

## The Mock Application of the Insolvency Law by the Jordanian Courts: Lessons Learnt from Indonesia

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**Abstract:** Jordan is currently going through difficult economic conditions whose features have begun to crystallize clearly since the outbreak of crises and wars in Syria and Iraq. In addition to that, the year 2020 brought with it the unknown to further complicate the Jordanian economic situation. In order to find a comprehensive solution, the Jordanian legislator used some international references, such as the principles of effective systems of creditors' rights and insolvency issued by the World Bank and the Legislative Guide to the Insolvency Law issued by the United Nations Commission on International Trade Law (UNCITRAL) to rescue faltering economic projects or those that are about to stumble. The study resulted in the issuance of the Jordanian Insolvency Law No. 21 of 2018. This paper aims to identify the insolvency standard of the Jordanian courts and its impact on Jordan's economy. By applying a qualitative legal approach, this paper analyses the mock application of the Insolvency Law by the Jordanian courts. It also examines the insolvency standard followed by the Jordanian courts via juridical-normative with descriptive analysis. The finding shows that applying the insolvency law in Jordan is still a theory. Jordanian courts should cautiously extend the scope of insolvency theory for the law to achieve the purpose for which it was issued. Comparing the practice in Indonesia, which has switched from the insolvency test concept to the presumption of bankruptcy, this is a lesson because, in the conditions of the COVID-19 pandemic, companies will find it challenging to request reports due to uncertain situations. According to the financial aspect, large companies are still good, but companies are reluctant to pay debts. This condition means that if the system used is a bankruptcy test, this case cannot be brought to the Commercial Court, so the court cannot force debtors who are reluctant to pay their debt obligations.

**Keywords:** Insolvency; International Trade; Jordanian Courts; UNCITRAL

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### 1. Introduction

Jordan is currently going through difficult economic conditions whose features have begun to crystallize clearly since the outbreak of crises and wars in Syria and Iraq. In addition to that, the year 2020 brought with it the unknown to further complicate the Jordanian economic situation. The Corona pandemic directly caused a reduction in the financial returns of the Jordanian citizen and the state, which was reflected on the purchasing power of the citizen in general, and this negatively affected the financial returns of Jordanian companies and factories, which made it unable to keep pace with its financial obligations towards its creditors.<sup>1</sup> During difficult economic conditions, the

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<sup>1</sup> During February to May 2021, Jordan experienced one of the strongest COVID-19 waves since the beginning of the pandemic, leading to a modest 0.3% real GDP growth in Q1-2021. The World Bank, "Jordan's Economic Update — October 2021." <https://www.worldbank.org/en/country/jordan/publication/economic-update-october-2021>.

troubled companies' liquidation will directly exacerbate the economic situation and lead to the loss of many workers to their work and their source of livelihood. It is not considered the best solution, especially in light of the repercussions of the emerging coronavirus, so the Jordanian legislator had to find a solution to this dilemma.

In order to find a comprehensive solution, the Jordanian legislator used some international references, such as the principles of effective systems of creditors' rights and insolvency issued by the World Bank and the Legislative Guide to the Insolvency Law issued by the United Nations Commission on International Trade Law (UNCITRAL) to rescue faltering economic projects or those that are about to stumble.<sup>2</sup> The study resulted in the enactment and issuance of the Jordanian Insolvency Law No. (21) of (2018), which explains what insolvency is, in addition to the procedures for declaring insolvency and the legal means and procedures that faltering economic projects or those that are about to stumble can resort when declaring their insolvency, by submitting a plan to reorganize and to arrange their economic conditions and continuing to carry out their activity instead of liquidation.<sup>3</sup>

## 2. Research Method

This study is juridical-normative with descriptive analysis.<sup>4</sup> The data collection was through library and field research. The library research was conducted to seek relevant information by collecting secondary data and valid information that can assist the researcher in answering the research question. All collected data has been analyzed using a qualitative legal approach.<sup>5</sup> In addition, data collection has been gathered through library research in public and private universities in Jordan. The secondary resources from which data is collected mainly include reports issued by some institutions, textbooks, and journal articles by scholars.<sup>6</sup> In addition, a large volume of Arabian Middle Eastern acts and cases are used to constitute the legal basis of this work by critically analyzing and comparing the various opinions expressed in these materials. In this stage, a review of several laws in some countries relevant to the research problem was also conducted. The objective of the study is to determine the insolvency standard followed by the Jordanian courts and its impact on Jordan's economy. In examining standards followed by courts in Jordan about applying the insolvency theory under the Jordan system, qualitative and doctrinal legal approaches are used in this paper through descriptive and content analysis. Furthermore, this paper has used a case approach by analyzing several Jordanian courts of cassation decisions.<sup>7</sup>

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<sup>2</sup> Jason J. Kilborn, "Elaborating UNCITRAL's Legislative Guide on Insolvency Law: Principles for Natural Persons." In *Modernizing International Trade Law to Support Innovation and Sustainable Development*. Proceedings of the Congress of the United Nations Commission on International Trade Law, 2017.

<sup>3</sup> Bisir Salem Rabai, *Introduction to the Commercial Insolvency Law; an explanation of the Jordanian Insolvency Law No. (21) of 2018, compared with the UNCITRAL, Legislative Guide on Insolvency Law*. (Amwaj for Printing, Publishing and Distribution, 2018).

<sup>4</sup> Emad Mohammad Al-Amaren et al., "An Introduction to the Legal Research Method: To Clear the Blurred Image on How Students Understand the Method of the Legal Science Research." *International Journal of Multidisciplinary Sciences and Advanced Technology* 1, no. 9 (2020): 50–55.

<sup>5</sup> Al-Amaren et al., "An Introduction to the Legal," 50-55.

<sup>6</sup> Emad Mohammad Al-Amaren and Rachma Indriyani, "Appraising the Law of Wills in a Contract." *Hang Tuah Law Journal* 3, no. 1 (2019): 46–58.

<sup>7</sup> Soehartono et al., "The Establishing Paradigm of Dominus Litis Principle in Indonesian Administrative Justice." *Sriwijaya Law Review* 5, no. 1 (2021): 42–55.

### 3. Conceptual Framework of Insolvency Theory

Insolvency is a legal system through which a seizure shall be enforced on the debtor's assets whose debts' value exceeds the value of his assets. The seizure shall be enforced according to a judgment issued by the court that has jurisdiction.<sup>8</sup> The Jordanian legislator defined insolvency in the article (2) of the Jordanian Insolvency Law No. (21) of 2018 as: "The failure of the debtors to pay his/her debts regularly or when the total value of his/her obligations exceeded his/her financial assets."

The Jordanian Insolvency Law stipulates that the debtor can be an individual or a legal person who practices a commercial business according to the relevant laws or a person to whom the provisions of the insolvency law could be applied on him/her, or finally, an individual or a legal person who has declared his/her insolvency or is about to do so.<sup>9</sup> As for the UAE Federal Law No. (19) of 2019, insolvency is defined as facing current or expected financial difficulties that make the debtor unable to settle his/her financial obligations.<sup>10</sup>

The Jordanian insolvency law identifies those who can't be considered insolvent debtors, such as banks, insurance companies, associations, clubs, ministries, public departments, and public institutions. That applies unless the council of ministers decides to consider them so. Under the Jordanian insolvency law, those who can't be regarded as insolvent debtors may include natural persons whose affairs are governed by civil law. Under the Jordanian insolvency law.<sup>11</sup>

The Legislative Guide for Insolvency Law (UNCITRAL) issued by the International Trade Commission of the United Nations for the year 2004 defines insolvency as when the debtor is unable to pay his debts as they fall due or when the value of his obligations exceeds the value of his assets.<sup>12</sup> While according to Islamic Shari'ah jurists,<sup>13</sup> insolvency, according to the Ḥanafī's, is a lack of money at all. On the other hand, according to the Mālikīs insolvency, is the one who has nothing to sell. And the Shāfi'ī has given definitions for insolvency, including those who do not have any money or do not have more than enough for their daily lives.<sup>14</sup>

Insolvency is a system of collective execution on the debtor's money, whose business has deteriorated in a way that he/she is unable to fulfill his/her financial commitments, or the financial estate of the debtor is occupied with more than what he/she owns, or he/she was about to be exposed to that. In this regard, if the debtor faces any of the

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<sup>8</sup> Murad Mahmoud Al-Shnikat, "The Meaning and Declaration of Commercial and Civil Insolvency under the Provisions of the Jordanian Insolvency Law No. 21 of 2018." *Journal of Politics and Law* 13, no. 1 (February 29, 2020): 161–75. <https://doi.org/10.5539/jpl.v13n1p161>.

<sup>9</sup> Jordanian Insolvency Law No. 21 of 2018.

<sup>10</sup> The UAE Federal Law No. 19 of 2019.

<sup>11</sup> Murad Mahmoud Al-Shnikat, "The Meaning and Declaration of Commercial and Civil Insolvency under the Provisions of the Jordanian Insolvency Law No. 21 of 2018." *Journal of Politics and Law* 13, no. 1 (February 29, 2020): 161–75. <https://doi.org/10.5539/jpl.v13n1p161>.

<sup>12</sup> UNCITRAL, *Legislative Guide on Insolvency Law*.

<sup>13</sup> Abdullah Hassan Hamid Al-Hudhaifi, *The Provisions of the Insolvent in Islamic Jurisprudence*. 2nd Ed. (Makkah Al-Mukarramah: Nizar Mustafa Al-Baz Library, 2005).

<sup>14</sup> Issam Khalaf Abdullah Saleh Al-Anazi, "Islamic Financial Institutions Stumbled Due to Lack of Liquidity and the Proposed Ways to Address It." *Journal of the College of Sharia and Islamic Studies* 2012, no. 30 (2012): 436–90. <https://search.emarefa.net/detail/BIM-759739>.

previous matters, a competent court's decision is issued against him/her declaring his/her insolvency aimed at restructuring his/her economic project if it is viable.<sup>15</sup>

Insolvency is defined as the situation of the debtor whose debts exceed his existing assets, and this means all debts of the debtor, both current and deferred.<sup>16</sup> If the combined value of these debts exceeds the value of his/her existing assets at a specific time, then the debtor becomes insolvent.<sup>17</sup> Insolvency is also considered a realistic situation characterized by a person resulting from a financial imbalance between the debtor's assets and his/her financial rights and is based on the idea of the link and correlation between current and deferred debts.<sup>18</sup>

### 3.1. Types of Insolvency

Observing Arab legislation on the one hand and European laws on the other, the researcher can find that the types of insolvency are mainly due to legal jurisprudence and not to legislation in origin.<sup>19</sup> Accordingly, jurisprudence has divided insolvency into two types, legal insolvency, and actual insolvency.<sup>20</sup>

#### 3.1.1. Legal Insolvency

Legal insolvency is expressed as a legal situation where a negative imbalance appears between the debtor's due debts and his/her financial assets owned. To confirm the condition of the debtor, a competent court decision must prove the debtor's insolvency.<sup>21</sup> According to the previous, it is not sufficient for the debtor to be described as legally insolvent when the total value of his/her obligations exceeded his/her financial assets only, but this must be accompanied by a competent court decision declaring his/her insolvency.<sup>22</sup> It is also worth noting that the effects that the Jordanian law has arranged for the legal insolvency may not be applied where the case is actual insolvencies only, such as the termination of the term, preventing the debtor from the expenditure of his/her money, exposing him to the penalty of waste, and the permissibility of giving him/her outlay from his seized revenues.<sup>23</sup>

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<sup>15</sup> Ibrahim Sabri Al-Arnaout, "Normal Reorganization Plan for Saving Struggling Economic Projects In Pursuant to the Jordanian Insolvency Law (Comparison Study)." *Studies, Sharia and Law Sciences* 3, no. 47 (2020).

<sup>16</sup> Turki Hamdan Masalha, "Reorganization: An Insolvency Procedure Preventing Liquidation in Accordance with the Provisions of the Jordanian Insolvency Law: A Comparative Study." *International Review of Law* 9, no. 2 (April 30, 2021): 118–63. <https://doi.org/10.29117/irl.2020.0108>.

<sup>17</sup> S. Marqas, "Part 2: Commitment. Volume 4. Provisions of Commitment." In *Al-Wafi: Illustration for The Civil Law*, 2nd Ed. (Cairo: Al-Feker Al-Arabi Publication and Distribution House, 1992).

<sup>18</sup> Bader Jassim Al-Yacoub, *The Origins of Obligation in Kuwaiti Civil Law*. 6th ed. (Kuwait: Kuwait University, 2004).

<sup>19</sup> Mohamed Bassem Melhem, "Insolvency in Qatari Civil Law: Between the Absence of Regulation and the Arrangement of Some Effects." *International Journal of Law* 2017, no. 1 (2017): 2–25.

<sup>20</sup> Al-Sanhuri, "Part 2: The Theory of Commitment from a General Perspective. Volume 2. The Impact of Commitment." In *Al-Waseet: Illustration for the Civil Law*, 2nd Ed. (Cairo: Al-Feker Al-Arabi Publishing and Distribution House, n.d).

<sup>21</sup> Al-Far, *Provisions Regulating Commitment: The Effects of Having Rights under the Civil Law*. (Amman: Al-Thaqafah Publishing and Distribution Journal, n.d).

<sup>22</sup> Issam Khalaf Abdullah Saleh Al-Anazi, "Islamic Financial Institutions Stumbled Due to Lack of Liquidity and the Proposed Ways to Address It." *Journal of the College of Sharia and Islamic Studies* 2012, no. 30 (2012): 436–90. <https://search.emarefa.net/detail/BIM-759739>.

<sup>23</sup> Al-Anazi. "Islamic Financial Institutions," 436–90.

Based on that, the researcher reaches to a result that the effect of the legal insolvency is more potent than the effect of the actual insolvency, as the legal insolvency ends with a competent court decision declaring his/her insolvency.<sup>24</sup> This means that legal insolvency is a legal situation that occurs when the value of debtor debts exceeds the financial assets he/she owns. Accordingly, the debtor must formally disclose his/her insolvency through a competent court decision.<sup>25</sup>

### 3.1.2. Actual Insolvency

Actual insolvency is expressed in simple insolvency, the negative balance between the debtor's due or future debts and his ownership rights and assets.<sup>26</sup> Further actual insolvency differs from legal insolvency in that there is no need for a court decision to prove the inability of debtors to pay his/her debts. This leads the researcher to conclude that actual insolvency is a broader concept than legal insolvency, which means that actual insolvency is not necessarily legal insolvency, while legal insolvency is actual insolvency.<sup>27</sup> However, it is worth noting that despite the narrowness of the concept of legal insolvency, it is considered more comprehensive than the concept of commercial bankruptcy because as soon as the merchant debtor stops paying his due commercial debt, this permits the declaration of his bankruptcy, even if this debtor is not insolvent, neither legal nor actual insolvency.<sup>28</sup>

This leads to a result that legal insolvency ends before the actual insolvency ends because legal insolvency ends by a court decision if the insolvent debtor fulfills his/her debts in a certain period and inevitably ends by the force of the law if the insolvency period expired. However, the debtor's future debts remain unstated more than his rights and assets owned, so he/she is insolvent in the period in which the debts turn into obligations that must be fulfilled. Thus, the debtor may alternate from actual insolvency to legal insolvency to return after that to actual insolvency.

Under the Jordanian Insolvency Law No. 21 of 2018, two types of insolvency; imminent insolvency and actual insolvency.<sup>29</sup> The Jordanian Insolvency Law defines impending insolvency through the article (2) as: "The situation in which a future debtor is expected to lose his/her ability to pay their debts when they become due within six months. This applies even though the debtor can currently pay these debts".<sup>30</sup> While actual

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<sup>24</sup> Al-Shahawi, *The Theory of the Right to Prison Someone and the Case of Civil Insolvency*. 1st Ed. Alexandria: Al-Ma'aref publishing and distribution, 2010.

<sup>25</sup> Badr Abdel-Karim Hamdan Al-Zayoud, "Declaration of Insolvency and Its Legal Effects on the Merchant According to Jordanian Law." Al-Isra Private University, 2020.

<sup>26</sup> Mohammad Naser Abdul Karim Alkhawaldeh, "The Problem Of International Insolvency Rule Between What It Is And The Mechanism For Its Recognition In Jordanian Legislation." *Journal of Critical Reviews* 7, no. 19 (2020): 3549–60.

<sup>27</sup> Al-Sanhuri, "Part 2: The Theory of Commitment from a General Perspective. Volume 2. The Impact of Commitment." In *Al-Waseet: Illustration for the Civil Law*, 2nd Ed. (Cairo: Al-Feker Al-Arabi Publishing and Distribution House, n.d).

<sup>28</sup> F. S. Saeed, "The Legal Regulations Governing Civil Insolvency." The Middle East University, 2014.

<sup>29</sup> Murad Mahmoud Al-Shnikat, "The Meaning and Declaration of Commercial and Civil Insolvency under the Provisions of the Jordanian Insolvency Law No. 21 of 2018." *Journal of Politics and Law* 13, no. 1 (February 29, 2020): 161–75. <https://doi.org/10.5539/jpl.v13n1p161>.

<sup>30</sup> Jordanian Insolvency Law No. 21 of 2018.

insolvency refers to legal insolvency or insolvency in general. Specifically, it relates to the debtor's failure to pay his outstanding debts regularly.

#### 4. Insolvency Test Practice in Indonesia

We still remember the monetary crisis that hit Indonesia's banking world in 1998. When capital outflows have occurred and public trust has decreased in banks, people have withdrawn money from banks, which impacts the crisis in the banking world. Many banks could not survive and were liquidated. The actual soundness sector and banking prudence are like two sides of a coin.<sup>31</sup> At the International Monetary Fund (IMF) initiative, Law Number 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations (hereinafter referred to as the Bankruptcy Act) was issued to regulate the debt payment system.

During the COVID-19 pandemic, almost all countries in the world, including Indonesia. Many banks are experiencing challenging conditions because bad loans hit various business debtors, giving rise to multiple circumstances for banks to file bankruptcy applications to business actors. Before the Bankruptcy Law came into effect, Indonesia applied the concept of the Insolvency Test, namely at the time of Faillissements – verification (Staatsblad 1905 No. 217 junto Staatsblad Year 1906 No. 348). However, after the Bankruptcy Law came into effect, the Insolvency Test as a condition for Bankruptcy was no longer valid.<sup>32</sup> In this chapter, the authors would like to examine the historical context of why the Insolvency Test requirement does not apply as a condition for a bankruptcy application.

The terms bankruptcy and insolvency have different meanings. Sjahdeni,<sup>33</sup> defines insolvency as a financial state (a financial state) against a subject of civil law. Meanwhile, Bankruptcy is a legal state of a civil law subject. Conceptually, a debtor can only be declared bankrupt by the court if the debtor is in an insolvent condition. However, debtors who are already insolvent cannot be declared bankrupt by law but must go through the bankruptcy application process to the court.

How is the insolvency condition interpreted? That the debtor is declared insolvent only if the value of the debt obligation is greater than the value of the asset. This condition is known as balance sheet insolvency. According to Article 47 of the Commercial Code, a debtor is considered insolvent when he has suffered continuous losses and has reduced his capital by more than 50%. Balance sheet insolvency is different from cash-flow insolvency (CFI). CFI is defined as the debtor's financial condition who does not have sufficient liquidity to pay debts at maturity because the cash inflow is smaller than the

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<sup>31</sup> Halliday, Terence C., and G. Carruthers Bruce. "Foiling the Financial Hegemons: Limits to the Globalisation of Corporate Insolvency Regimes in Indonesia, Korea and China." (2007).

<sup>32</sup> HERSUGONDO, Hersugondo, Nabila ANJANI, and Imang Dapit Pamungkas. "The Role of Non-Performing Asset, Capital, Adequacy and Insolvency Risk on Bank Performance: A Case Study in Indonesia." *The Journal of Asian Finance, Economics and Business* 8.3 (2021): 319-329. <https://doi.org/10.13106/jafeb.2021.vol8.no3.0319>

<sup>33</sup> Shubhan, M. Hadi. "Charging Director of Company with Personal Bankruptcy for Company Mismanagement." *Jurnal Hukum dan Peradilan* 8.3 (2019): 353-370. <http://dx.doi.org/10.25216/jhp.8.3.2019.353-370>

cash outflow, even though the asset value is still more significant than the debt value.<sup>34</sup> The legal implications of CFI with Balance sheet insolvency are different. If a CFI condition occurs, then the non-payment of the debtor's debt is a breach of contract dispute which is not the domain of the bankruptcy case. If there is a balance sheet insolvency condition, the issue is a bankruptcy law regime.

#### 4.1. Debate on the conditions of the Insolvency Test: Indonesian Perspective

An essential principle in bankruptcy law is that debtors can only be bankrupt if they are in an insolvency state. This condition applies to Bankruptcy Laws in various countries. However, Article 2 paragraph (1) of the Indonesian Bankruptcy Law states that insolvency is not a condition for Bankruptcy. Article 2 paragraph (1) of the Bankruptcy Law only requires two things: (a) the existence of at least two debts, and one of the debts is due and can be collected.<sup>35</sup> This article means that the insolvency condition in the bankruptcy application in Indonesia is not a condition for the Bankruptcy of a debtor.

Teddy Anggoro stated that he did not deny that any bankrupt person or legal entity must be in a state of insolvency. Still, he did not agree with the proposal for an insolvency test to be used as a condition for Bankruptcy.<sup>36</sup> The principle of the state of insolvency applies in the Indonesian bankruptcy law system, both in the applicable *faillless verordening* (FV) and the applicable Bankruptcy Law.

The concept of bankruptcy assessment exists in two regimes. First, the insolvency regime is a condition for declaration of Bankruptcy or "pre-bankruptcy conditions". Second, the *concursum creditorium* regime is a condition for indicating Bankruptcy or presumed to be insolvent. This condition means that when the conditions for two creditors and one debt are due, the debtor must be assumed insolvent. We do not pay attention to whether the debtor can or cannot pay the debt. Based on such explanation, the Bankruptcy Law does not place the condition of insolvency as not a condition for Bankruptcy.<sup>37</sup> Nevertheless, suppose the debtor has been declared bankrupt, and the debtor does not submit a proposal for reconciliation or the proposal for reconciliation. In that case, he can be called insolvent. If we insist on adopting the Insolvency Test, then the proof in the insolvency test to show that the assets are less than the liabilities can be accomplished through an accounting formula whose tracking is based on the

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<sup>34</sup> Retnaningsih, Sonyendah, and Isis Ikhwanyah. "Legal Status of Individual Bankrupt Debtors After Termination of Bankruptcy and Rehabilitation Under Indonesian Bankruptcy Law." *Indon. L. Rev.* 7 (2017): 79. <http://dx.doi.org/10.15742/ilrev.v7n1.289>

<sup>35</sup> Robert, Robert, Rosa Agustina, and Bismar Nasution. "The Rationalization of Debt Discharge Policy for Individual Debtors in Indonesian Bankruptcy Regime." *Sriwijaya Law Review* 6.1 (2022): 101-121.. <http://dx.doi.org/10.28946/slrev.Vol6.Iss1.928.pp101-121>

<sup>36</sup> Anggoro, Teddy. "Transformasi Asas Publisitas Kepailitan Dan Pkpu Untuk Penurunan Biaya Kepailitan Dan Kemudahan Akses Informasi Dalam Mendukung Pemulihan Ekonomi Indonesia." *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional* 10.3 (2021): 479-497. <http://dx.doi.org/10.33331/rechtsvinding.v10i3.746>

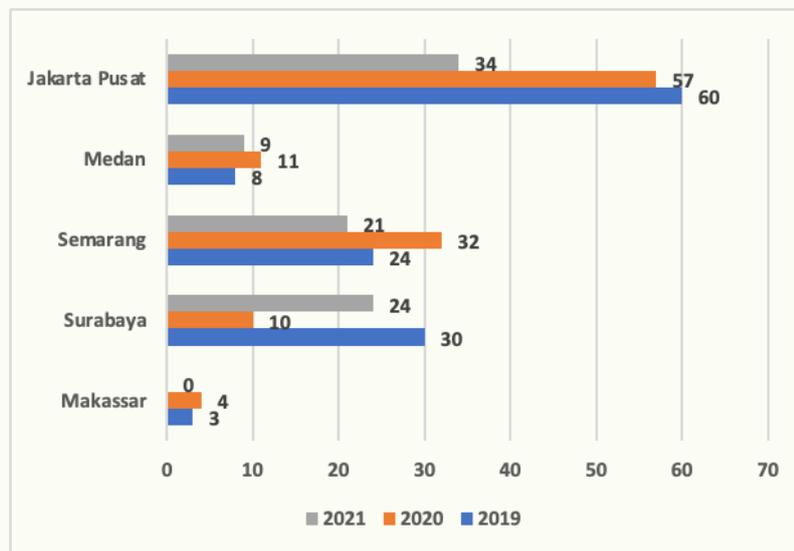
<sup>37</sup> Permatasari, Cintya Sekar Ayu, and Octa Nadia Mellynda. "Temporary Measures on Bankruptcy: Alternatives to the Moratorium on Act 37/2004 in Resolving Indonesian Bankruptcy During the COVID-19 Pandemic." *Lex Scientia Law Review* 5.2 (2021): 19-40. <https://doi.org/10.15294/lesrev.v5i2.50600>

company's financial statements.<sup>38</sup> However, the condition is that it is difficult to obtain financial information for creditors.

#### 4.2. Bankruptcy Moratorium Issue

Bankruptcy instruments are considered as a weapon for business people to solve their liquidity problems during the COVID-19 pandemic so that the number of bankruptcy filings increases. According to the Indonesian Employers' Association (APINDO), a pandemic situation can be used by certain parties for purposes that are not in good faith. Moral Hazard in the bankruptcy petition is considered to have put pressure on the business world, trying to restore the situation. Based on these considerations, APINDO proposes to the government to issue a Regulation on the Bankruptcy Moratorium until 2025.

Chart 1. Bankruptcy Application Data at the Commercial Court from 2019 to 2021<sup>39</sup>



Suppose this moratorium policy is enforced without a comprehensive assessment. There will only be a civil collection route with three years of not implementing the Bankruptcy Law. It is feared that this moratorium policy will be followed by debtors who "do not want" to pay their debts when the company can afford it. Nevertheless, the bank can collapse because no one is willing to lend, and the bank will have no way of recovering its receivables. Investor confidence will decrease to place funds due to the reduced certainty of returning investment funds that have been given to the Indonesian market.

<sup>38</sup> Watters, Casey. "SPVs as a barrier to cross-border insolvency proceedings: Lessons from Indonesia." *Australian Journal of Corporate Law* 32 no. 2 (2017): 241-259.

<sup>39</sup> See: [http://sipp.pn-jakartapusat.go.id/list\\_perkara](http://sipp.pn-jakartapusat.go.id/list_perkara); <https://sipp.pn-semarangkota.go.id/>; <https://sipp.pn-medankota.go.id/>; <http://sipp.pn-makassar.go.id/>, accessed on 26 February 2022

## 5. The Legal Effects of the Insolvency Theory

Insolvency is an area of law of increasing importance not merely in its own right but because it impinges on a host of other sectors such as the employment, tort, environmental, pension and bank.<sup>40</sup> The insolvency theory is a legal system whose ultimate goal is to provide balance and protection for both parties (creditor-debtor) in a commercial relationship. The main goal of the insolvency law is based on the premise that all the parties affected by this law are to be treated as equals.<sup>41</sup>

The importance of regulating the insolvency law lies in several aspects: the first is to guarantee creditors' rights through a general guarantee. The new Jordanian insolvency law includes many precautionary and executive procedures that ensure the protection of the creditor's right over the funds of their debtors.<sup>42</sup> The idea of insolvency is closely related to the concept of the financial state in which it means the debtor rights in front of others and the rights of others in front of the debtor, as the financial state of an individual does not include existing rights and obligations only, but also reflects on future rights and responsibilities.<sup>43</sup> The aim of enacting the insolvency theory is to keep the debtor's financial state to protect the creditors. Hence, insolvency litigation aims to preserve the creditors' rights through the law's preventive means, such as precautionary seizure.<sup>44</sup> Also, regulating the insolvency theory would protect the creditor from the misconduct of his/her debtor by preventing them from actions that would harm the creditor, such as smuggling money or increasing his debts, as confirmed by Article 12/A/4 of the Jordanian Insolvency Law, which state the following: "The court may, on its own or at the request of any of the creditors, take precautionary procedures to preserve the insolvency funds value and protect the rights of all parties, or limiting the powers of the debtor in carrying out his economic activity."<sup>45</sup>

Furthermore, one of the bright aspects of the new insolvency law is to prevent one of the creditors' arbitrariness from expropriating the debtor's money, as paying the debtor's money to one creditor without the others would cause harm to the rest of the creditors. Hence, the fair insolvency legal system came to prevent this from happening, so it is not possible, based on the insolvency theory, that one of the creditors expropriate with the money that the debtor has in isolation from the others.<sup>46</sup>

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<sup>40</sup> Vanessa Finch, "The Measures of Insolvency Law." *Oxford Journal of Legal Studies* 17, no. 2 (1997): 227–51.

<sup>41</sup> Rizwaan Jameel Mokal, *Corporate Insolvency Law*. (Oxford: Oxford University Press, 2005). <https://doi.org/10.1093/acprof:oso/9780199264872.001.0001>.

<sup>42</sup> Hassan Abdel Latif, *In-Kind Insurances, a Comprehensive Study of The Provisions of Mortgage, Insurance and Privilege*. (Beirut: Manshwart Al-Halabi Human Rights, 2007).

<sup>43</sup> Al-Sanhuri, "Part 2: The Theory of Commitment from a General Perspective. Volume 2. The Impact of Commitment." In *Al-Waseet: Illustration for the Civil Law*, 2nd Ed. (Cairo: Al-Feker Al-Arabi Publishing and Distribution House, n.d).

<sup>44</sup> Murad Mahmoud Al-Shnikat, "The Meaning and Declaration of Commercial and Civil Insolvency under the Provisions of the Jordanian Insolvency Law No. 21 of 2018." *Journal of Politics and Law* 13, no. 1 (February 29, 2020): 161–75. <https://doi.org/10.5539/jpl.v13n1p161>.

<sup>45</sup> Jordanian Insolvency Law No. 21 of 2018.

<sup>46</sup> Tawfiq Hassan Faraj, "Part 2: Obligations." In *Explanation of Civil Law*. (Cairo: Dar Al-Nahda Al-Arabiya, 1984).

This was also confirmed by Article (33) of the new Jordanian Insolvency Law, as it states the following:

1. The damage due to the insolvency shall be considered genuine if the debtor concludes a transaction that brings him a return that is much less than the consideration achieved for the other party.
2. The debtor's preferential disposition shall be considered unjustified if the debtor performs an act that would put one of the creditors in a better position than other creditors in the insolvency proceedings.

The reason behind establishing the insolvency system is to protect the debtor's rights and to preserve his/her money. Although the insolvency system is different from the bankruptcy system, the two systems are still similar in purpose, but the second is stricter than the first. The insolvency system prevents the creditors from confinement the insolvent money, as well as, insolvency does not lead to the collective elutriation of the debtor's money. It is also not permissible to execute on the insolvent money when he/she declares his/her insolvency except through insolvency procedures. These procedures protect the insolvent and ensure that his/her creditors cannot abuse their rights granted them under the insolvency law provisions.<sup>47</sup>

As for the social aspect, the insolvency system has a benefit on the economic and social system of the state in general, as the faltering economic conditions experienced by societies have raised the percentage of debts, and in view of this matter, the insolvency system helps to limit those economic and social effects on society and economic life, as it leads to not imprisoning the debtor and helping him to get out of his financial crisis. It may also lead the insolvent to get out of this crisis and return to his/her financial activity again, developing his money and reducing his debts in the future.<sup>48</sup>

The declaration of the debtor insolvency by a competent court decision entails the insolvent and his/her creditors a set of effects stipulated in the Jordanian insolvency law, which is:

1. Non-effectiveness of the actions of the insolvent debtor during the year preceding the date of declaring the insolvency,
2. It is not permissible to sell insolvency owed funds during the preliminary stage, except within specific conditions and procedures and with the court's approval.
3. Stopping litigation against the insolvent debtor
4. The inability of the creditors to execute on the debtor's money for six months from the date of declaring the insolvency
5. The inability of the creditors to seizure on the debtor's money for six months from the date of declaring the insolvency
6. The suspension of calculating interest and delay penalties on insolvency debts from the date of declaring the insolvency

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<sup>47</sup> Aziz Al-E'kaili, "Part No. 3: The Provisions of Bankruptcy and the Settlement That Avoid One Getting Bankrupted: A Comparative Study." In *Al-Waseet: Illustration for the Commercial Law*, 4th Ed. (Al-Thaqafeh Publishing and Distribution House, 2011).

<sup>48</sup> UNCITRAL, *Legislative Guide on Insolvency Law*.

7. The possibility of rescission contracts in force, sale contracts, or rental contracts if the court sees that it will benefit the insolvency procedures.<sup>49</sup>
8. The possibility of rescission or modification of the labour contracts if the court sees that it will benefit the insolvency procedures.

## 6. The Mock Application of the Insolvency Law by the Jordanian Courts

Since 2018, many cases have been brought up in front of the Jordanian courts to declare the insolvency of many Jordanian companies, traders, and citizens. The Jordanian Judicial Council has indicated that 123 insolvency cases have been registered with the courts since the law came into force in 2018. Faced with this situation, which makes it challenging to theorize and analyze after the law is in force, which is supposed to take its natural course of implementation, the surprise occurred when all the cases brought up in front of the competent court were rejected.

When it comes to the rejection of all cases which was brought up in front of the competent court, it is necessary to examine the dimensions carefully and the impact of this law on the influential parties which they are trying to prevent its enforcement in one way or another, in order to protect what it's called "higher national interest" of financial institutions (Jordanian Banks), which fear that this law will affect on its guarantor funds according to the effects of declaring insolvency mentioned in the article (17) of the Jordanian insolvency Law, in addition to the article (22/a) which stipulates that: it is not permissible to execute on the debtor's funds after the declaration of insolvency and the suspension of the enforcement procedures that started before declaring insolvency.

Accordingly, since the banks exercise their legitimate legal action on the failure debtors, the insolvency law will undoubtedly be an obstacle for the bank who want to practice its legitimate legal action such as imprisonment, financial fines, legal interest, or seizure of the property of the debtor to force the debtors to fulfil his/her financial obligation. Therefore, the Banking sector in Jordan considers itself the biggest loser from implementing the Jordanian Insolvency Law. Even though the Banking sector in Jordan has succeeded in one way or another in eliminating the implementation of the law in the face of the actual defaulters at this challenging time, this success in eliminating the implementation of the Jordanian insolvency Law can be seen clearly in the approach that the Jordanian courts (Court of First Instance, Court of Appeal, Court of Cassation) have taken in their decision towards declaring the insolvency, for example, the Salt First Instance Courts have concluded that:

Since the objector is a licensed bank, in which it had granted the objected company (the company which has submitted an application to declare its insolvency) a banking facility as indicated previously, based on that, claiming the insolvency of the objected company would cause adverse effects on the objector (the bank) such as cessation of interest, and classify the loans and banking facilities as non-performing debts in which would reflect those effects on the annual profits of the objector. Moreover, these effects will affect the entire banking sector, which is the cornerstone of the national economy.

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<sup>49</sup> Jordanian Insolvency Law No. 21 of 2018.

Instead, these effects go beyond the banking sector to prejudice the rights of the public treasury represented by the tax, which is a tributary of public revenues, which is 38% of the profits regarding the banking sector. In addition, using the insolvency theory by submitting a request to declare someone insolvency by the competent court will become a method for the debtors who want to escape from their financial obligations.<sup>50</sup>

Through analyzing the decisions issued by the Jordanian courts of the first instance, appeal, and cassation,<sup>51</sup> it's worth noticing that all the cases which were brought up in front of the competent court were rejected due to the failure of one of the formal conditions or a deficiency in one of the conditions of Article (7,8) of the Jordanian Insolvency Law, which leads us to say that the standards followed by Jordanian courts are still ambiguous regarding the application of the insolvency theory under the Jordanian law. Although, in June 2021, the Jordanian legal system witnessed the application of the insolvency law for the first time to a Jordanian company, "Lafarge Cement Jordan,"<sup>52</sup> which was able to declare its insolvency after its debts exceeded double of its capital, which forced the Jordanian company to recourse to the insolvency application to rescue the company from declaring it bankruptcy.<sup>53</sup> Through analyzing the case of Lafarge, it seems that the Jordanian court has followed a simple standard which can be analyzed through Four main points:

1. When the company submitted its application to the competent court, the company was suffering from a deficit in its ability to pay due debts, as the value of its debts exceeded the total value of its capital and assets, which made the company unable to pay its due debts on time, which mean that the Jordanian company was in actual insolvency.
2. During the period before submitting its application to the competent court to declare its insolvency, the Jordanian company attempted various available means to get out of its financial struggle, but all of its attempts were unsuccessful. This leads us to think that the esteemed court has searched for the real reason that made the company require declaring its insolvency and found that the company tried by various means to survive from reaching the insolvency. Still, it failed, meaning that the purpose of the insolvency application was based on genuine reasons and not fraud reasons to escape from paying debts and to benefit from the provisions of the insolvency law.

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<sup>50</sup> Salt Court of Appeal Decision No. 267 of 2020.

<sup>51</sup> Amman Court of Appeal Decision No. 18175 of 2019; Amman Court of Appeal Decision No. 21067 of 2019; Amman Court of Appeal Decision No. 23821 of 2019; Amman Court of Appeal Decision No. 22674 of 2019; Amman Court of Appeal Decision No. 18959 of 2019; Jordanian Court of Cassation Decision No. 8690 of 2019; Amman Court of Appeal Decision No. 11511 of 2020; Amman Court of Appeal Decision No. 8290 of 2020; Amman Court of Appeal Decision No. 11047 of 2020; Amman Court of Appeal Decision No. 11026 of 2020; Amman Court of Appeal Decision No. 11535 of 2020; Salt Court of Appeal Decision No. 267 of 2020.

<sup>52</sup> Lafarge Cement Jordan (JOCM) is a Jordan-based public shareholding company engaged in the production and distribution of cement and related products. The Company is organized into the following business segments: Cement and Ready Mix Concrete. The Company cement products include blended cements, Portland cements and special cements. The Company offers a range of products and solutions for a number of different applications in both building and construction sectors. The Company trades in cement products directly or through intermediaries within and outside Jordan. The Company owns cement plants, one in Fuheis and another in Rashadiyah, and has an export terminal in Aqaba.

<sup>53</sup> Decision No. 6372 of 2020 - Court of Cassation.

3. The company can return to achieve profits by adjusting its situation, scheduling its debts, and re-evaluating its immovable assets.
4. Considering the legal period stipulated in Article (7/A) of the insolvency law, starting after the end of all the company's attempts to get out of the financial struggle, that is, after the last letter issued by the company's board of directors to the shareholders to stand by the company and not from the beginning of the realization of losses and the rise in indebtedness.

This decision is the first of its kind in Jordan so that Lafarge will be the first Jordanian company to benefit from the provisions of the insolvency law. It is worth noting that the court did not hesitate to accept insolvency, meaning that the mentioned points are the standard that the Jordanian companies can follow to declare their insolvency. Finally, the researchers is calling the Jordanian judiciary to implement the insolvency law provisions without bias and without taking into account other interests, even if they are banks. The Jordanian judiciary must remember that the law was issued only to help the companies survive during the financial struggle that Jordan is living now. This goal cannot be achieved only with a proper application of the insolvency law provisions.

## 7. Conclusion

The main research goal is to identify the insolvency standard followed by the Jordanian courts and its impact on Jordan's economy. The data collection and analyses show that Jordanian court depends on four main elements to declare the insolvency of a Jordanian citizen (individual or company) which is: actual insolvency, the purpose of the insolvency application was based on genuine reasons and not fraud reason, the company can return to achieve profits if it is allowed to adjust its situation. Even though the mock application of the law can be seen clearly without the need for a microscope, all cases brought up in front of the competent court were rejected. In conclusion, the application of the insolvency law in Jordan is still a theory, as until 2021, Jordanian courts still hesitate to declare the insolvency of citizen based on reasons that are not related to the law but rather to achieve an interest for the benefit of certain parties to protect what it's called "higher national interest" of the Jordanian financial institutions (Jordanian Banks). Jordanian courts should cautiously extend the scope of insolvency theory in order for the law to achieve the purpose for which it was issued.

Comparing the practice of the Indonesian state, which has switched from the insolvency test concept to the presumption of bankruptcy, this is a lesson because, in the conditions of the COVID-19 pandemic, companies will find it challenging to request reports due to uncertain situations. According to the financial aspect, large companies are still good, but companies are reluctant to pay debts. This condition means that if the system used is a bankruptcy test, this case cannot be brought to the Commercial Court, so the court cannot force debtors who are reluctant to pay their debt obligations

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