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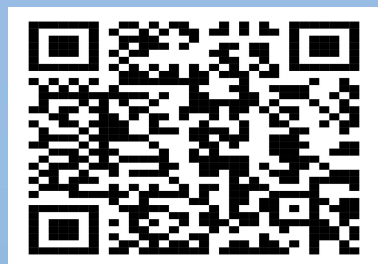
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## Contemporary Islamic Economic Law on Legal Protection for Bankrupt Guarantors: Comparative Insights from Common Law and Asian Jurisdictions

**Abstract:** The legal protection of guarantors declared bankrupt or suspended from debt payment obligations (PKPU), together with the principal debtor, remains a critical yet underexplored issue in Indonesian insolvency law. This study examines the scope and adequacy of such protections under contemporary Islamic economic law, providing comparative insights from selected common law and Asian jurisdictions. Employing a normative juridical approach combined with comparative legal analysis, the research analyses statutory provisions, judicial precedents, and doctrinal interpretations. The study highlights the imbalance of liability between guarantors and debtors, the absence of explicit safeguards under Law No. 37 of 2004 on Bankruptcy and PKPU, and the resulting implications for creditor rights and economic justice. Comparative analysis draws from the United Kingdom and United States (standard law systems) and Singapore, Japan, and Malaysia (Asian jurisdictions), revealing more structured protections for guarantors, including mechanisms such as independent liability, automatic stay, and negotiated debt restructuring. The findings indicate that Indonesia's current framework inadequately recognises the secondary and derivative nature of guarantor obligations, exposing them to disproportionate risk. This study contributes to the academic discourse by integrating contemporary Islamic economic principles into the analysis of insolvency law, providing a normative framework for reform and offering comparative insights that can inform both legislation and future research on guarantor protection. The study recommends legislative reform to explicitly regulate guarantor protection, integrating principles of proportionality, good faith, and balanced creditor-debtor relations, in line with contemporary Islamic economic law.

**Keywords:** Legal Protection, Guarantor, Bankruptcy, Islamic Economic Law.

## INTRODUCTION

The legal position of guarantors in Indonesia's bankruptcy (pailit) and suspension of debt payment obligations (PKPU) framework remains unclear, even amid the country's significant legal developments in insolvency. Law No. 37 of 2004 provides a detailed framework for bankruptcy and PKPU procedures, but it does not explicitly regulate guarantor protection. As a result, guarantors are often declared bankrupt alongside the principal debtor, even when their role is merely accessory or collateral. This practice exposes guarantors to disproportionate legal risks, undermining the fundamental distinction between primary and secondary liability. Consequently, questions arise regarding fairness, proportionality, and economic justice, and there is an urgent need for a systematic legal analysis that considers both domestic and comparative perspectives to identify reform pathways.<sup>1</sup>

While several studies have explored Indonesia's insolvency law, they have predominantly focused on debtor-creditor relations, corporate restructuring mechanisms, or general judicial interpretations of bankruptcy provisions, leaving the position of guarantors underexplored. Research by Dedi Yudishtira (2016) highlights practical challenges faced by guarantors but does not address the normative or comparative aspects of legal protection.<sup>2</sup> Similarly, Serlika Aprita et al (2023) discuss legal protection and proportional justice in general terms but overlook the unique nature of guarantor liability as secondary and conditional.<sup>3</sup> Comparative studies, however, indicate that other jurisdictions—prevalent law countries like the United Kingdom and the United States, as well as Asian nations such as Singapore, Japan, and Malaysia—provide more structured mechanisms to protect guarantors. These include independent liability, automatic stay

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<sup>1</sup> Risma Nur Arifah and Arman Safril Adam, 'Legal Protection of Concurrent Creditors for The Debts That Are Not Guaranteed by Property Rights According to Bankruptcy Law and Islamic Law', *AT-TURAS: Jurnal Studi Keislaman* 9, no. 1 (June 2022): 1-19, <https://doi.org/10.33650/at-turas.v9i1.3398>.

<sup>2</sup> Dedy Yudhistira, 'Kepailitan Terhadap Penjamin Perorangan', *Jurnal Paradigma Hukum Pembangunan* 1, no. 02 (August 2016): 97-108, <https://doi.org/10.25170/paradigma.v1i02.1722>.

<sup>3</sup> Serlika Aprita et al., 'Analisis Jaminan Perorangan (Personal Guarantor) Dalam Perkara Kepailitan Ditinjau Dari Perspektif Hukum Dan Hak Asasi Manusia', *Justicia Sains: Jurnal Ilmu Hukum* 8, no. 1 (July 2023): 54-66, <https://doi.org/10.24967/jcs.v8i1.2375>.

provisions, and negotiated restructuring, which offer more explicit recognition of guarantor obligations and limit undue risk exposure. Such comparative insights highlight the potential for Indonesia to strengthen its regulatory framework by learning from international practices while adapting them to local contexts.

Despite these insights, a significant research gap remains. The treatment of guarantors as secondary obligors has not been systematically examined in Indonesian legal scholarship, and there is limited integration of contemporary Islamic economic principles in assessing the legal protections afforded to them. Current practices risk imposing the same level of liability on guarantors as on primary debtors, creating structural injustice and undermining the accessory nature of guarantees. This study addresses this gap by critically analysing the legal protection of guarantors declared bankrupt in relation to debtors under contemporary Islamic economic law, while also drawing lessons from selected common law and Asian jurisdictions. The study aims to provide a comprehensive understanding of the existing normative framework, evaluate its adequacy in ensuring fairness and proportionality, and identify reforms that align with both international best practices and principles of Islamic economic justice.

In this context, the central research question guiding this study is: how can Indonesia effectively regulate and protect guarantors in bankruptcy and PKPU proceedings to ensure fairness, proportionality, and legal certainty, while integrating principles of contemporary Islamic economic law and drawing on comparative insights? By addressing this question, the study makes an academic contribution by filling a gap in the literature on guarantor protection and Islamic economic perspectives, and a practical contribution by offering recommendations for law reform that balance the interests of creditors, debtors, and guarantors, ultimately supporting a more equitable and just insolvency system in Indonesia.

## METHOD

This study employs a normative juridical method<sup>4</sup> that examines statutory norms, doctrinal principles,<sup>5</sup> and authoritative legal interpretations concerning the protection of guarantors declared bankrupt alongside debtors. Focusing on Law No. 37/2004 on Bankruptcy and the PKPU, as well as the Civil Code provisions on *borgtocht*, the research evaluates the coherence of Indonesia's insolvency framework with the principles of legal certainty, proportionality, and fairness, including those emphasised in contemporary Islamic economic law. To structure the analysis, three approaches are used: the statute approach to assess the legal foundation of guarantor obligations; the conceptual approach to explore theories of legal protection, proportional justice, and accessory obligations; and the comparative approach to analyze guarantor protection mechanisms in selected common law jurisdictions (the UK and the US) and Asian countries (Singapore, Japan, and Malaysia).

The study draws on primary legal sources—Indonesian statutes, Commercial Court decisions, and foreign legislation—supplemented by secondary materials, including scholarly books, journal articles, and expert commentaries, as well as tertiary materials to enhance conceptual clarity. Data are analysed qualitatively through classification,<sup>6</sup> interpretation, and doctrinal reasoning, employing grammatical, systematic, and teleological methods to uncover the logic and purpose of bankruptcy provisions affecting guarantor rights. The findings are then synthesised with comparative insights to formulate recommendations that align with international best practices and the justice-oriented principles of contemporary Islamic economic law, laying a coherent foundation for future reform of guarantor protection within Indonesia's insolvency regime.

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<sup>4</sup> Matthew B Miles and A. Michael Huberman, *Analisis Data Kualitatif : Buku Sumber Tentang Metode Metode Baru* (Jakarta: Universitas Indonesia Press, 2014).

<sup>5</sup> Laksana, Andri Winjaya, Adhi Budi Susilo, Peni Rinda Listyawati, Setiawan Widiyoko, and Toni Triyanto. "Legal Uncertainty in Law Enforcement for Drug Addicts Resulting in Criminal Disparity." *Yuridika* 40, no. 2 (2025): 253-270.

<sup>6</sup> Laksana, Andri Winjaya, Akhmad Ikraam, and Anila Robbani. "The Liability of Criminal Law for Perpetrators of Goods Embezzlement." *Journal of Justice Dialectical* 2, no. 2 (2024): 70-83.

## RESULTS AND DISCUSSION

### Legal Position and Vulnerabilities of Guarantors in Indonesian Insolvency Law

The legal position of guarantors (borg) in the Indonesian legal system is essentially accessory, meaning that their existence and obligations depend on the principal debtor's debt. However, despite being a secondary party in theory, judicial practice often places guarantors in a position as vulnerable as debtors, particularly in bankruptcy and suspension of payment (PKPU) cases. The lack of clear boundaries regarding their obligations increases the legal risks for guarantors, including the possibility of being required to fulfil debts beyond their actual capacity.<sup>7</sup>

Law No. 37 of 2004 on Bankruptcy and PKPU does not provide explicit provisions concerning the protection of guarantors who are declared bankrupt alongside debtors. This normative gap leaves interpretation to judges' discretion, resulting in uncertainty in practice. Several decisions of the Commercial Court even suggest a tendency to treat guarantors as parties who may be declared bankrupt independently, even though their obligations arise only when the principal debtor truly fails to fulfil its payment obligations. This vulnerability is further exacerbated by the application of the doctrine of joint liability without a clear distinction between guarantors, as accessory parties, and debtors, as principal obligors. Such equal treatment has profound implications, as guarantors may still be petitioned for bankruptcy even when the principal debtor has not defaulted. This approach contradicts the fundamental nature of a guarantee agreement, which should be subsidiary.<sup>8</sup>

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<sup>7</sup> Febriyana Nursyamsudin, Oyo Sunaryo Mukhlas, and Ramdani Wahyu Sururie, 'Comparison of Bankruptcy Concepts and Procedures in Islamic Economic Law and Indonesian Bankruptcy Law', *Strata Law Review* 3, no. 2 (September 2025): 65-79, <https://doi.org/10.59631/slr.v3i2.140>.

<sup>8</sup> Sabrina Zahara Noor Rahma and Siti Mahmudah, 'Tinjauan Yuridis Terhadap Kedudukan Penjamin Perorangan (Borgtocht) Dalam Penyelesaian Kredit Macet Di Pt. Bank Perkreditan Rakyat Data Semarang', *Jurnal Ilmiah Living Law* 16, no. 2 (July 2024): 119-133, <https://doi.org/10.30997/jill.v16i2.12703>.

The absence of adequate regulations also leads to procedural injustices within bankruptcy proceedings. Guarantors do not have sufficient opportunity to challenge bankruptcy petitions or to prove that no enforceable obligation has yet arisen. The "simple proof" requirement in bankruptcy petitions exacerbates the situation, as creditors only need to demonstrate the existence of two creditors and one due debt, without considering the accessory nature of the guarantee. On the other hand, Indonesian civil law, as outlined in the Civil Code (KUHPerdata), clearly states that guarantors are not liable until the principal debtor fails to make payment. However, the disharmony between the Civil Code and the Bankruptcy Law makes this protection ineffective. In practice, judges tend to prioritize the creditor's interest in debt recovery over the principle of safeguarding the guarantor.<sup>9</sup>

The situation becomes even more challenging for guarantors who are not large business entities, but rather individuals or small organisations with limited bargaining power in credit agreements. Many guarantors sign guarantee contracts without fully understanding the risk of being declared bankrupt, due to inadequate transparency and significant information asymmetry in contractual relationships. This reality stands in direct contrast with the principle of equality of bargaining power, which is essential for contractual fairness. These legal vulnerabilities also carry significant economic implications. Uncertainty about guarantors' rights and responsibilities may deter public willingness to enter into guarantee agreements, even though such arrangements play a crucial role in supporting economic financing. A bankruptcy system that fails to distinguish between guarantors and debtors clearly may create systemic risks that undermine business stability.<sup>10</sup>

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<sup>9</sup> Liza Mashita Ramadhania, 'A Dualistic Concept of Personal Guarantee Responsibility and Its Relevancy with Law Number 37 of 2004 Concerning Bankruptcy and Suspension of Debt Payment Obligation A Dualism of Personal Guarantee Responsibility In Indonesia Bankruptcy Law', *Legal Brief* 12, no. 1 (April 2023): 22-35, <https://doi.org/10.35335/legal.v12i1.751>.

<sup>10</sup> Selvia Oktaviana et al., 'Legal Position of Creditors Holding Fiduciary Security Rights in Debtor Bankruptcy Processes', *International Journal of Multicultural and Multireligious Understanding* 11, no. 11 (November 2024): 401-408, <https://doi.org/10.18415/ijmmu.v11i11.6327>.

## Contemporary Islamic Economic Law Perspective on Guarantor Protection

In contemporary Islamic economic law, guarantees—known through the concepts of *kafālah* and *dhamān*—are regarded as instruments that facilitate transactions, build trust between parties, and support the smooth functioning of economic activities. Even so, Islamic teachings firmly place justice at the centre of all financial and contractual relationships. For this reason, the obligations imposed on a guarantor must remain within reasonable limits and must not become a burdensome or unjust liability. A guarantor is meant to assist in a transaction, not to become a party exposed to disproportionate harm.<sup>11</sup>

Classical Islamic legal sources emphasise that, in *kafālah*, the guarantor assumes responsibility only when the principal debtor fails to fulfil their obligation. The principle "*al-dhamān tabī' li al-ashl*"—that a guarantee follows the principal obligation—clarifies that a guarantor cannot be held liable independently in the same way as the primary debtor. This conceptual foundation underscores that, in Islamic law, the guarantor is inherently a secondary party, not one who can be treated as equivalent to the debtor.<sup>12</sup>

The principle of *lā ḍarar wa lā ḍirār* (no harm and no reciprocating harm) further strengthens the idea that no party, including a guarantor, should suffer disproportionate loss as a result of a financial arrangement. Declaring a guarantor bankrupt or imposing obligations beyond their capacity without a clear default from the debtor constitutes a form of *ḍarar*, which is prohibited in Islamic law. This principle remains highly relevant today as a benchmark for evaluating the fairness of modern insolvency systems, which often fail to distinguish between accessory and principal obligations.<sup>13</sup> From the perspective of *maqāṣid*

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<sup>11</sup> Mohammad Rizky Siregar, Muthia Sakti, and Iwan Erar Joesoef, 'Legal Liability Framework of a Bankrupt Guarantor (Corporate Guarantee) Toward Creditors in Credit Agreements with Debtors : Analysis of Decision No. 318/Pdt.Sus-PKPU/2022 from the Jakarta Commercial Court', *International Journal of Law and Society* 2, no. 3 (June 2025): 69–80, <https://doi.org/10.62951/ijls.v2i3.649>.

<sup>12</sup> Isdiana Syafitri et al., 'Contemporary Legal Certainty in Insurance Default Claims: A Comparative Study of Islamic and Positive Law Perspectives', *MILRev: Metro Islamic Law Review* 4, no. 1 (June 2025): 539–565, <https://doi.org/10.32332/milrev.v4i1.10465>.

<sup>13</sup> Chaibou Issoufou and Naziruddin Abdullah, 'Revisiting The Concept Of Legal Guarantee In Islamic Law For Structuring Islamic Financial Products', *Humanities & Social Sciences Reviews* 7, no. 2 (July 2019): 396–406, <https://doi.org/10.18510/hssr.2019.7247>.



*al-sharī'ah*, protecting wealth (*ḥifẓ al-māl*) and preventing economic injustice are key objectives. A bankruptcy system that exposes guarantors to excessive losses without clear proportionality contradicts syariah's aim of maintaining a fair distribution of economic burdens. Under *maqāṣid*, economic justice is not merely an ethical value—it is a legal principle that should guide the development of contemporary financial regulations.<sup>14</sup>

Modern Islamic economic thought also affirms that guarantors are entitled to transparent information, informed consent, and clearly defined limitations of liability. These principles align with contemporary responsible lending practices, which aim to protect parties with weaker bargaining power. In contrast, information asymmetry in many conventional credit agreements often leaves guarantors unprotected and vulnerable to harm that could have been avoided. Islamic law likewise recognises the need for legal reconstruction to keep pace with changing economic realities and increasingly complex financial transactions. Contemporary thinkers such as Jasser Auda highlight the importance of a systems thinking approach, which calls for regulatory frameworks that ensure not only financial efficiency but also sustainability and fairness for all participants—including guarantors—within the insolvency system.<sup>15</sup>

From this standpoint, contemporary Islamic economic law strongly supports comprehensive protection for guarantors in bankruptcy proceedings. Such protection includes limiting liability, granting procedural rights to challenge claims, and ensuring clarity in legal processes so that the guarantor's accessory status is respected correctly. These protections are not merely policy preferences; they are integral to the syariah's commitment to justice. Overall, contemporary Islamic economic law provides a robust normative foundation for reforming guarantor protection within Indonesia's bankruptcy system. Integrating syariah principles with national legal frameworks can yield more just, relevant,

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<sup>14</sup> Ade fisti Pongoliu et al., 'Public Health Protection and Social Insurance: Reforming Legal Norms through Contextualized Islamic Economic Law', *Jurnal Ilmiah Mizani: Wacana Hukum, Ekonomi Dan Keagamaan* 12, no. 2 (October 2025): 601–617, <https://doi.org/10.29300/mzn.v12i2.8402>.

<sup>15</sup> Helza Nova Lita, Norazlina Abdul Azis, and Adnan Mahmutovic, 'Legal Analysis of The Application of Islamic Economic Principles in International Trade Law to Realize Fair World Economic Development', *Fiat Justisia: Jurnal Ilmu Hukum* 19, no. 2 (May 2025): 131–152, <https://doi.org/10.25041/fiatjustisia.v19no2.3938>.



and sustainable solutions that align with the broader objectives of Islamic law to promote fairness and balance in modern economic life.<sup>16</sup>

### **Comparative Analysis of Guarantor Protection in Common Law and Asian Countries**

A comparative analysis of various legal systems reveals that common law jurisdictions, such as the United Kingdom and the United States, generally offer more explicit and more structured protections for guarantors than those found in Indonesia.<sup>17</sup> In these systems, guarantors are indeed treated as parties with independent liability; however, such liability is tightly regulated through strict contractual limits and robust transparency requirements. The aim is to ensure that a guarantor's consent is genuine, informed, and grounded in fair contractual practices.<sup>18</sup> In the United Kingdom, guarantor protection is shaped by the Consumer Credit Act and a long line of judicial decisions emphasizing fair dealing, creditors' obligations to disclose relevant information, and guarantors' rights to challenge agreements deemed unfair or unconscionable. The regulatory landscape aims to prevent creditors' abuses of power, particularly when dealing with individuals who may not fully understand the implications of guarantee agreements.<sup>19</sup>

The United States adopts a slightly different model. Although the automatic stay under Chapter 11 of the Bankruptcy Code does not extend to guarantors, US jurisprudence provides robust procedural and contractual safeguards. Courts often allow guarantors to contest obligations that violate principles of good faith or arise from

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<sup>16</sup> Deni Kamaludin Yusup, 'Multi Contract as A Legal Justification of Islamic Economic Law for Gold Mortgage Agreement in Islamic Bank', *Jurnal Ilmiah Peuradeun* 7, no. 1 (January 2019): 1-20, <https://doi.org/10.26811/peuradeun.v7i1.318>.

<sup>17</sup> Laksana, Andri Winjaya, Muhammad Ridwan Lubis, Denny Suwondo, Muhammad Ngazis, and Ratih Mega Puspa Sari. "Integrating Maqasid al-Shari'ah in Contemporary Islamic Legal Reform on Drug Policy." *MILRev: Metro Islamic Law Review* 4, no. 1 (2025): 416-439.

<sup>18</sup> Irawan Soerodjo and Putra Hutomo, 'Legal Position of Personal Guarantee in Security Law', *The International Journal of Politics and Sociology Research* 11, no. 2 (September 2023): 311-315, <https://doi.org/10.35335/ijopsor.v11i2.111>.

<sup>19</sup> Reisha Rizkia Sabila Supardi and Sylvana Murni Deborah Hutabarat, 'Comparative Legal Analysis of Indonesian and South Korean Consumer Protection in Cosmetic Safety Regulations', *Rechtsidee* 13, no. 1 (May 2025): 10.21070/jihr.v13i1.1052-10.21070/jihr.v13i1.1052, <https://doi.org/10.21070/jihr.v13i1.1052>.

unreasonable collection practices. These protections ensure that guarantors are not forced into financial ruin by predatory or misleading creditor behaviour.<sup>20</sup>

Asian jurisdictions offer diverse models, many of which blend civil law and common law principles. Singapore, for example, operates under a hybrid system that carefully balances creditor rights with protections for guarantors. Mechanisms such as statutory demand reviews, capacity-based limitations on liability, and clear procedural safeguards help prevent contractual unfairness and reduce the risk of overburdening individual guarantors.<sup>21</sup>

Japan has undergone particularly significant reforms. Historically, widespread personal bankruptcies occurred as individuals acted as guarantors for family-owned businesses, prompting the government to impose strict limits on personal guarantees for commercial debts.<sup>22</sup> Today, Japan requires professional guarantors and mandates a formal consultation process before guarantee contracts can be finalised, ensuring that individuals do not unknowingly assume excessive financial risk.<sup>23</sup>

Malaysia offers yet another example, combining civil law traditions with Islamic legal principles. The Contracts Act provides guarantor protection and is further reinforced by Islamic banking standards, which limit guarantees to specific circumstances and require that they not impose disproportionate burdens. Islamic finance institutions, in particular,

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<sup>20</sup> Tarunabh Khaitan, 'Guarantor Institutions', *Asian Journal of Comparative Law* 16, no. S1 (December 2021): S40–549, <https://doi.org/10.1017/asjcl.2021.19>.

<sup>21</sup> Rongxin Zeng, 'A Comparative Analysis of the Right of Recourse between Co-Guarantors', *Journal of Politics and Law* 17, no. 4 (October 2024): p30, <https://doi.org/10.5539/jpl.v17n4p30>.

<sup>22</sup> '(PDF) Islamic Law and Modern Guarantees in Malaysia', ResearchGate, accessed 16 November 2025, [https://www.researchgate.net/publication/237290277\\_Islamic\\_Law\\_and\\_Modern\\_Guarantees\\_in\\_Malaysi](https://www.researchgate.net/publication/237290277_Islamic_Law_and_Modern_Guarantees_in_Malaysi) a.

<sup>23</sup> Christina Shintya Hapsari et al., 'Comparative Analysis of Factors Forming Consumer Protection Law in Indonesia and The Philippines', *Jurnal Dialektika: Jurnal Ilmu Sosial* 23, no. 3 (October 2025): 18–27, <https://doi.org/10.63309/dialektika.v23i3.732>.

are required to uphold fairness and prevent guarantors from being exposed to undue hardship.<sup>24</sup>

Across these systems, a consistent pattern emerges: guarantors are recognised as secondary parties, protected through explicit legal mechanisms, and shielded by strict disclosure obligations imposed on creditors.<sup>25</sup> These safeguards reflect a global understanding that guarantors must not be treated as interchangeable with primary debtors, and that their involvement in financial transactions requires heightened sensitivity and fairness.<sup>26</sup> For Indonesia, these comparative insights highlight not only the need for individual justice but also the importance of aligning national regulations with more developed international practices. The models adopted in common law and advanced Asian jurisdictions provide concrete examples of how guarantor protection can be structured more clearly and equitably. Adopting similar approaches would help Indonesia establish a more coherent and just insolvency regime that can safeguard all parties involved, especially those with limited bargaining power.

Table 1. Comparative Overview of Guarantor Protection in Common Law and Asian Countries

Jurisdiction	Legal Basis / Framework	Nature of Guarantor Liability	Key Protections for Guarantors	Notable Features
United Kingdom	<i>Consumer Credit Act</i> , case law (fair dealing)	Independent but tightly regulated	Mandatory disclosure, ability to challenge unfair contracts, protections from creditor overreach	Strong focus on fairness and informed consent
United States	<i>Bankruptcy Code (Chapter</i>	Independent; automatic stay	Rights to contest obligations violating	Broad procedural

<sup>24</sup> Manasi Kumar and Maren Heidemann, 'Contract Law in Common Law Countries: A Study in Divergence', *Liverpool Law Review* 43, no. 2 (August 2022): 133-147, <https://doi.org/10.1007/s10991-022-09312-8>.

<sup>25</sup> Maartje De Visser, Victor V. Ramraj, and Arun Thiruvengadam, 'Constitutions and the Rule of Law in Asia', in *Oxford Research Encyclopedia of Politics* (2024), <https://doi.org/10.1093/acrefore/9780190228637.013.2122>.

<sup>26</sup> Lu Sudirman, Hari Sutra Disemadi, and Arwa Meida Aninda, 'Comparative Analysis of Personal Data Protection Laws in Indonesia and Thailand: A Legal Framework Perspective', *JED (Jurnal Etika Demokrasi)* 8, no. 4 (November 2023): 497-510, <https://doi.org/10.26618/jed.v8i4.12875>.

	11), extensive jurisprudence	not automatically extended	good faith; protections against unreasonable collection	safeguards and creditor-duty doctrines
Singapore	Hybrid civil-standard law insolvency system	Independent but capacity-based limitations	Statutory demand review, proportional liability, and contractual fairness controls	Highly structured, with stringent creditor obligations.
Japan	Post-reform Commercial and Civil Code	Limited use of personal guarantees	Mandatory consultation, use of professional guarantors, and strict restrictions on family-business guarantees	Reforms driven by high personal bankruptcy rates
Malaysia	<i>Contracts Act</i> , Islamic finance regulations	Conditional and limited under Syariah	Guarantee only allowed in specific cases; no disproportionate burden; transparency required.	Dual system (civil + syariah) ensuring fairness and balance.
Indonesia	KUHPdata; UU Kepailitan (no specific guarantor provisions)	Accessory in theory, but treated independently in practice	Minimal explicit protection; no clear procedural safeguards; simple proof standard; disadvantages guarantors	Significant normative gaps; vulnerable to unfair treatment

Source: Author's Interpretation

The table above provides a comprehensive comparison of guarantor protection regimes across several jurisdictions, highlighting differences in legal foundations, the nature of guarantor liability, and the mechanisms established to safeguard guarantors. Common law countries such as the United Kingdom and the United States stand out for their strong protections grounded in principles of fairness, mandatory disclosure, and the right to challenge unfair contractual terms. Singapore and Japan demonstrate highly structured approaches emphasising regulatory clarity, professional involvement, and strict limitations on personal guarantees to prevent abuse. Malaysia presents a unique model by integrating civil and Syariah-based regulations to ensure justice, transparency, and the prohibition of disproportionate burdens on guarantors. In contrast, Indonesia lags, with a legal framework that lacks explicit protections and often treats guarantors independently, without adequate procedural safeguards, thereby increasing the potential for unfair treatment. Overall, the

table underscores the urgent need for Indonesia to reform its guarantor regulations by adopting global best practices and contemporary Islamic economic justice principles.

### **Reconstruction of an Equitable Guarantor Protection Framework for Indonesia**

Reconstructing guarantor protection in Indonesia must begin with reaffirming the accessory nature of guarantee obligations. The bankruptcy system should explicitly recognise that a guarantor cannot be declared bankrupt before the principal debtor has demonstrably failed to meet their obligations. Such clarification is essential to prevent premature or unjustified bankruptcy petitions against guarantors. This reform effort must also be grounded in the principles of contemporary Islamic economic law, particularly justice, proportionality, and the prohibition of *ḍarar* (harm). These principles offer not only an ethical foundation but also a normative framework to ensure that guarantors are not burdened beyond their economic capacity. By integrating these values, the reconstruction of guarantor laws aligns with both regulatory standards and substantive justice.<sup>27</sup>

Strengthening procedural safeguards is equally crucial to prevent guarantors from being placed in structurally weak positions. Guarantors should have the right to raise objections, request postponement of bankruptcy proceedings, and receive complete and transparent information from creditors before being held liable. Such procedural protections have proven effective in enhancing guarantors' bargaining positions in other jurisdictions. Reform should also adopt the concept of differentiated liability by distinguishing between individual and corporate guarantors, as well as between social and commercial guarantors.<sup>28</sup> Experiences from countries such as Japan and Malaysia

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<sup>27</sup> Devi Maulani Asomarito Pakpahan and Mhd Yadi Harahap, 'Legal Protection for Personal Guarantee Agreements In Bankruptcy Cases (Analysis Of Commercial Court Decision Number 6/Pdt.Sus-Pailit/2020/PN.Niaga.Jkt.Pst.)', *LEGAL BRIEF* 14, no. 2 (June 2025): 365-372, <https://doi.org/10.35335/legal.v14i2.1316>.

<sup>28</sup> Muhammad Adib Alfarisi et al., 'Negotiating Customary Law and Fiqh Norms: The Transformation of the Mepahukh Tradition in the Indigenous Marriage Practices of the Alas People in Southeast Aceh', *Indonesian Journal of Sharia and Socio-Legal Studies* 1, no. 1 (May 2025): 72-93, <https://doi.org/10.24260/ijssls.1.1.9>.

demonstrate that such differentiation can significantly reduce the social impact on individuals who extend guarantees outside a commercial context.<sup>29</sup>

To reinforce distributive justice, Indonesia should consider adopting liability caps for individual guarantors. This limitation would prevent guarantors from bearing risks beyond their financial capacity and is consistent with Islamic principles of asset protection and the avoidance of harmful transactional practices.<sup>30</sup> Furthermore, the roles of notaries and financial institutions must be strengthened to ensure that guarantee contracts are transparent, understandable, and free of unfair clauses. The requirement of good faith should be emphasized as a minimum standard in every guarantee arrangement to prevent creditors from abusing their power.<sup>31</sup>

Indonesia's bankruptcy system may also benefit from adopting the concept of automatic-stay differentiation, as practised in several common law jurisdictions. This mechanism ensures that guarantors are not automatically drawn into bankruptcy proceedings alongside the principal debtor unless specific conditions are met, thereby providing essential initial protection.<sup>32</sup> Ultimately, the reconstruction of guarantor protection in Indonesia must be integrative, combining national legal principles, international best practices, and the value of justice embedded in Islamic economic law. Such a holistic approach provides a strong foundation for developing a guarantor

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<sup>29</sup> Siti Mahmudah Rahmanda Siti Malikhatun Badriyah, Bagus, 'the position of the guarantor in reconciliation', hukumonline.com, accessed 16 November 2025, <https://jurnal.hukumonline.com/a/5d543eda38f91c90c6176690/the-position-of-the-guarantor-in-reconciliation-on-the-bankruptcy-act-according-to-the-law-of-bankruptcy-in-indonesia/>.

<sup>30</sup> Vincentius Setyawan and Bariah Safrut, 'Rethinking Law and Justice: The Core Principles of Critical Legal Studies against Legal Formalism', *NUSANTARA: Journal of Law Studies* 4, no. 2 (October 2025): 74-85, <https://doi.org/10.5281/zenodo.17332128>.

<sup>31</sup> Siti Mahmudah, Siti Malikhatun Badriyah, and Bagus Rahmanda, 'The Position of The Guarantor In Reconciliation on The Bankruptcy Act According To The Law Of Bankruptcy In Indonesia', *Diponegoro Law Review* 3, no. 2 (October 2018): 243-256, <https://doi.org/10.14710/dilrev.3.2.2018.243-256>.

<sup>32</sup> Dewi Fransiska Mamonto et al., 'The Evolution of Islamic Civil Law in Indonesia: Developments, Contemporary Challenges, and Future Directions', *NUSANTARA: Journal Of Law Studies* 3, no. 02 (December 2024): 147-158, <https://doi.org/10.5281/zenodo.17385985>.

protection framework that is fair, proportionate, and responsive to contemporary economic realities, while ensuring balanced protection for all parties involved.<sup>33</sup>

## CONCLUSION

This study concludes that the legal protection for guarantors who are declared bankrupt, along with principal debtors, in Indonesia remains weak, inconsistent, and misaligned with both contemporary Islamic economic principles and international best practices. Although guarantors are doctrinally considered accessory parties whose liability arises only upon the debtor's default, Indonesia's insolvency regime—particularly Law No. 37 of 2004—does not explicitly acknowledge this status. As a result, guarantors are frequently treated as if they bear independent and equal liability, exposing them to disproportionate legal and economic risks. Earlier research has primarily examined debtor-creditor relations and systemic insolvency issues, leaving the specific position and vulnerabilities of guarantors largely unaddressed—an important gap this study helps to fill. Comparative insights from the United Kingdom, the United States, Singapore, Japan, and Malaysia reveal more structured and equitable guarantor protections, including differentiated liability, mandatory disclosure, procedural safeguards, and restrictions on personal guarantees. These systems demonstrate that Indonesia needs more transparent, balanced regulations to uphold fairness and legal certainty.

Contemporary Islamic economic law further underscores the urgency of reform, as principles such as *al-'adl*, *lā ḍarar wa lā ḍirār*, and *ḥifẓ al-māl* emphasise justice, harm prevention, and the protection of property. Classical doctrines of *kafālah* and *dhamān* affirm the secondary nature of guarantor obligations, making current Indonesian practice incompatible with Islamic economic ethics. For future research, scholars are encouraged to examine empirical data on guarantor-related bankruptcy cases, assess the economic impacts of proposed legislative reforms, and develop integrated models that combine Islamic legal principles with modern insolvency mechanisms. Further interdisciplinary studies

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<sup>33</sup> Yuhelson and Nur Hakim, 'Legal Protection of Secured Creditors in Contemporary Bankruptcy: A Comparative Study of Positive Law and Islamic Law', *MILRev: Metro Islamic Law Review* 4, no. 2 (September 2025): 1189–1214, <https://doi.org/10.32332/milrev.v4i2.11518>.



integrating behavioural economics and financial risk assessment would also enrich the understanding of guarantor vulnerabilities in contemporary credit systems.

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## AUTHOR CONTRIBUTIONS STATEMENT

The authors collaborated to complete this study. Bambang Sugeng Ariadi Subagyono led the development of the research design and conceptual framework and guided the comparative legal analysis across Indonesian, common law, and Asian jurisdictions. Ermanto Fahamsyah analysed Indonesian insolvency law, examining statutory provisions and judicial practices to identify the specific vulnerabilities of guarantors. Hariyanto Sururi integrated the principles of contemporary Islamic economic law into the study, ensuring that discussions on *kafālah*, *dhamān*, and *maqāṣid al-syarī'ah* were accurately and systematically connected to insolvency issues. Amaliyah supported the research by organising relevant literature, synthesising prior studies, and ensuring coherence across sections, while also contributing to the refinement and clarity of the manuscript. Collectively, these contributions strengthened the depth, rigour, and interdisciplinary relevance of the research.

## CONFLICT OF INTEREST

In this study, the author affirms that no conflict of interest influences the preparation, analysis, or conclusions of the research. All stages of the study were conducted independently, without pressure, influence, or intervention from any party, including

governmental institutions, private organisations, or individuals with financial or non-financial interests related to the topic. Any research funding—if present—did not influence the direction of the findings or the interpretation of the data. All data, arguments, and analytical results were developed in accordance with the principles of scientific objectivity, academic integrity, and adherence to research ethics. Therefore, the author ensures that this scholarly work is free from personal or institutional biases that could undermine the quality and neutrality of the research.

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