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The Application of the Insolvency Principle as a Condition for a Debt Rexturization for a Bankrupt Company

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Abstract

The application of the law relating to bankruptcy is the application of rigid rules because without paying attention to the debtor's condition that is located under challenging conditions. To avoid the application of strict laws for companies affected by the bankruptcy, then the implementation of the institution of insolvency in Indonesia, especially for companies that declared bankruptcy, would undoubtedly have an impact on the issues/problems of the law of conflict of norms (conflict of the model) between the regulation of the bankruptcy of his particular related to the institution of insolvency against the rules bankruptcy regulated in Law Number 9 of 2009 (the rules applicable local) compared with chapter 11 of the US Bankruptcy Code (the rules of the internationally), this research is legal research using Normative juridical approach, the data used are primary data and secondary data were analyzed by using quantitative analysis. The research results are the reorganization (restructuring and rehabilitation, restructuring corporate debtor) regulated in Chapter 11 of the U.S. Bankruptcy Code. In the case of repair, which the creditors see, is whether the debtor's income can pay off the bills they are, instead of seeing the Debtor's wealth at the time of bankruptcy proceedings began. The subject of bankruptcy is the stage where the debtor's status is determined, in a superficial sense where the debtor's assets are divided to cover their debts or are still allowed to manage their assets.

Keywords: *Insolvency; Bankruptcy; Corporate; Restructuration*

Introduction

As a result of the monetary crisis in July 1997 in Indonesia, which resulted in the resignation of then-President Suharto as President of the Republic of Indonesia, on May 21, 1998, this monetary crisis began with the weakening of the rupiah against the US dollar. This has caused the debts of Indonesian businesspeople in foreign currencies, especially to foreign creditors, to swell tremendously. As a result, most debtors are unable to pay their debts; in addition, the bad debts of companies in domestic banks are also skyrocketing. This is because Indonesian banks previously faced a worrisome problem of non-performing loans resulting from the slump in the real sector due to the monetary crisis (Sjahdeni, 2002).

The above situation forces the business law community, especially creditors, to seek legal means that can be used to obtain their claims satisfactorily. Meanwhile, the legal regulations relating to the

existing bankruptcy rules, namely Faillissementsverordening, are no longer reliable (inadequate) to overcome them. Therefore, to overcome the monetary crisis that hit Indonesia, debtors also could not be separated from the obligation to settle foreign debts, Indonesian businesspeople to their foreign creditors, and efforts to resolve bad loans from Indonesian banks.

Therefore, the IMF at that time ernment of the Republic of Indonesia to immediately replace or amend the Bankruptcy Regulations that were in effect to settle the debts of Indonesian entrepreneurs to their creditors, especially creditors from abroad. The Government of the Republic of Indonesia responded to the IMF's insistence by stipulating a Government Regulation instead of Law on Bankruptcy (PERPPU Bankruptcy). The PERPPU amends and adds to the Bankruptcy Regulations (rules contained in the Faillissementsverordening). Furthermore, Government Regulation instead of Law number 1 of 1998 with the approval of the House of Representatives of the Republic of Indonesia, Law Number 4 of 1998 concerning Bankruptcy replaces the Faillissementsverordening to regulate problems bankruptcy in Indonesia.

When the regulation came into effect, the main problem with its application was that the Judge in applying the Bankruptcy Law as regulated in PERPPU Number 1 of 1998 (which became the embryo of Law Number 4 of 1998) only protected the interests of creditors, so that the purpose of implementing the Bankruptcy Law was to protect the interests of creditors. Justice is not achieved. According to Aristotle, it should be in the application of law that "a justice will be achieved if there is a balance of protection for the parties who have legal relations (Huijbers, 1982)". In this case, according to Sutan Remy Sjahdeni, justice in Bankruptcy Law is that Bankruptcy law must provide balanced protection for Creditors and Debtors so that not only Creditors but also Debtors must have their legal interests protected (Sjahdeni, 2002).

The Bankruptcy Law is intended to provide protection to the business community, especially investors/creditors, with the premise that if debtors do not pay their debts, it is hoped that creditors can gain access to the assets of the Debtor's company declared bankrupt. However, the protection provided by the Bankruptcy Law for the interests of the business community, especially investors in general and creditors in particular, must not harm the interests of other business communities, namely debtors and the stakeholders concerned.

It starts the purpose of Bankruptcy Law to protect the business community by borrowing Selznick's thoughts (Nonete & Selznick, 2003) about a responsive legal system that can be interpreted as Law which is a responsive tool to the needs and aspirations of the community. Starting from Selznick's thoughts, the Bankruptcy Law currently in force, Law Number 4 of 1998, which was amended and added to Law Number 37 of 2004, shows that its legal makers have not followed a responsive legal system because responsive law has characteristics that aim so that the law is more responsive to the needs and more effective in dealing with the problems of the business community.

Based on the above background, this research includes 2 (two) problem formulations. The formulation of the problem is as follows:

1. How can insolvency institutions provide legal protection for companies declared bankrupt?

2. How is the principle of applying insolvency institutions for bankrupt companies?

Methodology

The research method used in this research is using normative juridical methods combined with library data sourced from primary, secondary, and tertiary data. The data collected were analyzed

systematically for further analysis using the descriptive analysis method, which is secondary data processing related to the problem in this research which will be compiled, explained, and interpreted to answer so that it can be drawn related to efforts to apply the principle of insolvency as a condition for restructuring debt for companies that are hit by bankruptcy.

Result and Discussion

I. Insolvency Institutions in Providing Legal Protection for Companies Declared Bankrupt

Bankruptcy Law basically must protect parties involved in the business community in a balanced manner so that the results of the substance of the Bankruptcy Law and the responsibility of the Commercial Court as an institution implementing Bankruptcy Law can provide effective decisions. A responsive Bankruptcy Legal System will try to prevent business actors from committing moral hazard, namely an attitude that does not want to see the debtor's financial position and business difficulties. There is a different attitude between creditors and debtors: creditors always emphasize that debtors must immediately pay off their debt payments that are he other hand, debtors always avoid their legal obligations, not pay off their debts.

Sjahdeini provides a way to overcome the insular attitude of the business community with a problem-oriented approach that is socially integrated. Furthermore, Sjahdeini argued that Creditors and Debtors must be willing to solve the problems encountered through reorganization. Reorganization in restructuring and rehabilitation, restructuring of debtor companies; as stipulated in Chapter 11 of the US Bankruptcy Code (Sjahdeni, 2002).

In the case of rehabilitation, creditors look at whether the debtor's future income can pay off their bills, not seeing the debtor's assets when the bankruptcy process begins. In the rehabilitation cases regulated in Chapters 11, 12, and 13, the Debtor generally retains control of his assets and makes repayments of his debts to his creditors, from the income he earns, after submitting the rehabilitation process that the court has approved.

Chapter 11 of the Bankruptcy Code is very well known and has become a reference for drafting provisions or laws on debt restructuring from various countries. The reorganization in the Bankruptcy Code cannot be compared with the Suspension of Debt Payment Obligations (PKPU) in the Bankruptcy Act. As contained in Chapter 11 of the Bankruptcy Code, Reorganization can be categorized as an embodiment of responsive law because the code aims to make Bankruptcy Law more responsive to the needs and more effective in dealing with the problems of the business community, between investors in their status as Creditors and entrepreneurs in their class as Debtors.

Bankruptcy Law as an effective law is an embodiment of responsive law, which aims to make the law more responsive to the effects of social changes and more effective in dealing with social problems, namely problems that arise in the business community. Mainly the problem between creditors and debtors, who carry out legal relations in the business world. Bankruptcy Law is a positive law. Most of them, even almost entirely, are ceremonial; that is, they are procedural laws. The characteristics of procedural law as formal law are more directed towards legal certainty and order. However, for Bankruptcy Law to be a practical and helpful law, changes to Bankruptcy Law must continue to lead to responsive law.

Responsive law in its application must avoid repressive laws. The purpose of repressive law is the protection of society. In correlation with the Bankruptcy Law, the regulations in the Bankruptcy Law are detailed but less binding on the rule makers; there is often a repressive nature of discretion in Law Number 4 of 1998, especially in the provisions of Article 1 paragraph (1), which amended and added to article 2 paragraph (1) of Law Number 37 of 2004, appears to be widespread and only weakly limited by

the provisions of article 6 paragraph (3) of Law Number 4 of 1998 which is amended and added to article 8 paragraph 4 of Law Number 37 of 2004.

Meanwhile, what is being developed is "restraint morality," as reflected in article 82 Bankruptcy Law, namely the Bankruptcy Law is subject to the politics of power, namely the Government of the Republic of Indonesia, which in the process of forming Government Regulation instead of Law Number 1 of 1998 (as the embryo of the Law Number 4 of 1998) came under pressure from the IMF, which acted in the interests of foreign investors. The substance of the Bankruptcy Law is the reality of the submission of Indonesian debtors to the political power of the Government of Indonesia, namely the pressure from the IMF, that it will not disburse loan funds when the Government does not issue Government Regulation instead of Law Number 1 of 1998 which is the embryo of the Law Bankruptcy Act. The critical attitude of the Government of the Republic of Indonesia against the will of I.M.F.

The Bankruptcy Law must provide balanced protection for creditors and debtors, meaning that in the formation of the Bankruptcy Law, the interests of the business community participants must be taken into account. By borrowing Jhering's thoughts on the construction of law, in the author's opinion, every interest in the business community, both from creditors and debtors and their stakeholders, must be inventoried. Furthermore, it is sorted out which attractions are related to the creditor and related to the debtor's interests. In practice, conflicts of interest will be found between the interests claimsors and debtors. Therefore, these different, perhaps even conflicting, claims must be balanced (Freeman, 1994).

Peters stated that if bankruptcy law has a normative meaning, it must also have practical value, meaning that a conception of Bankruptcy Law must be developed as a political effort that will become the basis for responsive law (Nonete & Selznick, 2003). As stated by John Austin, legal practitioners who are influenced by legal positivism apply this Bankruptcy Act mechanistically. In theory: Law As A Command prioritizes legal certainty and does not consider the fairness of this law in its application.

Besides being unfair in its application, because it prioritizes the interests of the bankrupt applicant (the creditor) rather than the interests of the bankrupt respondent (the debtor), its implementation is not practical. If these principles are applied, then as a bankrupt party, there will be a termination of investment as a reaction. Cessation of investment hampers economic development. Stopped acquisition has an impact on increasing the number of unemployed. This means the failure of economic growth.

In matters of interpretation of the law in bankruptcy cases, the judgment of the Judges of the Commercial Court, against whom a debtor can be declared bankrupt, is only based on the provisions of the law, namely as stated in article 1 paragraph (1) and Article 6 paragraph (3) Law Number 4 of 1998 which was amended and supplemented by Article 2 paragraph (1) and Article 8 paragraph (4) of Law Number 37 of 2004. Bankruptcy is declared, whe the Debtor has at least 2 (two) Creditors, and maturity does not pay its debt to one of its Creditors. The non-payment of the debt can be easily proven by the creditor applying for bankruptcy.

The judge mechanistically stated that the debtor was declared bankrupt because the provisions had been fulfilled, as indicated in article 1 paragraph (1) yo. Article 6 paragraph (3) of Law Number 4 of 1998 was amended and added with article 2 paragraph (1) and Article 8 paragraph (4) of Law Number 37 of 2004. The judge did not look further, whether, in reality, the debtor was actually in a state of bankruptcy, in the sense that the debtor is unable to pay. Thus, the Judge does not need to go further to consider whether the debtor in his business always suffers a loss? Is the value of the assets owned is less than the debt.As described above, the Judge's decision is only based on the truth that is mechanically legalistic. Therefore, the judge's decision is not based on facts or fidelity to objective reality; namely: there is a match between statements about facts or judgments with the situation described by those considerations. This means that a new comment is considered valid if the knowledge material contained by the information relates (corresponds) to the object addressed by the statement (Titus et al., 1984).

Suppose the panel of judges of the Commercial Court, in a bankruptcy case, declares that it is bankrupt, after simply proving that the Debtor in case has at least 2 (two) Creditors and, at maturity, is unable to pay the debt. In that case, the statement of the Panel of Judges is true. In accordance with a solid object, the notion of being unable to be identical with bankruptcy and its assets are smaller than its debts.

Suppose the Panel of Judges declares the Debtor in case is bankrupt because, after maturity, it does not pay its debt. In that case, the statement by the Panel of Judges of the Commercial Court is wrong, because there is no legal certainty and therefore unfair, because the information is not by the reality of facts; because the debtor in his business still provides profits and the value of his assets is greater than the debt. It's just that when the debt is due, you don't have cash yet.

II. Principles of Insolvency Application for Bankrupt Companies

Today, in terms of corporate law and bankruptcy law, a company is said to be bankrupt if there is a situation where the debtor is unable to pay its debts amounting to one or more that are due. These legal principles and practices are generally applied to countries that follow the standard law legal system, and internationally this principle is justified. Incorporate law, a bankrupt company must first go through the insolvency stage; insolvency is one of the critical stages in the bankruptcy process.

In principle, the insolvency stage is where the debtor's status is determined, in a superficial sense where the debtor's assets are divided up to cover their debts or are they still allowed to manage their assets. In this stage, if a settlement plan or debt restructuring is accepted, the debtor is declared in a state of insolvency. Therefore, the debtor was wholly bankrupt and the assets were immediately distributed to the creditors, although this did not mean that the business of the bankrupt company could not continue.

According to Jack P. Friedman (Friedmann, 1987), what is meant by insolvency is the inability to meet financial obligations when the specified maturity date in the business or the excess of liabilities compared to their assets within a specific time. From the above understanding, it can be understood that a person who does not have a lot of money compared to the number of debts is not an absolute thing to be in a state of insolvency. He can only be said to be in the form of ruining the state of his obligations exceeds his assets, last for a certain period (Fuady, 1999).

Henry Cambell Black suggests that what is meant by insolvency is the condition of a person or business that is insolvent, inability or lack of means to pay debts (Black, 1980). What is meant by bankruptcy is: the state or condition of a person (individual, partnership, corporation, municipality) who cannot pay its debts, as they are, or become, due (Epstein, 1993).

From the explanation of Henry Cambell Black's understanding, it can be concluded that the debtor is in a state of insolvency when his financial condition shows the number of his debts is more significant than his tangible assets, the debtor can be declared bankrupt when he cannot pay his debts after the debt is due (Epstein, 1993). However, when viewed, especially from a philosophical perspective, if the debtor is still able to pay his debts, it is unfair if the debtor is declared bankrupt so that it can clearly be distinguished between being unable and unwilling to pay debts. Unable to pay related to their financial condition, while reluctant to pay is related to their good faith or the creditors' mora.

In the UK, there are 3 (three) conditions so that a bankruptcy respondent can be accepted in a bankruptcy petition (Frieze, 2001), namely:

1. The debtor must reside in the territory of the United Kingdom for at least 3 (three) years since the company is registered.
2. The debtor's debt is at least 750 British Pounds.
3. The debtor must be unable to pay his debts, or there is no hope of being able to pay his debts.

According to Hikmahanto, two basic things must be included for a debtor to be bankrupt: first: only debtors who are in an unhealthy financial condition can be bankrupt. And secondly, for companies engaged in an industry that is highly dependent on community decisions or managing public funds, they must receive consideration from the government agency that provides guidance (Juwana, 2004).

Further explanation of this in the Indonesian legal system is regulated in the provisions of Article 1 paragraph (1) of Law Number 4 of 1998, which has been amended and added to Article 2 paragraph (1) of Law Number 37 of 2004 which in general stated:

- Can ,result in the declaration of bankruptcy, a Debtor who has assets more significant than their debts.

- Can lead to the e because Creditors whose receivables are still being paid by the DebtorDebtor, but can apply for bankruptcy against the Debtor. Because the Creditor is worried, there is a conspiracy between the Debtor and the Creditor whose receivables are not paid but remain silent by not submitting a claim, resulting in the creditor's receivables, which the debtor is still paying, then become unpaid. This is due to the absence of insolvency provisions, so it is possible for creditors who are still being paid to file for bankruptcy.

According to the Common Law System, after payment of debt through verificatioa n of the Debtor's assets, the Debtor is released from his responsibility to pay his debts because there is no property to pay his debts. This does not apply according to the legal system in Indonesia; in Indonesia, debtors can be billed to pay their debts when they are due. The Indonesian legal system does not recognize what is called a "discharge," namely the release of the debtor (especially personal debtors) from the remaining debt if the company is in a state of bankruptcy so that the debtor can calmly try again, as is the case in the United States Bankruptcy Law.

Different conditions occur in the Dutch legal system, wherein the case of a company that bankrupt company,bject to a simple bankruptcy offense. A person who is declared bankrupt is threatened with imprisonment and a fine if there are "excessive expenses" or "the goods are transferred below their value.

In the UK, violations of the Criminal Law, as set out in the Act on Crime of Insolvency of 1986, can be divided into 2 groups, namely:

1. Acts committed before insolvency.

2. Actions are taken after insolvency.

Often cases that have been committed by someone involved in a criminal act of insolvency, more are prosecuted based on having violated the Law on the Crime of "Theft" (Theft Acts) than being charged with violating the provisions of the Insolvency Act. The criminal conditions that were broken included: obtaining land parcels by fraud, obtaining money by committing fraud, intentionally miscalculating accounts payable, dishonestly obtaining rights by deceiving, avoiding responsibility by deceiving. The penalties imposed based on the Law on the Crime of "Theft" are heavier than the crimes inflicted based on the Law on the Crime of Insolvency (Tolmie, 1998).

Conclusion

The form of an insolvency institution for restructuring a bankrupt company is a form of reorganization (restructuring and rehabilitation, restructuring of debtor companies) this is regulated in

Chapter 11 of the US Bankruptcy Code. In the case of rehabilitation, creditors look at whether the debtor's future income can pay off their bills, not seeing the debtor's assets when the bankruptcy process begins. In the rehabilitation cases regulated in Chapters 11, 12, and 13, the Debtor generally retains control of his assets and makes repayments of his debts to his creditors, from the income he earns, after submitting the rehabilitation process that the court has approved. The principle of the insolvency stage is the stage where the debtor's status is determined, in a superficial sense where the debtor's assets are divided up to cover their debts or are they still allowed to manage their assets. In this stage, if a settlement plan or debt restructuring is accepted, the debtor is declared in a state of insolvency. Therefore, the debtor is genuinely bankrupt and the assets are immediately distributed to the creditors. However, this does not mean that the business of the bankrupt company cannot be continued.

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