

The Implementation of the Going Concern Principle in Bankruptcy and The Suspension of Payment to Protect the Economic Rights of the Parties

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Abstract

This study aims to analyze the regulation on the going concern principle and indicators to determine the continuity of prospective business activity. It employed normative juridical method that was based on library research. It obtained secondary data sourced from primary, secondary, and tertiary legal materials. The study was analytical descriptive because the author described the going concern principle by referring to the Law Number 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations (the Bankruptcy Law). subsequently, the study analyzed it to find relevant indicators to determine whether a prospective business activity can continue or not. The data were analyzed using a qualitative juridical method. The results indicate that the sustainability of the debtor's business is crucial for the fulfillment of the economic rights of the debtor and creditor, even though the law does not provide indicators to determine that the prospective debtor's business will continue. For this reason, decisions regarding the business continuity of debtors are influenced by various internal and external factors and must be made by competent parties.

Keywords: bankruptcy, going concern, suspension of payment.

A. Introduction

The Coronavirus 19 (Covid-19) was confirmed to have spread to Indonesia on March 2020. Since then, the pandemic has led to fundamental changes to the live of the people, including their economic activities.¹ Prior to the pandemic, Indonesia's economy ran steadily. Economic growth was predicted to increase based on the improving distribution, production, transaction, and operational processes. Following the pandemic, the Indonesian government started to implement numerous Covid19-related policies, such as forms of social restrictions. Indonesia has enforced some forms of social restriction, from Large-Scale Social Restrictions or LSSR (*PSBB—Pembatasan Sosial Berskala Besar*), Community

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¹ Satuan Tugas Penanganan Covid-19, "Data Sebaran", accessed July 18, 2022, <https://covid19.go.id/>. As of 18 July 2022, there were ±557,9 million confirmed cases worldwide, resulting in ±6.3 million deaths and more than 6,1 million confirmed cases in Indonesia with the death toll of 156.849 people. The provinces that have the highest number of spread of the corona virus are Jakarta (1.291.985 cases), West Java (1.120.567cases), Central Java (629.048 cases) and East Java (580.723 cases).

Activities Restrictions Enforcement or CARE (PPKM—*Pemberlakuan Pembatasan Kegiatan Masyarakat*), Micro-Based CARE, and emergency CARE. The enforcements pushed various economic sectors to adapt new situation. LSRR and CARE are intended to control social and economic activities, enabling the the spread of Covid-19 to be controlled. Micro-businesses such as food street vendors or barbershops were allowed to operate up to 9 p.m. local time, if they apply strict health protocols. The details are regulated by respective regency/municipality.²

For some business sectors, the implementation of the social restrictions will reduce company's ability to generate profits because the company's turnover has decreased significantly.³ For instance, according to Eka Sumantri, the Chair of the Greater Bogor Broiler Chicken Merchant Association, the Covid-19 pandemic has led to instability in chicken market prices and a decrease of demand for chicken meat in the Bogor Regency's chicken farming business. Traders has been forced to sell their chicken at a loss.⁴

The Covid-19 outbreak also had a detrimental effect on the real estate industry. According to Hari Ganie, Deputy Chairperson of the Indonesian Real Estate Central Executive Board, the Covid-19 Pandemic led to a decline in property sector sales, up to 50-60% for the housing sub-sector. It reached 95% for the hotel and retail sub-sector.⁵

The decrease of profits, to the point of loss, also affects the company's ability to pay debts. A company may have loan to finance company operations, such as pay employee wages or rent a place of business.

A company's inability to pay various obligations to other parties poses serious legal consequences. A company may face lawsuits due to default and unlawful acts. Such conditions will further make conditions worse. On the one hand, the company is facing the Covid-19 Pandemic, which causes the company to no longer be able to operate optimally. On the other hand, the company must face legal problems due to its inability to fulfil its obligations to other parties. To deal with such legal problem, the company may try to find the most appropriate alternatives.

Large companies are also facing similar conditions. For example, Indonesia Stock Exchange data⁶ shows that of the total 787 issuers listed on the Indonesia

² Kementerian Koordinator Bidang Perekonomian Republik Indonesia, "Press Release of the Coordinating Ministry for Economic Affairs of the Republic of Indonesia, Number HM.4.6/187/SET.M.EKON.3/07/2021", accessed July 11, 2022, <https://ekon.go.id/>.

³ Badan Pusat Statistik, "Analysis of the Impact of the Covid-19 Survey on Business Actors Volume 2", accessed July 11, 2022, <https://www.bps.go.id/publication/2020/12/21/7ec02d39d6732972dcebe54f/analisis-hasil-survei-dampak-covid-19-terhadap-pelaku-usaha-jilid-2.html>.

⁴ Media Indonesia, "Pandemi Covid-19, Pelaku Usaha Daging Ayam Alami Kerugian", accessed March 14, 2022, <https://mediaindonesia.com/nusantara/443558/pandemi-covid-19-pelaku-usaha-daging-ayam-alami-kerugian>.

⁵ Ali Akhmad Noor Hidayat, "Dampak Pandemi ke Properti, REI: Bisa Dibilang Kita Hadapi Masa Paling Kelam", accessed March 14, 2022, <https://bisnis.tempo.co/read/1421858/dampak-pandemi-ke-properti-rei-bisa-dibilang-kita-hadapi-masa-paling-kelam>.

⁶ Bursa Efek Indonesia, "Notasi Khusus", accessed July 8, 2022, <https://www.idx.co.id/perusahaan-tercatat/notasi-khusus>.

Stock Exchange as of July 2022, 40 listed companies ($\pm 5\%$) are currently in financial distress. It is indicated by a negative equity balance in their financial statements. In addition, four listed companies are facing a suspension of payment (PKPU–*Penundaan Kewajiban Pembayaran Utang*) and three others are facing a petition for a declaration of bankruptcy. The list of public companies experiencing financial difficulties is depicted in Figure 1.

Figure 1. A List of Public Companies Experiencing Financial Difficulties

NEGATIVE EQUITY BALANCE				SUSPENSION OF PAYMENT
1. Cowell Development Tbk (COWL)	12. PT Borneo Olah Sarana Sukses Tbk. (BOSS)	Facility Aero Asia Tbk. (GMFI)	Tbk (HDTX)	1. PT Dua Putra Utama Makmur Tbk (DPUM)
2. Intraco Penta Tbk (INTA)	13. PT Capitalinc Investment Tbk (MTFN)	22. PT Globe Kita Terang Tbk (GLOB)	32. PT Ratu Prabu Energi Tbk (ARTI)	2. PT Garuda Indonesia (Persero) Tbk (GIAA)*
3. PT AirAsia Indonesia Tbk (CMPP)	14. PT Capitol Nusantara Indonesia Tbk. (CANI)	23. PT ICTSI Jasa Prima Tbk (KARW)	33. PT Siwani Makmur Tbk (SIMA)	3. PT Waskita Beton Precast Tbk (WSBP)*
4. PT Ancora Indonesia Resources Tbk (OKAS)	15. PT Century Textile Industry Tbk (CNTX)	24. PT Intan Baru Prana Tbk (IBFN)	34. PT SLJ Global Tbk (SULI)	
5. PT Argo Pantas Tbk (ARGO)	16. PT Dewata Freight International Tbk. (DEAL)	25. PT Jakarta Kyoei Steel Works Tbk (JKSW)	35. PT Sri Rejeki Isman Tbk (SRIL)	
6. PT Asia Pacific Fibers Tbk (POLY)	17. PT Estika Tata Tiara Tbk. (BEEF)	26. PT Leyand International Tbk (LAPD)	36. PT Steady Safe Tbk (SAFE)	DECLARATION OF BANKRUPTCY
7. PT Asia Pacific Investama Tbk. (MYTX)	18. PT Eterindo Wahanatama Tbk (ETWA)	27. PT Magna Investama Mandiri Tbk (MGNA)	37. PT Tiphone Mobile Indonesia Tbk. (TELE)	1. PT Golden Plantation Tbk (GOLL)
8. PT Bakrie Sumatera Plantations Tbk (UNSP)	19. PT Exploitasi Energi Indonesia Tbk (CNKO)	28. PT MNC Energy Investments Tbk (IATA)	38. PT Tirta Mahakam Resources Tbk (TIRT)	2. PT Grand Kartech Tbk (KRAH)
9. PT Bakrie Telecom Tbk (BTCL)	20. PT Garuda Indonesia (Persero) Tbk (GIAA)*	29. PT Modern Internasional Tbk (MDRN)	39. PT Trikomsel Oke Tbk (TRIO)	3. PT Hanson International Tbk (MYRX)
10. PT Binakarya Jaya Abadi Tbk. (BIKA)	21. PT Garuda Maintenance	30. PT Onix Capital Tbk (OCAP)	40. PT Waskita Beton Precast Tbk (WSBP)*	4. PT Pan Brothers Tbk (PBRX)
11. PT Bliss Properti Indonesia Tbk. (POSA)		31. PT Panasia Indo Resources		

Financial distress can lead to bankruptcy if it is not addressed immediately. Companies in financial distress typically have a few issues, such as delays in debt payments, in wage payment, and layoffs.⁷

In addition to using a default lawsuit or unlawful act, company can take another way to overcome debt problems.⁸ It can file a petition for a declaration of bankruptcy based on the Law Number 37 of 2004 on the Bankruptcy and Suspension of Debt Payment Obligations (the Bankruptcy Law). Both creditors and debtors can submit the application for a declaration of bankruptcy based on Article 2 paragraph (1) of the Bankruptcy Law. The requirements are (1) consisting of two or more creditors; and (2) at least one debt that is past due and can be collected.

According to Sastrawidjaja, in Faisal,⁹ bankruptcy is an alternative in resolving disputes regarding debt and receivables besides other methods, such as settlement

⁷ Kamaludin, Karona Cahya Susena, and Berto Usman, *Restrukturisasi, Merger & Akuisisi* (Bandung: Penerbit Mandar Maju, 2015), 4.

⁸ Debt in bankruptcy does not always arise from the legal relationship of borrowing but in a broader sense. Therefore, in some cases of bankruptcy, the application for filing for bankruptcy can originate from the non-payment of wages (commissions) or the unfinished construction of a residential unit.

⁹ Pupung Faisal, "Kajian Hukum Acara Perdata Terhadap Pelaksanaan Renvooi Procedure Dalam Proses Kepailitan," *ADHAPER: Jurnal Hukum Acara Perdata* 2, no. 1 (2016): 136.

outside or through the courts, delaying payments, or settlement. In line with that, Singadimeja (et.al.) also gave a similar opinion that bankruptcy is recognized as a way to resolve debt, to obtain payments or repayments of debtors' obligations to creditors through the public confiscation of the debtors' wealth.¹⁰

The requirements for filing a declaration of bankruptcy, as referred to in Article 2 paragraph (1) of the Bankruptcy Law, do not include the element of "the debtor's inability to pay the debts".¹¹ In fact, the element is very important for the acceptance requirements. In some literature, the notion of bankruptcy always contains the element. For instance, Investopedia defines bankruptcy as a legal process involving people or businesses that are unable to pay their outstanding debts.¹² Another definition from the Economic Times reads "*When an organization is unable to honor its financial obligations or make payment to its creditors, it files for bankruptcy*".¹³

The concern is that the "inability of the debtor to pay the debt" is not included as a criterion of bankruptcy. Thus, a bankruptcy statement can be imposed on debtors who still can pay debts. Just because the debtor does not pay the debt that is due and can be collected, the debtor can be declared bankrupt even though the debtor's assets are greater than the obligations.¹⁴ Therefore, an insolvency test before a debtor is declared bankrupt is important. In the insolvency test, the bankruptcy respondent's financial capacity is assessed before the court decides whether the respondent is bankrupt or not. The court can assess the financial condition of bankruptcy by seeing the company's financial statements and books.

Bankruptcy and suspension of payment institution is intended to settle debts fairly, quickly, openly, and effectively. In practice, there are parties who use the bankruptcy and suspension of payment institution defiantly and do not follow the original purpose. For instance, some debtors use mechanisms of bankruptcy and suspension of payment to buy time in fulfilling their obligations to creditors. Likewise, some creditors use bankruptcy and suspension of payment as tools to damage debtor's image before the public. The trick is to take advantage of legal loopholes in the Bankruptcy Law that lead to moral hazards. Ironically, whatever the reason behind the action of the debtor or creditor applying for bankruptcy and

¹⁰ Singadimeja, Holyness, Rai Mantili, and Ema Rahmawati, "The Implementation of Legal Certainty Principles in the Reporting Process of Debtor Bankruptcy Settlement by Curator to Supervisory Judge in Bankruptcy Practice," *Padjadjaran Jurnal Ilmu Hukum (Journal of Law)* 5, no. 3 (2018): 512.

¹¹ Elucidation of Article 57 Paragraph (1) of the Bankruptcy Law and PKPU, the condition of being unable to pay is called "bankruptcy".

¹² Investopedia, "Bankruptcy Explained: Types and How it Works", accessed March 21, 2022, <https://www.investopedia.com/terms/b/bankruptcy.asp>.

¹³ The Economic Times, "What is Bankruptcy", accessed March 21, 2022, <https://economictimes.indiatimes.com/definition/bankruptcy>.

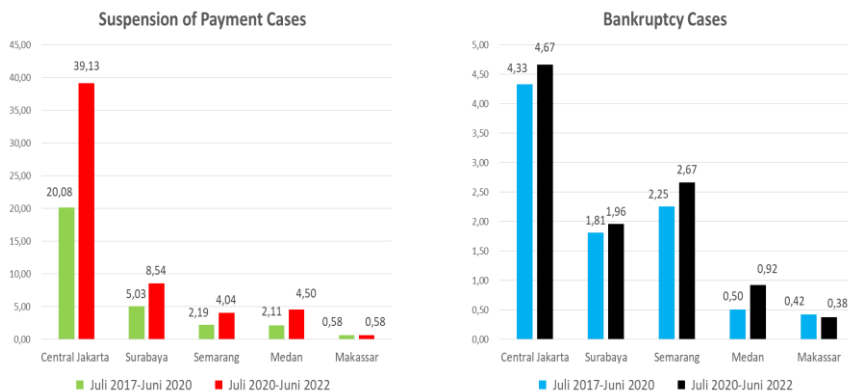
¹⁴ The condition has occurred in the bankruptcy petition case against (1) PT Asuransi Jiwa Manulife Indonesia with Case No. 10/PAILIT2000/PN.NIAGA.JKT PST which was filed for bankruptcy by its own shareholders PT Dharmala Sakti Sejahtera; and (2) PT Prudential Life Insurance with Case No. 13/PAILIT/2004/PN.NIAGA JKT PST filed for bankruptcy by its agent or partner.

suspension of payment, if the conditions and procedures are met, there is no reason for the court to refuse.

The effectiveness of bankruptcy and suspension of payment institutions as alternatives to debt settlement are irrefutable. After the Covid-19 outbreak, applications for bankruptcy and suspension of payment have been increased significantly.¹⁵

Based on the data on the Case Tracking Information System of Commercial Courts in five cities,¹⁶ the number of bankruptcy and suspension of payment cases during the Covid-19 pandemic (July 2020 to June 2022; 24 months) is significant, compared to the period before the pandemic (July 2017 to June 2020; 36 months). Suspension of payment cases are increased 89,31%, from the previous average 30 cases to 56,79 cases per month. In the meantime, bankruptcy cases are increased 13,73% from the previous average 9,31 cases to 10,58 cases per month.

Figure 2. Suspension of Payment and Bankruptcy Case Statistics Before and During the Pandemic



This study is of the opinion that the increases, apart from being caused by the condition of the national economy as a result of the Covid-19 pandemic, are caused

¹⁵ Fitri Novia Heriani, "Perkara Kepailitan dan PKPU Meningkat 50 Persen Selama Pandemi", accessed March 17, 2022, <https://www.hukumonline.com/berita/a/perkara-kepailitan-dan-pkpu-meningkat-50-persen-selama-pandemi-lt5f4ce322c779b/>.

¹⁶ Pengadilan Negeri Jakarta Pusat, "Laporan Statistik Perkara", accessed July 8, 2022, http://sipp.pn-jakartapusat.go.id/statistik_perkara; Pengadilan Negeri Makassar, "Laporan Statistik Perkara", accessed July 8, 2022, http://sipp.pn-makassar.go.id/statistik_perkara; Pengadilan Negeri Medan, "Laporan Statistik Perkara", accessed July 8, 2022, https://sipp.pn-medankota.go.id/statistik_perkara; Pengadilan Negeri Semarang, "Laporan Statistik Perkara", accessed July 8, 2022, https://sipp.pn-semarangkota.go.id/statistik_perkara; Pengadilan Negeri Surabaya, "Laporan Statistik Perkara", accessed July 8, 2022, http://sipp.pn-surabayakota.go.id/statistik_perkara.

by the process of applications for bankruptcy and suspension of payment.¹⁷ Thus, the trial process takes a relatively short period compared to the normal lawsuit process.¹⁸

Another debtor's reason is that there is still the possibility for the debtor's business to continue (going concern) based on certain considerations. The possibility of the debtor's business to continue during the debt settlement process can be determined based on the principle of the Bankruptcy Law: the going concern principle.¹⁹ The principle provides guarantees to debtors, especially who have good intentions to continue to control and run their business so that in the future, they can generate profits to pay their debts to creditors without having to lose their business. based on the creditor's perspective, the implementation of the going concern principle must be classified as an opportunity to obtain maximum debt payments from the debtor's assets compared to the continuing business. Considering the importance of the going concern principle in the process of settlement, understanding the Bankruptcy Law and the going concern principle is essential. In addition, indicators to determine whether a prospective business activity can still go on are also important.

B. The Bankruptcy Law's Inclusion of the Going Concern Principle

In the formation of legislation, legal principles are central because they are the foundation and the rationale behind the regulation. Rahardjo, in Erwin and Busroh,²⁰ states that the principle of law is the broadest basis for the birth or *ratio legis* of the rule of law. The legal principle will not run out of power by generating a legal regulation. It will remain exist and generate further legal regulations. Therefore, the content material in a statutory regulation should be a reflection (concretization) of the principles.

Sometimes a principle is regulated implicitly in a statutory regulation. For instance, Article 1 paragraph (1) of the Commercial Code (KUHD–*Kitab Undang-undang Hukum Dagang*) states that the Civil Code also applies to matters regulated in the Civil Code. Only in this law book it is not specifically regulated to deviate. Article 1 paragraph (1) of the Commercial Code implies the principle of *lex specialis derogat lex general* or special provisions overriding general provisions.²¹ In several

¹⁷ Efa Laela Fakhriah, "Pembuktian Sederhana Dalam Perkara Kepailitan di Pengadilan Niaga," in *Perkembangan Hukum Bisnis Dalam Era Globalisasi: Dalam Rangka 80 Tahun Prof. Dr. Djuhaendah Hasan, S.H.* (Bandung: Corelone Books, 2017), 264.

¹⁸ Article 8 paragraph (4) of the Law Number 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations states that application for bankruptcy must be granted if there are facts or circumstances that are simply proven that the requirements to be declared bankrupt as referred to in Article 2 paragraph (1) have been fulfilled.

¹⁹ General Elucidation of the Law Number 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations.

²⁰ Muhamad Erwin and Firman Freaddy Busroh, *Pengantar Ilmu Hukum* (Bandung: Refika Aditama, 2016), 90.

²¹ Elsi Kartika and Advendi Simangunsong, *Hukum dalam Ekonomi* (Jakarta: PT Gramedia Widiasarana, 2017), 41.

laws and regulations, there are also explicit mentions of the principle, such as Article 2 of the Law Number 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition,²² or Article 2 of the Law Number 8 of 1999 on Consumer Protection.²³

The Bankruptcy Law mention the principle explicitly in the General Elucidation section. The General Elucidation of the Bankruptcy Law mentions some principles as the basis of the Law: (1) the principle of balance, (2) the principle of going concern, (3) the principle of justice, (4) and the principle of integration.²⁴ The inclusion of the phrase “among others” in the General Elucidation is not appropriate because it opens the possibility of other principles in the Bankruptcy Law. The mention of the principle should be regulated in a limited manner in a statutory regulation to ensure the fulfilment of the legal certainty aspect.

Of the several principles mentioned in the Bankruptcy Law, the principle directly related to the future of the debtor’s business activities is the going concern principle. Based on the principle, the debtor’s business continuity can be determined. The principle is so important in settlement process. The Bankruptcy Law contains the going concern principle in both bankruptcy process and suspension of payment.

In financial terminology, an entity is deemed to be able to continue its business operations in the long run and will not be quickly liquidated due to a going concern.²⁵ In other words, based on the aspect of the company’s ability to generate profits, an entity’s going concern is to generate revenue, fulfil its obligations, and not plan or does not need to be liquidated in the incoming year.²⁶

The going concern is closely related to the economic (financial) aspect. Savova states that it can also be viewed from another perspective. In addition, applied perspective can be used to understand the nature of going concern principle. Legally speaking, a going concern is an organization that has been established for an extended amount of time. Active business operations equal to going concern based on applied standpoint.²⁷

²² Article 2 of Law Number 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition: “*Business actors in Indonesia in carrying out their business activities are based on the principle of economic democracy by taking into account the balance between the interests of business actors and the public interest.*”

²³ Article 2 of Law Number 8 of 1999 on Consumer Protection: “*Consumer protection is based on benefits, justice, balance, consumer security and safety as well as legal certainty.*”

²⁴ Kurnia Toha and Sonyendah Retnaningsih, “Legal Policy Granting Status of Fresh Start to the Individual Bankrupt Debtor in Developing the Bankruptcy Law in Indonesia”, *Academic Journal of Interdisciplinary Studies* 9, no. 2 (2020): 158.

²⁵ Dewi, I Gusti Ayu Agung Omika and, I Gusti Ayu Agung Pradnya Dewi, “Corporate Social Responsibility, Green Banking, and Going Concern on Banking Company In Indonesia Stock Exchange,” *International Journal of Social Sciences and Humanities (IJSSH)* 1, no. 3 (2017): 126.

²⁶ Lisa Anthony, Billie Anne Grigg. “Going Concern Definition and Red Flags”, accessed May 8, 2022, <https://www.nerdwallet.com/article/small-business/what-is-the-going-concern-assumption>.

²⁷ Kameliya Savova, “Global impact of COVID 19 on the concept of Going Concern”, *SHS Web of Conferences* 92 (2021): 1045.

The Law Dictionary defines going concern as *“a business currently successful with indications in the foreseeable future of continuing to do well”*.²⁸ Steven Bragg, CPA, founder of AccountingTools, describes going concern as *“a firm or corporation which, though financially embarrassed, continues to transact its ordinary business”*.²⁹

The Bankruptcy Law does not define the going concern principle. However, a description of the going concern principle can be found in the General Elucidation of the Bankruptcy Law.

Based on the explanation, there are at least two important things that are related to the going concern principle in the bankruptcy and suspension of the payment process. First, a company that is considered a going concern is not a “unhealthy” company. Thus, when the business is continued, it will not cause problems. In addition, going concern implies bankruptcy process does not only lead to efforts to divide up all assets (wealth) to pay off debts. It also provides an opportunity to run their business. Therefore, the company can generate income and profit while also increases the value of the company. Furthermore, the going concern principle can be used to prevent the actions of certain parties have bad faith to end debtor’s business even though it has the potential to be continued.

The going concern principle in the Bankruptcy Law must also be interpreted as protection for third parties. For instance, for the apartments, the consumers who must bear losses due to the developer company is going bankrupt. It happened in the case of the bankruptcy of PT Cowell Development Tbk.³⁰ For consumers, continuing the debtor’s business by constructing apartments is seen as more beneficial than leaving it undeveloped because consumers will get their right. Likewise, for companies engaged in manufacturing, the implementation of going concern principle has greater benefits for suppliers, employees, and the community than letting it no longer operate, as happened in the case of PT Buana Pacific International (PT BPI). PT Berca Schindler Lifts and PT Asset Indonusa, Tbk are suppliers of PT BPI for the Gayanti City apartment project. The case also involves a buyer on behalf of Mery Nina Hafni Harahap. It is recorded in the Court Decision No. 376/Pdt.Sus-PKPU/2021/PN.Niaga.Jkt.Pst. The basis of the application was due to the delay in payment of the invoices submitted and the handover of the Gayanti City apartment unit to 75 consumers. In its decision, the court ratified a settlement (homologation) between the debtor and the creditor, which essentially allowed the developer to hand over the apartment unit no later than 36 months

²⁸ The Law Dictionary, “Going Concern,” The Law Dictionary, accessed July 21, 2022, <https://thelawdictionary.org/?s=going+concern>.

²⁹ Steven Bragg, “The going concern principle,” accessed April 27, 2022, <https://www.accountingtools.com/articles/the-going-concern-principle#:~:text=The%20going%20concern%20principle%20is,very%20low%20fire%2Dsale%20prices>.

³⁰ Syahrizal Sidik, “Pengembang Cowell Pailit, Bagaimana Nasib Konsumen?,” accessed April 7, 2022, <https://www.cnbcindonesia.com/market/20200717084605-17-173419/pengembang-cowell-pailit-bagaimana-nasib-konsumen>.

after the verdict was issued. In other words, the developer was allowed to continue building the apartment.

As going concern business activities are expected to be able to maintain business activities for the long term and not liquidated in the short term, it is important to carry out the decision on the continuity of a business carefully. It must be based on careful consideration and assessment by a competent party.³¹ Sjahdeini, in Kornelis and Amboro,³² states that a settlement plan should be made by a team of expert consultants formed by the debtor. The team should consist of at least (1) public accountants, (2) legal consultants, (3) financial and business management consultants, and (4) appraiser.

Therefore, according to Dohrer and Tysiac, management must determine whether some conditions or events could cast serious doubt on its ability to continue as a going concern. The judgment is based on conditions or events that may have been known or were well known at the time of the assessment.³³

Thus, in determining whether a company needs to continue its activities or not, economic (financial) considerations seem to be more prominent than other aspects because it cannot be separated from the question of how much wealth (assets) of the company; how the company can be run; and how can profit be generated by the company so that it can continue its activities. Therefore, the company is not advised to continue if it increases its financial burden.

The General Elucidation of the Bankruptcy Law, especially in the description of the going concern principle, contains the phrase "In this Law". The phrase means that the going concern principle is valid both to the bankruptcy and the suspension of the payment process, even though the intention behind the inclusion of the going concern principle in the suspension of payment is different from bankruptcy. If the application of the going concern principle in the suspension of payment is intended as a debtor's effort to make their business generating profits, they can continue to pay off based on the proof to their creditors and avoid being declared bankrupt. At this stage, those who run the business remain with the debtor, with a note that every action taken by the debtor must be approved by the Administrators. At the same time, the going concern principle in bankruptcy is a part of the settlement of the debtor's debt after the debtor is declared bankrupt. Those who continue the debtor's business can be given to the curator as stated in Article 104 paragraph (1) of the Bankruptcy Law. The article states that based on the approval of the interim creditor committee, the curator may continue the

³¹ Ni Nyoman Alit Triani, Made Dudy Satyawan, and Merlyana Dwindi Yanthi, "Determining The Effectiveness of Going Concern Audit Opinion by ISA 570", *Asian Journal of Accounting Research* 2, no. 2 (2017): 30.

³² Kornelis, Yudi, and Florianus Yudhi Priyo Amboro, "Implementasi Restrukturisasi Dalam Prosesi Kepailitan Dan Penundaan Kewajiban Pembayaran Utang Di Indonesia", *Jurnal Selat* 7, no. 2 (2020): 268.

³³ Bob Dohrer and Ken Tysiac, "Going concern tips for auditors during the pandemic", accessed April 27, 2022, <https://www.journalofaccountancy.com/news/2020/apr/going-concern-tips-for-auditors-during-coronavirus-pandemic.html>.

business of the debtor who is declared bankrupt even though an appeal or judicial review is filed against the decision on the bankruptcy statement.

The reason behind the provision is that a bankrupt debtor's business carried out by the curator is not affected by the issuance of the decision on cassation or review, even though the decision is detrimental to one party. Furthermore, continuing the debtor's business involves two disputing parties. They are the creditor as the party giving approval and the curator as the debtor's representative running the business.

In general, in settlement of bankruptcy estates, the curator usually confiscates the bankruptcy estates and auctions them to be distributed to creditors according to their respective shares. However, the curator can also determine if the debtor's assets, especially those in business activities, do not need to be discontinued and then distributed to creditors. In this case, their activities will continue. The curator's consideration to continue the debtor's business is solely based on pragmatic reasons, namely that the debtor's business is more useful if it is continued rather than discontinued.

The importance of the going concern principle in the bankruptcy process and suspension of payment is reflected in several formulations related to business continuity, both implicitly and explicitly as follows.

Table 1. Article on Business Continuity in the Bankruptcy Law

No	Article Reference	Article Content
1	Article 104 paragraph (1)	Based on the approval of the interim creditor committee, the Curator may continue the business of the Debtor who is declared bankrupt even though an appeal or judicial review is filed against the decision on the bankruptcy statement.
2	Article 104 paragraph (2)	If in bankruptcy no committee of creditors is appointed, the Curator will need permission from the Supervisory Judge to continue the business as referred to in paragraph (1).
3	Article 179 paragraph (1)	If the reconciliation meeting is not offered a reconciliation plan or if the proposed reconciliation plan is not accepted, the Curator or Creditor present at the meeting may propose that the Bankrupt Debtor company be continued.
4	Article 184 paragraph (2)	In the event that the company is continued, the sale of objects that are included in the bankruptcy estate can be carried out, which are not required to continue the company.
5	Article 240 paragraph (1)	During the suspension of the obligation to pay debts, the Debtor without the approval of the management cannot take management actions or take ownership of all or part of his assets.

The formulation of Article 240 paragraph (1) of the Bankruptcy Law implicitly implies the debtor's authority, including to continue their business (going concern), if there is approval from the Administrators.

In the suspension of payment, the application of the going concern principle is intended as a part of the debtor's efforts to restructure their debts to creditors to prevent bankruptcy. Thus, the considerations that underlie the continuation of the debtor's business are subjective because they believe that their business is still

feasible to continue.³⁴ Another aspect that underlies going concern is the debtor's view that their business still has prospects to continue. If the business at the time the suspension of the payment process has not been running well, it is solely due to temporary (not permanent) factors. Therefore, after these factors have been overcome, the business can still be continued. It is expected that it can carry out the business, the value of the company is still good, and it can allow the debtors to pay their debts.

The example of the bankruptcy case of PT Dirgantara Indonesia (Persero) provides an overview of the importance of going concern principle in a bankruptcy case. As per the Supreme Court Decision Number 075K/PDT.SUS/2007 dated October 22, 2007, the Panel of Judges (Chief Judge Mariana Sutadi, Member Judge Abdul Kadir Moppong, and Member Judge Atja Sandjaya) decided to cancel the bankruptcy decision of PT Dirgantara Indonesia as previously ruled by the Commercial Court Number 41/Pailit/2007/ PN.Niaga/Jkt.Pst dated September 4, 2007. The panel of judges considered that the Judges of the Commercial Court did not pay attention to the principles underlying the Bankruptcy Law, including the principles of balance, going concern, and justice. In addition, PT Dirgantara Indonesia was in the process of being restructured by other creditors (in this case, PT Perusahaan Pengelola Aset). The nominal amount of receivables submitted by the Bankruptcy Applicant is much smaller than receivables belonging to other creditors. The judges also considered the provisions for filing for bankruptcy against SOEs as referred to in Article 2 paragraph (5) of the Bankruptcy Law must be carried out by the Minister of Finance.

C. Determining Indicators of Prospective Business Activities Continued

In dealing with debts that are past due and can be collected, each debtor faces at least two choices. First, debtor can leave the debt unpaid with the consequences of going bankrupt. Second, debtor can seek restructuring to have a second chance to fulfill the obligations by using other means, avoiding bankruptcy. Whatever the choice is, it certainly has advantages and disadvantages. Therefore, debtor should make a choice based on careful considerations from both legal and economic aspects to avoid or to minimize the risks.

When a debtor or a creditor submits a suspension of payment application to the Commercial Court, the debtor or the creditor expects their economic rights are protected, considering that economic rights for a person or a company are a form of acknowledgment of their existence as legal subjects that must be respected and a part of the protection of their dignity. In the suspension of the payment process, debtor's economic rights are realized from the repayment of debt without having to lose all assets, including ensuring their business activities to run normally and to

³⁴ Suwinto Johan, "Separatist Creditors Problems on Postponement of Debt Payment Obligations Based on the Supreme Court's Decree Number 30/KMA/SK/I/2020," *Fiat Justisia: Jurnal Ilmu Hukum* 15, no. 3 (2021): 212.

generate profits. On the other hand, creditors economic rights are realized from the recognition that the debtor has obligations (debts) that must be paid to them and the full return of their money (if possible), so that they can make good use of the money.

In the suspension of payment application, the intention of the parties (debtors and creditors) to protect their economic rights is implicitly recognized in Article 222 paragraph (1) of the Bankruptcy Law. It states that *debtors... can request a postponement of debt payment obligations, with the intention of submitting a settlement plan which includes offer of payment of part or all of the debt to Creditors and creditors... may request that the Debtor be given a postponement of the obligation to pay debts, to enable the Debtor to submit a reconciliation plan which includes an offer to pay part or all of the debt to the Creditor*. There is a difference in the settlement between bankruptcy and suspension of payment. Settlement in bankruptcy focuses on the process of paying off debts through the settlement of bankruptcy assets. In contrast, settlement in the suspension of payment focuses on payment offers or debt restructuring plans.³⁵

The parties want the suspension of the payment process to run well. They follow the intent of the suspension of payment application, which is marked by the acceptance (approval) of the settlement plan by creditors. The agreed settlement plan is then ratified by the court (homologation). The plan has permanent legal force to be implemented. The settlement agreement process often must go through very tough negotiations because the parties hope that the agreed settlement plan will not harm them. With the approval of the settlement plan, it seems as if the position of the parties is restored to its original state when there had not been a “state of debt that was due and collectible”. In other words, the settlement plan is intended to become a new agreement as a renewal of the previous agreement between debtors and creditors. Therefore, in the suspension of the payment process, the most crucial stage is the stage of submitting a settlement plan proposal because it can measure debtors’ good faith is to fulfill obligations to creditors.

If the settlement plan is accepted by the creditors, then the initial step of settling the debt has been passed, even though the issue of paying their debt has not been fully resolved. On the contrary, if the settlement plan is rejected, the debtor will automatically be in a state of bankruptcy. Their right to manage their assets is closed. Article 24 paragraph (1) Bankruptcy Law states that *debtor by law loses right to control and manage assets which are included in the bankruptcy estate, from the date of the declaration of bankruptcy*.

The Bankruptcy Law does not formulate the definition of a settlement plan. However, the practice of drafting a settlement plan can be interpreted as a written

³⁵ M. Hadi Shuban, *Hukum Kepailitan, Prinsip, Norma dan Praktik di Pengadilan* (Jakarta: Kencana Prenada Media Group, 2012), 141.

document made by debtor and contains several alternatives for debt repayment (restructuring), which are submitted either during or after the suspension of the payment application. Thus, debt restructuring is a method used by debtors to reorganize the payment of their debts to creditors by proposing new terms and conditions agreed by both parties.

Although there are no standard rules in the preparation of a settlement plan, in practice, the settlement plan outlines several things, such as the debtor's business condition when the settlement plan is drawn up, the company's financial position, sources of funds for debt repayment, the prospect of the debtor's business continuity, alternative forms of debt repayment (restructuring), and assets. The description of the settlement plan must be made clearly and logically. Thus, creditors are sure that by making a settlement plan, their debts can be paid (paid off). The ambiguity and illogicality of the settlement plan are considered by the creditors as their attempt to delay their obligations, which leads to the rejection of the settlement plan.

Debtors need to conduct a special and in-depth study before drafting a settlement plan, in case the settlement plan offered after homologation turns out to be difficult to implement. The settlement plan offered by debtor usually involves changing the payment term or changing the method or form of payment, such as extending the payment period (repayment), reducing interest rates, reducing principal, paying with assets, or debt to equity swaps.

Another thing that should not be overlooked when submitting a settlement plan is the timeframe for submitting it. The Bankruptcy Law has determined several timeframes for submitting settlement proposals.

Firstly, it is carried out simultaneously with submitting the suspension of payment application as stated in Article 224 paragraph (5) of the Bankruptcy Law. It means that when the debtor submits a suspension of payment application as completeness of the suspension of payment application, they can include a settlement plan document.

Secondly, it is carried out after the suspension of the payment submission, as stated in Article 265 of the Bankruptcy Law. However, Article 265 of the Bankruptcy Law does not explain the exact period. Therefore, the period in question must be within a reasonable time so as not to hinder the smooth running of the suspension of the payment process.

The intention behind the proposed settlement plan by the debtor is a form of their good faith to pay off their obligations to the creditors, but the settlement plan can be accepted or rejected by the creditors. Thus, the settlement plan is the most important stage. It can even be said to be the essence of suspension of payment because the approval or rejection of the settlement plan has an impact on whether the debtor is bankrupt or not.

In the settlement plan, the debtor conveys various options regarding ways to pay off their debt to the creditor at the same time as submitting a suspension of a

payment application or after submitting a suspension of payment application. Article 265 of the Bankruptcy Law regulates it. At this stage, the debtor must already have several options that are considered adequate so that the proposed settlement plan is accepted by the creditor.

The Bankruptcy Law has stipulated requirements for the settlement plan to be accepted. According to Article 281 paragraph (1) of the Bankruptcy Law, a settlement plan can be accepted based on concurrent and separatist creditors' approval.

The supervisory judge must deliver a written report to the court on a specific date following the receipt of the settlement plan to ratify the settlement (homologation) as well as be able to convey the reasons that caused the Administrators and creditors to want ratification (Article 284 paragraph [1] of the Bankruptcy Law). When the decision to ratify the settlement has permanent legal force, the suspension of payment is considered to have ended (Article 288 of the Bankruptcy Law). Furthermore, the debtor only needs to carry out the contents of a settlement agreement that has been ratified.

However, referring to Article 285 paragraph (2) of the Bankruptcy Law, the court may refuse to ratify the settlement plan that has been approved by the parties if certain circumstances occur. Firstly, the debtor's assets are significantly larger than the amount specified in the settlement plan. Secondly, the implementation of the settlement is not sufficiently guaranteed. Thirdly, the settlement was reached through fraud, conspiracy between creditors, or other dishonest means. Fourthly, services and expenses incurred by experts and administrators have not been reimbursed.

In some cases, one of the reasons for the creditor's acceptance of the settlement plan is that the debtor's business has the prospect of continuing. It can be a means for the debtor to pay various obligations. It is in line with one of the principles adopted by the Bankruptcy Law, namely the going concern principle.

The main cause of the debtor's inability to pay obligations to other parties is their business experiencing problems. If the trigger for the problem is due to temporary factors, such as the scarcity of raw materials, it is still possible for their business to run after the raw materials are available again. The business condition is one of the reasons the creditor accepts the settlement plan proposed by the debtor. It is different if the trigger is due to permanent factors, such as government policies prohibiting businesses run by debtors, or if no special license is required. PT Merpati Nusantara Airlines (Persero) experienced such condition after the Ministry of Transportation revoked the License of Scheduled Commercial Transport Business and Aircraft Operator Certificate in 2015.³⁶ Thus, the debtor's going concern has been ended and cannot be continued.

³⁶ Khuswatun Hasanah, "Syarat Bagi Merpati untuk Kembali Mengudara," accessed July 8, 2022, <https://katadata.co.id/ariemega/infografik/5e9a5597a0491/syarat-merpati-untuk-kembali-mengudara>.

The question is, is it only because of non-permanent factors that the prospective debtor's business is carried out (continued) and a consideration for the acceptance of the settlement plan by the creditor?

It is possible for either debtor or creditor to apply when they consider the suspension of the payment application and bankruptcy process. If a creditor applies for bankruptcy and suspension of payments, the applicant creditor ought to have taken the debtor's ability to continue operating as a going concern into account. If the debtor submits a request for a suspension of payments, the creditor must act appropriately to ensure they can continue operating. Moreover, the debtor should prepare a settlement proposal based on assumptions that are running wisely and adequately so that the proposed settlement of obligations is reliable and can be realized.

For this reason, referring to the provisions in the Bankruptcy Law, debtors can use experts, such as financial planning consultants, in preparing a settlement proposal. In addition, if necessary, the settlement proposal can also include a company revitalization plan, both financially and organizationally, for example, by rationalizing the number of employees and making changes to the business model to reduce costs and increase company profitability.

To determine if a company has prospects to run requires a comprehensive and in-depth assessment carried out by a competent party, especially from the economic and financial aspects, because the company's business prospects cannot be separated from its economic (financial) condition. Herein lies the significance of considering the opinions of economic and financial experts when assessing the company's financial condition³⁷ during the processes of bankruptcy and suspension of payment. Examination of financial statements has a very close relationship with the issuance of a going concern audit opinion³⁸ of a company. When determining to issue a going concern audit opinion, auditor must take the financial statement results into account. Judging the company from the outside is not enough to prove that the company is prospective to run.

As a jurisprudence, in the case of Suspension of Debt Payment Obligations as stated in the Supreme Court's Decision No. 024 PK/N/1999, between PT Citra Jimbaran Indah Hotel and Ssangyong Engineering & Construction Co. Ltd., it was decided that judges must also pay attention to the general explanation of the Bankruptcy Law,³⁹ which substantially stipulates that *the determination of bankruptcy must be carried out/adjusted fairly in the sense of taking into account*

³⁷ Thomas Averio, "The Analysis of Influencing Factors on The Going Concern Audit Opinion - A Study in Manufacturing Firms in Indonesia", *Asian Journal of Accounting Research* 6, no. 2 (2020): 162.

³⁸ According to the 2001 Public Accountant Professional Standard (*Standar Profesi Akuntan Publik*; SPAP 2001), a going concern audit opinion is an opinion issued by an auditor to ascertain whether the company can maintain its viability. The going concern audit opinion includes Modified Unqualified Opinion, Qualified Opinion, Adverse Opinion and Disclaimer of Opinion.

³⁹ At that time the applicable law was Law Number 4 of 1998 concerning the Stipulation of Government Regulation in Lieu of Law Number 1 of 1998 concerning Amendments to the Law on Bankruptcy into Law.

the interests of the company as a debtor or the interests of creditors in a balanced manner.

In fact, a company's financial condition that looks positive in the financial statements does not necessarily mean that the company is prospective or free from business failure. An example is the bankruptcy case of Lehman Brothers, the fourth largest investment bank in the United States after Goldman Sachs, Morgan Stanley, and Merrill Lynch, on September 15, 2008. Lehman Brothers were proven to have engineered finances to cover a debt of USD 50 billion in its financial statements. Ernst & Young, the Accounting Firm employed by Lehman Brothers, was found to have failed to issue an Unqualified Opinion for Lehman prior to bankruptcy. It should have provided an early warning in the opinion it gave.⁴⁰ It is known that the Lehman Brothers case triggered the economic crisis in the United States (subprime mortgage crisis) and globally in 2008-2009.

The business continuity of a company is influenced by both internal and external factors of company. For example, macroeconomic conditions, political stability, financial conditions, corporate culture, or mastery of technology. These internal and external factors can trigger the company's business failure. Therefore, many factors and indicators of the firm's business failure can be examined to determine whether the company can continue its business continuity.⁴¹

Figure 3. Business Failure Indicators and Assumptions of Going Concern



An indicator can affect other indicators. The primary indicator of a company's ability to sustain business continuity is financial condition. Particular attention should be paid to the company's capacity to generate income, representing the capacity to settle creditors' claims.

⁴⁰ Yunie Elvandari, Hiro Tugiman, and Dedik Nur Triyanto, "Pengaruh Kualitas Audit Dan Financial Distress Terhadap Penerimaan Opini Audit Modifikasi Going Concern (pada Perusahaan Property Dan Real Estate Yang Terdaftar Di Bursa Efek Indonesia Tahun 2008-2015)", *eProceedings of Management* 3, no. 3 (2016): 3275.

⁴¹ Marisi P. Purba, *Asumsi Going Concern: Suatu Tinjauan Terhadap Dampak Krisis Keuangan atas Opini Audit & Laporan Keuangan* (Yogyakarta: Ekuilibria, 2016), 33-41.

Country's macroeconomic conditions greatly influence company's financial condition. For example, companies with export-import business will be very sensitive to local currency's exchange rate against foreign currencies. A low local currency's exchange rate will be beneficial if the company's performance is good. On the other hand, it will be detrimental and burdensome for companies whose operational activities are dominated by imports, for example, imports of raw materials.

Macroeconomic conditions can influence each other with conditions of social vulnerability. For example, due to the economic downturn during the Covid-19 pandemic, numerous firms shut down, resulting in many layoffs of workers.⁴² On the other hand, conditions of social vulnerability such as frequent demonstrations or labor strikes, or high minimum wages for workers, can result in foreign investors being reluctant to open factories in Indonesia.

On the other hand, political stability can also affect economic conditions and social vulnerability. For example, the political instability caused by the fall of the New Order regime in 1998 did not only cause the economic recession but also caused various economic and social problems.

The condition of the company's profitability is directly determined by the ability to dominate the market for products. Market control is influenced by various factors, including competitiveness, regulation, product innovation, and the presence of competitors. For example, in the case of PT Merpati Nusantara Airlines (Persero), with the revocation of the License of Scheduled Commercial Transport Business and the Aircraft Operator Certificate by the Ministry of Transportation, Merpati has automatically lost its market and even lost the ability to operate normally.

A company's level of technological mastery can also be an indicator in analyzing a company's going concern capability. For example, media companies may face tough challenges in the digital era if their production facilities rely solely on print-based products and there are no plans to switch to digital business.

The six indicators above, either directly or indirectly, can result in business failure and difficulties in company's operations affecting business continuity. According to Boritz in Purba,⁴³ business failure indicators can be categorized as follows.

⁴² Data from the Statistics Indonesia shows that 29,12 million people of working age have been affected by the Covid-19 pandemic, namely 2,56 million people who are unemployed due to Covid-19; not the workforce due to Covid-19 of 0,76 million people; temporarily not working due to Covid-19 by 1,77 million people; and those who work experienced a reduction in working hours as many as 24,03 million people. Kementerian Ketenagakerjaan Republik Indonesia, "Menaker Ida: 29,12 Juta Orang Penduduk Usia Kerja Terdampak Pandemi Covid-19, accessed July 8, 2022, <https://kemnaker.go.id/news/detail/menaker-ida-2912-juta-orang-penduduk-usia-kerja-terdampak-pandemi-covid-19>.

⁴³ Marisi P. Purba, 19.

Table 2. Category of Business Failure indicators

No	Category	Indicators
1	Macro economics	Bank rating, GDP
2	Industry	Nature of operation, regulation
3	Size, age, possession	Big/Small, Beginner/Old, Public/Nonpublic
4	Management	Lack of planning
5	Financial	Profitability, debt, liquidity
6	Accounting Change	Profit increase, Fraud
7	Operations and internal	Marketing, production, finance
8	Communication	Creditors, regulators, analysts, media
9	Contingency and external	Competition, risk, environment

School of Accounting, Binus University, describes several indicators that influence auditors in issuing going-concern audit opinions, such as⁴⁴ (1) negative financial trends (e.g., capital deficiency, negative cash-flow), (2) internal problems (e.g., loss of key personnel), (3) external problems (e.g., revocation of business license), (4) other problems (e.g., loan default), and (5) major alterations in the competitiveness of the client's products or the market.

The fulfillment of the matters does not necessarily result in the company's return to health because other factors need to be considered. However, it gives an indication that debtor has good intentions to manage company with better corporate governance. It is good since effective business management, which ultimately results in the ability of the company to meet all its commitments, is always linked to business continuity.

D. Conclusion

Based on the description, the study concludes several points. First, the rules on bankruptcy and payment suspension contain provisions addressing the going-concern principle. It shows that the going concern (sustainability) of debtor's business is very important for the fulfillment of the economic rights of debtor and creditor, even though the law does not provide indicators to determine that the prospective debtor's business will continue.

Second, the decision that permits debtor's company to continue due to the prospect of business ability must be based on careful consideration. It must be carried out by a competent party. Therefore, no parties will be harmed. In addition,

⁴⁴ Binus University School of Accounting, "Apakah Going Concern Termasuk Opini Audit?," accessed July 12, 2022, <https://accounting.binus.ac.id/2020/08/19/apakah-going-concern-termasuk-opini-audit/#:~:text=Sebagai%20konsep%2C%20istilah%20going%20concern,untuk%20melanjutkan%20usahnya%20dimasa%20mendatang.>

the decisions are strongly influenced by various factors, either internal or external factors. the examples of internal factors are company's credibility, company's financial condition, the condition of the company's assets adequacy to be collateral of debts. The examples of external factors are creditor's belief on debtor's ability to continue their business and creditor's willingness to accept various settlement plans from debtors, mainly still adheres to the provisions and procedures outlined in the Bankruptcy Law.

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