the guarantor's PKPU phase results in the loss of the guarantor's independence in carrying out management actions or ownership of all or part of his assets because all actions concerning assets must go through the approval of the management as explained in Article 240 paragraph (1) of the Bankruptcy Law (Hasbullah, 2005).

As explained above, personal guarantee often occurs in debt settlement through Bankruptcy and PKPU mechanisms. For example, in PT Humpuss Trading v. PT Kasih Industri Indonesia case, it is known that the debt settlement with the basis of a personal guarantee is settled through a commercial court of Central Jakarta District Court. The case stresses that PT Humpuss Trading could not prove with certainty its legal position as a creditor and PT Kasih Industri Indonesia as a debtor based on the personal guarantee. Based on this case example, it can be concluded that the existence of a personal guarantee may confuse the judges in order to determine the position of creditors and debtors.

This journal certainly refers to various existing literaturesliterature. However, as far as the author acknowledgeacknowledges that there has been no writing or study that discusses the comparison of two opinions on responsibility by personal guarantees. This, this writing purely highlights the

comparison of expert opinions, jurisprudence, and theories that apply in Indonesia, so that in the writer's opinion thisstudythis study contains novelty in its writing.

The purpose of this journal isThis journal aims to analyze and explain further about the responsibility of personal guarantees in debt settlement through PKPU or Bankruptcy approach. Secondly, this journal is also intended to capture that there's a dualism or two different pointpoints of view in regards toconcerning the status of personal guarantee in a debt settlement based and its relevance withon Indonesia Bankruptcy Law and legal framework. Therefore, based on the existence of two different views on the implementation of this personal guarantee, it becomes an interesting and important study to examine about how the actual responsibility of the personal guarantor and its relation to the debt settlement process through PKPU or bankruptcy.

II. RESEARCH METHODE

Research methods are an important part important because itthey will reflect the result of this study (Mamudji et al., 2005). Therefore, research methods must be described properly to get results that are in accordance withper what you want to achievethe study objective. In general, the main objective of this study is to emphasize and to address the fundamental problem of the responsibilities of the personal guarantee in debt obligations in terms of implementing the Indonesia Bankruptcy Law. Based on this objective, therefore, the author believes that the The proper type of research used by the authors in this journal is normative juridical research, which is a method that emphasizes the use of a method that emphasizes legal norms with a conceptual approach and a statutory approach.

The statutory approach is carried out by reviewing and reviewing all laws and regulations that are interrelated with the legal issues being studied. The statutory approach is used to study the consistency of laws with the constitution and other statutory regulations as well as and answeringto answer legal issues. In addition, the statute approach is the approach taken to examine statutory rules and various legal rules which are the focus of researchand various legal rules, which are the research focus. The A conceptual approach is an approach that departs from the views and doctrines that have developed in the science of law.

The author uses the statutory approach to achieve the research objectives by focusing on laws, norms, and regulations as a ground reference in conducting research. By using this approach, the author examines such laws, norms, and regulations that are related to legal issues. On the other hand, the author uses the conceptual approach to provide a point of view of problem-solving analysis - viewed from the aspect of rationale of its legal concept - such as principles, theories, values, concepts, and so forth.

The author infers that by using normative juridical research method, the author shall achieve the result of the study accurately, due to the fact that the legal issues in this study are conceived as fundamental and theoritical. With the approach taken by examining theories, concepts, legal principles, laws, and regulations, the author believes this method is proper for examining these legal issues.

To further clarify how the author uses this research method, several examples of bankruptcy cases in this journal refer to basic theories or principles of personal guarantees. This journal describes that in practice, bankruptcy cases often face a dilemma or dualism in determining the responsibilities of a personal guarantor for debt settlement obligations. Thus, this research method is appropriate to address the objective of this study.

The typology of this research, when viewed from the point of view of its nature, this research is classified as explanatory research which describes or explains more deeply a phenomenon that is to reinforce existing hypotheses (A. Muhammad, 2004).

In this journal, the author uses a literature study which is carried out by reading materials collected both carried out by reading materials collected from laws and regulations, related books and articles. This research includes analytical-descriptive research, which is a research that provides as accurate data as possible about the concept of duality view of personal guarantees' responsibility. This is due to the reason that analytical-descriptive research will accurately identify the issues and how to solve it.

III. RESULT AND DISCUSSION

1. Personal Guarantee (Borgtocht) in the Indonesian Legal Framework

As mentioned above, there are two kinds of guarantee in Indonesia; property guarantee and personal guarantee. In general, there is a difference between these two kinds of guarantee. A property guarantee rights, by its nature, will follow the objects encumbered by the guarantee. Anyone can also maintain them, can be transferred, and have a priority principle. Meanwhile, a personal guarantee has a characteristic that can only be maintained by certain debtors and adhere to the principle of equality. Furthermore, in property guarantee, only the debtor's assets can be used as collateral to repay the debt if the debtor default. In contrast, in personal guarantee, third parties undertake to fulfil the debtor's commitment if the debtor cannot fulfil its obligation. Compared to property guarantee, a personal guarantee is still commonly used in Indonesia business scheme because the creditor can claim the debtor and the third party who guarantees it. In practice, although personal guarantee is less used than property guarantee, the simplicity of personal guarantee is still relevant in Indonesia's business scheme (Slamet et al., 2022).

Personal guarantee is regulated in Article 1820 of the Civil Code, which states that "Guarantee is an agreement in which a third party, for the benefit of the creditor, binds himself to fulfill the debtor's agreement, if the debtor does not fulfill his agreement". According to J. Satrio in his book entitled Hukum Jaminan, Hak-Hak Jaminan Pribadi: Tentang Perjanjian Penanggungan dan Perikatan Tanggung Menanggung, there are several elements of Article 1820 of the Civil Code. The five elements of a personal guarantee shall be in a form of agreement, borg or the guarantor is a third party, guarantees are given by the guarantorthe guarantor gives guarantees for the interest of creditors, the guarantor binds himself to fulfill the debtor's agreement if the debtor defaults, and involved a conditional agreement (Angelin, 2022).

Furthermore, Article 1822 of the Civil Code also explains that "a guarantor cannot bind himself to an agreement or with conditions that are more severe than the agreement made by the debtor. Guarantees can be held only for part of the debt or by reducing any appropriate conditions. If the guarantee is held for an amount that exceeds the debt or with more stringent conditions, then the agreement is not completely cancelled, but valid, but only for what has been determined in the main agreement." The purpose of Article 1822 of the Civil Code is that the guarantor cannot bind himself to more, or with more onerous conditions, than the agreement between the debtor and the creditor.

Furthermore, Article 1825 of the Civil Code also regulates the scope of the responsibility that must be borne by the guarantor, which states that "unlimited coverage for a main agreement, covering all consequences of the debt, even the costs of lawsuits filed against the main debtor, and all expenses incurred after the debt guarantor was warned about it." Thus, based on the provisions of Article 1822 and Article 1825 of the Civil Code, the scope of coverage includes payment of all debt, payment of debts partially, does not exceed the main debt - if it exceeds the main debt, it only binds the main debt, or covers the consequences of debt and costs incurred (Prasetyawati & Hanoraga, 2015).

The personal guarantee must be strictly agreed, upon for the purpose to provideof providing guarantees in order to fulfilfulfill the debt in the main agreement. Therefore, the personal guarantee

agreement is an accessoir agreement. The legal consequencesconsequence of the personal guarantee agreement as an accessoir agreement is that the existence of a personal guarantee agreement depends on the main agreement. If the main agreement is annulled, invalid, and/or cancelledcanceled, the personal guarantee agreement then is also annulled, invalid, and/or cancelledcanceled. By assigning the receivables based on the main agreement, the receivable which is attached to the personal guarantee agreement will also be assigned.

The most crucial matter in the concept of a personal guarantee is that the personal guarantor is not obliged to pay to the creditor unless the debtor is negligent or defaults in paying his debt to the creditor. In this case, the debtor's assets must be confiscated and sold first to pay off the debt. Based on Article 1831 of the Civil Code, that the guarantor has the privilege to demand that the debtor's assets must first be confiscated and sold to pay off the debt, if the sale of the debtor's assets sold is not sufficient, then the guarantor shall be responsible to payfor paying off the remainremaining debts. This is a form of privilege from a personal guarantor. However, the personal guarantor cannot demand that the debtor's property be confiscated and sold first. There are certain conditions of this matter, which are if: (i) the guarantor has relinquished his privileges (Article 1837 of the Civil Code); (ii) the guarantor binds himself to be responsible with the debtor jointly (Article 1838 of the Civil Code); (iii) the debtor can submit a response that only concerns himself (Article 1847 of the Civil Code); (iv) the debtor is in a state of bankruptcy (Article 1844 of the Civil Code); and (v) in terms of coverage ordered by a judge (Article 1849 of the Civil Code).

A personal guarantor, as stated above, has special rights contained in article 1831 of the Civil Code, but usually, in the guarantee agreement contains a clause stating that the personal guarantee relinquishes its privileges which actually have legal consequences for the personal guarantee. It is often not realized that if the guarantor releases his privileges and the debtor is negligent in carrying out his obligations to pay off his debts to creditors or more and is due. In this case, according to Aarticle 1832 of the Civil Code, the guarantor can first be held responsible for the negligence the debtor without first asking the debtor for accountability. And the guarantor can use his privileges when summoned for the first time before the court. Currently, guarantee agreements are widely used in practice for reasons such as the guarantor having an economic interest in the business of the debtor, such as the guarantor as a director of the company or always the largest shareholder of the company, personally participating in guaranteeing the debts of the company (Novi, 2020).

As previously explained, the execution of a personal guarantee is still deemed difficult. Aside from its simplicity, it is still difficult because no specific regulations provide the execution of a personal guarantee. Unlike property guarantee, the personal guarantee only provides collateral from an individual to other parties (i.e, creditor); hence the execution is unclear on which assets can be settled for execution(Ii & Jaminan, 2008).

In other legal systems, such as the UK, a personal guarantee is generally executed in two forms: negotiable instruments or contracts. When a personal guarantee is contained within a negotiable instrument, precise definitions and guidelines govern how the guarantee is to be interpreted. There are 2 principal types of personal guarantees with respect to a negotiable instrument, which are 1) those containing “payment guaranteed” or equivalent words added to a signature which means that the signer promises that if the instrument is not paid when due the signer will pay according to its terms without resort by the holder to any other party and 2) those containing “collection guaranteed” or equivalent words added to a signature means that the signer promises that if the instrument is not paid when due the signer will pay it according to its terms, but only after the holder has reduced his claim against the maker or acceptor to judgment and execution has been returned unsatisfied, or after the maker or acceptor has become insolvent or it is otherwise apparent that it is useless to proceed against them. Accordingly, if a personal guarantee is contained within or is made in conjunction with a negotiable instrument the language “payment

guaranteed" should be contained in order to most quickly and efficiently bind the guarantor. Unlike the term "collection guaranteed" where "payment guaranteed" is appropriately placed in the terms, it allows for an immediate binder of the signor without first being required to obtain a judgment against the debtor and exhaust collection avenues before being allowed to collect against the guarantor.

2. Guarantor is Always Guarantor" vs. "Guarantor is a Debtor

As stated above, a personal guarantor has special rights attached individually, based on Article 1831 of the Civil Code. Under such article, the guarantor has the privilege of demanding that the debtor's assets must first be confiscated and sold to pay off the debt. In the event that the personal guarantor in the personal guarantee agreement has ruled out to maintainmaintaining his privileges, the creditor then must execute the personal guarantor's assets after the debtor's assets have been sold first. After it is deemed sufficient to pay the debtor's debt and the main agreement ends due to the debtor's debt isbeing paid off, the personal guarantee agreement is also endsalso ends. This condition is known as the principle of "Guarantor is Always Guarantor", in which the guarantor will remain as the guarantor for the payment of the debtor's debt if he does not pay or is unable tothe guarantor for the debtor's debt if he does not pay or cannot pay the debt to the creditor. The purpose of this principle is that the legal standing of the debtor cannot be assigned to the guarantor other than the demands for payment of the debtor's debt. The consequence of this principle is that the guarantor cannot be demanded to pay the debtor's debt by the creditor, or specifically. Specifically, in this context, a bankruptcy application or PKPU cannot be submitted for the debtor's debt.

This principle was supported by the Decision of the Supreme Court of the Republic of Indonesia Number 992 K/Pdt/1995 dated October 31, 1997, where in their consideration the Panel of Judges applied the principle of "Guarantor is Always Guarantor", and decided that the guarantor can only be demanded the repayment of the debt with the debtor. In addition, Dr. Syamsudin M. Sinaga S.H., M.H in his book entitled Hukum Kepailitan Indonesia has similarly stated that the guarantor "only exist" and to be demanded his juridical responsibility if the debtor's assets are insufficient to pay his debts (Sinaga, 2012). This is also in accordance with the jurisprudence of the Supreme Court Number 1600 K/Pdt/1995 concerning the legal concept of guarantor.

The decision of Supreme Court Number 922 K/PDT/1995 dated 31 October 31 1997 also stated with the rule of law that: "according to the guarantor always guarantor principle, the civil status of the principal cannot be transferred to the guarantor in paying debts because forever the guarantor is the guarantor for the debt of the principal who is unable to pay then the guarantor cannot be asked for bankruptcy, all he can sue for is repayment of the principal's debt."

In connection with bankruptcy and PKPU, if the debt is due and the debtor cannot pay his debts, then the debtor can be filed for bankruptcy. After the debtor has been declared bankrupt, all of his assets are sold by the receiverthe receiver sells all his assets to pay off his debts. If the proceeds from the sale are not sufficientinsufficient to pay off the debts, then the receiver can sell the assets of the guarantor to complete the payment of the debts. Thus, the guarantor is obliged tomust fulfill its obligations if the debtor has run out of assets to pay off his debts. This was also confirmed in the Decision of the Supreme Court of the Republic of Indonesia Number 26/K/N/2005 dated 16 December 2005, which in its considerations, explained that "in the Loan Agreement, the main debtor is PT Bangun Mustika Intipersada, so the main debtor should be PT Bangun Mustika Intipersada was filed as the Respondent for Bankruptcy, but on the other hand, the Appellant for Cassation who served as a guarantor petitioned became the Respondent for Bankruptcy so that he has violated the principle of the Borgtocht/Guarantee Agreement (Article 1822 of the Civil Code) and has violated the function of the guarantee agreement that is ascesoir as stipulated in Article 1831 of the Civil Code, therefore; therefore the guarantor is not required to pay the creditor."

This principle is strengthened by the opinion of Yahya Harahap in his paper entitled Masalah Pailit Dikaitkan dengan Guarantor, (Haryuningsih, 2016), which explains that a borgtocth or guarantor according to Article 1820 of the Civil Code is not a debtor, but only someone who binds himself if the debtor himself cannot fulfill to pay the debts. In such legal standing, both technically and substantively, the guarantor does not mean turning into a debtor. Its position legally has been purely institutionalized in the form of borgtocht. Therefore, there is no legal basis for claiming and placing a guarantor in a state of bankruptcy. In principle, the nature of borgtocht only setsets out the guarantor to bear the payment to be carried out by the debtor, thus; thus the one that is responsible for paying the actual debt remains with the debtor. That being said, when the debtor is in a state of incapacityincapacitated, the guarantor must take placesplace. Even more, if the guarantor is incapable tocannot guarantee the debtor's debt, then his position as guarantor must be terminated by replacing him with a new guarantor.

On the other hand, there is a view that is contrary to the principles and legal opinions on the principle of "Guarantor is Always Guarantor". In the event thatIf the personal guarantor does not retain his privileges, the personal guarantor at once has to bear the obligation of all debts of the debtor at the timewhen the debtor defaults based on the main agreement. Article 1832 of the Civil Code stipulates that in the event that the guarantor in the guarantor agreement has relinquished his privileges or has committed himself to bear jointly and severally the debtor's default, then the guarantor cannot demand that the debtor's property takes precedence in paying off the debt. The guarantor is also considered to have participated in default when the debtor defaults. Article 1832 of the Civil Code is the legal basis for the "Guarantor is a Debtor" theory.

Whereas in the principle of "Guarantor is a Debtor", the responsibility of the debtor and guarantor to pay debts that are due and collectible is in line with the legal doctrine of Sutan Remy Sjahdenini, S.H., in his book entitled Sejarah, Asas, dan Teori Hukum Kepailitan, that "Guarantor is also a debtor who is obliged to pay off the debtor's debt to one or more creditors if it does not pay debts that are due and/or collectible. Because the guarantor is a debtor, the guarantor can be declared bankrupt under the Bankruptcy Law and PKPU".

Then, Sutan Remy Sjahdenini, S.H also explained that "if a person or a legal entity submits himself to become a guarantor for another person's (debtor) debt, then if the debtor does not pay off his debt when the debt is due to be paid or can be collected by the creditor, the guarantor is obligated to repay the guaranteed debt."

Sutan Remy Sjahdenini's opinion was also in line with Soebekti's opinion quoted by Dr. H. Salim HS., S.H., M.S in his book entitled Perkembangan Hukum Jaminan di Indonesia, that "an agreement between a creditor and a third person, which guarantees the fulfillment of the obligations of the debtor, it can even be made outside (without) the debtor. Soebekti examines personal guarantees from the contractual dimension between creditors and third parties. Furthermore, that the purpose of this guarantee is to fulfill the obligations of the debtor, which is guaranteed to fulfill all the assets of the guarantor can be confiscated and auctioned according to the provisions of the execution of court decisions".(Salim, 2016)

These legal opinions are also in line with the Decision of the Supreme Court of the Republic of Indonesia Number 39/K/N/1999 dated November 2, 1999 which essentially provides a decision based on the consideration that when a personal guarantor has relinquished his privileges, the creditor can directly sue claim the personal guarantor for debt repayment obligations. Thus, based on this decision, it is important to be note that the requirement of "waiver of privileges" itself for the guarantee provided by the guarantor to the creditor. Strengthening the above principles, the Makassar Commercial Court Decision Number 02/Pdt.Sus.Pailit/2019/PN.Niaga.Mks dated May 31 2017 stated that if the personal guarantor has relinquished his privileges as a guarantor, the

creditor can directly ask for accountability from the guarantor, and the guarantor must be responsible for all debts of the debtor.

Even more, in the Decision of the Makassar Commercial Court Number 02/Pdt.Sus.Pailit/2014/PN.Niaga.Mks dated 13 November 2014 essentially stated that the personal guarantor is jointly and severally responsible with the debtor obligated to pay the debtor's debts/creditor's receivables. Below are the quoted considerations:

"Whereas from the acknowledgment of the BANKRUPT APPELLEE I and reinforced by evidence P-11, it turns out that the debts of the BANKRUPT APPELLEE I to Vendome Investment Holding Ltd. has fallen due, can be billed but not/has not been paid in full by the BANKRUPT APPELEE I, therefore pursuant to Article 1820 in conjunction with Article 1832 of the Civil Code, the BANKRUPT APPELLEE II respectively and the BANKRUPTCY APPELLEE III are jointly and severally obligated to pay the debts/receivables of Vendome Investment Holding Ltd. to the BANKRUPT APPELLEE I, or in other words, respectively the BANKRUPT APPELLEE II and BANKRUPT APPELLEE III are debtors who are jointly and severally responsible for the debts of BANKRUPT APPELLEE I to Vendome Investment Holding Ltd."

In line with the matters mentioned above, Jerry Hoff, in his book Indonesian Bankruptcy Law, states that “there can be no doubt that under the Bankruptcy Law, it is possible to petition for the bankruptcy of a guarantor (either a corporate or an individual). The reason is that a guarantor is a debtor. The guarantor is the debtor of the obligation to guarantee the payment by a debtor. See for example, case Number 12/Pailit/1998/PN.Niaga/Jkt.Pst. It is furthermore possible to file for the bankruptcy of a debtor and a guarantor at the same time. The creditor may file petition and file for the full 100% of this claim both in the bankruptcy of the debtor and the guarantor." (Hoff & Churchill, 1999).

IV. CONCLUSION

Based on the description above, it can be understood that there is dualism in the responsibility of the personal guarantor in carrying out debt collection in the bankruptcy process and PKPU. On the one hand, there is an understanding that the guarantor is forever in the position of being the guarantor and can never be onin an equal legal standing with the debtor. On the other hand, the responsibility of the personal guarantor is equated with the responsibility of the debtordebtor's responsibility (joint responsibility). It should be noted that there is a lack of provisions to address these kinds of circumstancesabout to comprehend this kind of circumstances, and also development and implementation of guarantee law, in fact still leave paces for differences. However, according to the humble opinion fromof the author, as long as a debtor's debt is due and collectible, and the debtor is negligent in making payments on the debt, then the position of the debtor is very reasonable and logical if equated with the guarantor. Despite the fact thatAlthough there is a dualism of thisthese circumstances, the author believe argues that it is urgently needednecessary for unification of the concept of personal guarantee in order to provide legal certainty, especially in relation toto unify the concept of personal guarantee to provide legal certainty, especially concerning the implementation of debt collection in the bankruptcy process and at PKPU . The inconsistency between one personal guarantee concept and another can cause difficulties implementing the law and legal certainty. Harmonization or unification of the concept of personal guarantee shall be the solution to adjust legal principles to bring legal certainty and justice and overcome conflicting matters.

References

(Raden), S. (1989). Jaminan-jaminan untuk pemberian kredit menurut hukum Indonesia. Citra Aditya Bakti.

Angelin, M. S. R. (2022). Hilangnya Esensi “Persetujuan” dalam Jaminan Perorangan pada Praktik Pinjaman Online. Jurnal Ilmu Hukum, 18.

Arinova, P., & Putu, A. (2022). Jaminan perorangan (borgtocht) dalam perjanjian hutang piutang jika debitur wanprestasi. E Journal Ilmu Hukum Kertha Desa, 10(7), 493–503. https://ojs.unud.ac.id/index.php/kerthadesa/article/view/82021/45041

budi Purwaningsih, S. (2019). Hukum Jaminan dan Agunan Kredit Dalam Praktek Perbankan di Indonesia. Umsida Press, 1–129.

DIANI, A. Y. (2018). KEDUDUKAN PENJAMIN PERORANGAN SEBAGAI TERMOHON DALAM PENUNDAAN KEWAJIBAN PEMBAYARAN UTANG (PKPU).

Fadila, S., Gultom, E., & Rahmawati, E. (2022). Tanggung Jawab Penanggung Kepada Kreditor Pemegang Jaminan Penanggungan Pasca Putusan PKPU. Jurnal Sains Sosio Humaniora, 6(1), 346–356.

Goode, R. M. (1975). The consumer credit act 1974. The Cambridge Law Journal, 34(1), 79–130.

Hadisoeprapto, H. (1984). Pokok-pokok hukum perikatan dan hukum jaminan / oleh Hartono Hadisoeprapto. Liberty.

HARYUNINGSIH, A. (2016). PERMOHONAN PAILIT TERHADAP PERSONAL GUARANTOR KARENA DEBITOR WANPRESTASI (Kajian Yuridis terhadap Putusan Nomor 13/Pailit/2010/PN. NIAGA. JKT. PST, Putusan Nomor 51/Pailit/2004/PN. NIAGA. JKT. PST dan Putusan Nomor 29/Pailit/1999/PN. NIAGA. JKT. PST). Universitas Airlangga.

Hasbullah, F. H. (2005). Hukum Kebendaan Perdata Jilid II: Hak-Hak yang Memberi Jaminan. Jakarta: Ind-Hill Co.

Hoff, J., & Churchill, G. J. (1999). Indonesian Bankruptcy Law. Tatanusa.

Ii, B. A. B., & Jaminan, A. (2008). Titik Triwulandari Tutik, Hukum Perdata Dalam Sistem Hukum Nasional, (Jakarta : Kencana, 2008), h.175 26. 26–57.

Mamudji, S., Rahardjo, H., Supriyanto, A., Erni, D., & Simatupang, D. P. (2005). Metode Penelitian dan Penulisan Hukum. Jakarta: Badan Penerbit Fakultas Hukum Universitas Indonesia.

Manurung, B. F. L., Syarief, E., & Shahrullah, R. S. (2022). Legal Consequences of Bankruptcy and Postponement of Debt Payment Obligations: Are They Similar? Journal of Law and Policy Transformation, 7(1), 85–96.

Muhammad, A. (2004). Hukum dan penelitian hukum. Bandung: Citra Aditya Bakti.

Muhammad, R. (2022). PELAKSANAAN JAMINAN PERORANGAN (PERSONAL GUARANTEE) DALAM PERJANJIAN KREDIT DI BANK NAGARI CABANG UTAMA PADANG. Universitas Andalas.

Mulyadi, K. (2001). Kepailitan dan Penyelesaian Utang Piutang. Bandung: Alumni.

NOVI, S. R. (2020). EKSEKUSI JAMINAN PERORANGAN (PERSONAL GUARANTEE) TERHADAP DEBITUR YANG WANPRESTASI (STUDI PUTUSAN NO: 99/PDT. G/2010/PN-LP). Universitas Mataram.

Pangastuti, L. (2015). Pertanggung Jawaban Pihak Personal Guarantee yang Dinyatakan Pailit. Sebelas Maret University.

Prasetyawati, N., & Hanoraga, T. (2015). Jaminan Kebendaan Dan Jaminan Perorangan Sebagai Upaya Perlindungan Hukum Bagi Pemilik Piutang. Jurnal Sosial Humaniora (JSH), 8(1), 120–134.

Rizkia, N. D., & Fardiansyah, H. (2022). PERKEMBANGAN HUKUM JAMINAN DI INDONESIA.

Salim, H. S. (2016). Perkembangan hukum jaminan di Indonesia. Ar-Ruzz Media,.

Satrio, J. (1996). Hukum jaminan, hak-hak jaminan pribadi penanggungan (borgtocht), dan perikatan tanggung-menanggung. Penerbit PT. Citra Aditya Bakti.

Setiono, G. C. (2018). Jaminan kebendaan dalam proses perjanjian kredit perbankan (tinjauan yuridis terhadap jaminan benda bergerak tidak berwujud). Transparansi Hukum, 1(1).

Sinaga, S. M. (2012). Hukum Kepailitan Indonesia. PT. Tatanusa.

Slamet, S. R., Muliawan, A., Kandou, H., Mayjen, J., No, S., & Timur-, K. J. (2022). Pembaharuan hukum jaminan indonesia. 9.

Sofwan, S. S. M. (1980). Hukum Jaminan di Indonesia, Pokok-Pokok Hukum Jaminan dan Jaminan Perorangan. Liberty.

Sutan Remy Sjahdeini, S. H. (2016). Sejarah, Asas, dan Teori Hukum Kepailitan (Memahami undang-undang No. 37 Tahun 2004 tentang Kepailitan dan Penundaan Kewajiban Pembayaran). Kencana.

Wati, E. R. (2019). Eksekusi Jaminan Perorangan (Borgtocht) dalam Penyelesaian Kredit Macet Melalui Kepailitan (Analisis Putusan Mahkamah Agung RI Nomor 2960 K/Pdt/2010). Jurnal Minuta, 1(1), 14–19.

Wlliam, G. V. (2019). Akta Borgtocht dalam Perjanjian Kredit. Jurnal Media Hukum Dan Peradilan, 5(1), 50–61.

Yunianti, N. I., & Budhisulistyawati, A. (2020). 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), 111–116.