

Insolvency Test as The Requirement for Bankruptcy Declaration to Maintain Investment Conduciveness in Indonesia

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Abstract. Legal uncertainty in Indonesian bankruptcy cases stems from ambiguity in concept, regulation, and application of insolvency tests. Consequently, it is difficult to distinguish the discontinued debt payment due to a genuine inability or a deliberate decision. The former refers to the occurrence of bankruptcy, while the latter refers to a breach of contract that should only go to an ordinary civil lawsuit. This research adopts normative juridical research to obtain the necessary data about the problem. The secondary data consists of primary-, secondary-, and tertiary legal materials. In addition, primary data aims to support secondary legal materials. The data analysis employs a qualitative juridical analysis method. The study found that the current law does not require the insolvency test law for declaring bankruptcy. The requirements to declare bankruptcy are only the existence of debts, maturity date, and two creditors. The insolvency test is necessary for submitting a bankruptcy application. There should be legal certainty in settling debt conflicts between the debtors and creditors and impeding debtors from declaring bankruptcy who are still in a solvent state. The regulation regarding the insolvency test is to accommodate the interests involved in it, both from the material legal aspect and from the formal legal aspect. From the material legal aspect, it is necessary to emphasize, among other things, that the insolvency test cannot be applied if the debtor is an individual or a company that does not involve an enormous public interest.

Keywords: insolvency test; bankruptcy (failliet); debt; loan

1 Introduction

Settling debt in the business world should be swift and effective. Appropriate arrangements regarding bankruptcy, including proper deferral debt service obligations, are worth investigating scientifically [1]. Based on Law Number 37 of 2004 concerning Bankruptcy and Postponement of The Obligation of Debt Payment (from now on referred to as Undang-undang Kepailitan—UUK and Penundaan Kewajiban Pembayaran Utang—PKPU), there are no clear rules that the debtor must be insolvent to declare bankrupt. This certainly goes against the universal philosophy of bankruptcy regulation to provide a solution for debtors and creditors, especially for insolvent debtors [2]. Thus, based on the development of bankruptcy law in Indonesia, it is necessary to apply some form of insolvency test as a condition before declaring bankruptcy.

The judge must examine the provisions of the insolvency test before the filing of a bankruptcy declaration [3] to provide legal protection for the solvent company with no financial problem. This is because the requirement for declaring bankruptcy is simple: name at least two creditors and pass the debt maturity date. The amount of debtor's assets is irrelevant to reject or

accept the bankruptcy application because there is no legal protection for companies that are still solvent from the bondage of bankruptcy.

At the moment, the author suggests that fulfilling the requirements for bankruptcy is effortless, as enshrined in the UUK and PKPU. Albeit the judge considers that the debtor is in sound financial condition and thus unfit for bankruptcy [4], this cannot be used as a reason to bar them from being bankrupt. Thus, a valid bankruptcy application should be based on having met the conditions contained in Article 2 of the UUK and PKPU. Bankruptcy refers to a general confiscation of assets, and it is a lengthy and exhaustive process. On the one hand, many creditor parties are involved in the process due to the assumption that the debtor must involve in multiple debt schemes [5]. On the other hand, the bankrupt assets may not be necessarily sufficient, let alone reliable, to meet all the bills addressed to the debtor. Each creditor will attempt to extract the highest payment possible for their respective loans.

Frequently, legal certainty is often conflicted with a sense of justice. This can be examined from the decisions of the Tribunal of Commerce (Pengadilan Niaga) and the Supreme Court, which are often contradictory. The proof of insolvency, according to the author, provides legal protection for the debtor. However, the UUK and PKPU do not regulate this. Thus, the safety and certainty of the Indonesian Bankruptcy Law currently remain inadequate. If such a provision exists, legal protection for the debtor will be almost certain [6].

The need to impose an insolvency test is relevant to Article 2, paragraph 1 of the UUK and PKPU, in which debtors have debts with a maturity date and are involved with two or more creditors. The absence of an insolvency test in the Indonesian bankruptcy law can create legal loopholes for filing for bankruptcy and cause legal uncertainty over balanced legal protection between creditors and debtors. Frequently, it tends to protect the interests of creditors predominantly. Another consequence that will occur is the legal bankruptcy of companies in Indonesia due to the inexistence of insolvency test within the Indonesian law, which also indirectly says that assets must be considered irrelevant to weigh consideration of bankruptcy declaration.

2 Research Methods

As a logical consequence of the aspects above, this type of research is normative legal research or dogmatic law research, or doctrinal research. As normative legal research, the approach applied is statutory, an analytical and conceptual approach, a case approach, and a comparative approach using deductive and/or inductive reasoning to obtain and find objective truth [7]. Normative legal research was used to emphasize legal interpretation and legal construction to bring legal rules, conceptions, inventory of legal regulations, and the application of positive law that underlies balanced protection between debtors and creditors concerning the settlement of bankruptcy disputes.

The approach from the statutory and conceptual aspects was to discover an in-depth and detailed in the consistency, suitability, and the history of legal protection against the position and implementation of the business continuity principle concerning the solvency of the debtor of the bankruptcy defendant to achieve legal certainty and increase investment in Indonesia. This approach is within the framework of forming a more complete and detailed polarization of thought on the subject matter of this research, namely the application of the insolvency test to achieve legal certainty.

3 Results and Discussion

The insolvency test is needed in achieving a fast, certain, and just settlement dispute in a bankruptcy case with emphasis on the debtor's interest. Undoubtedly, it is limited to certain cases. The author has classified when the insolvency test is indispensable for filing bankruptcy. The description begins with the concept and limitation of insolvency itself. Based on current practice, a petition for declaring bankruptcy can only be submitted when a debtor is in default on one or more creditors in which the latter has in total constitute at least more than 50% of the debtor's total debt to all of his creditors [8]. If the debtor fails to pay only to certain creditors while not to other creditors who have claims of more than 50% of the total amount of their debts, then filing a declaration of bankruptcy is ineligible either by the creditor or the debtor themselves. A debtor can file for bankruptcy if the due debts cannot be paid to only one creditor, although the debtor in question has two or more creditors. Insolvency is not required to consider the debtor's finances in the current law. From the formulation of Article 2 paragraph (1), UUK and PKPU, companies that are still solvent can even declare bankruptcy.

There is no requirement for a minimum amount of loan from creditors to qualify for a declaration of bankruptcy. The approval from the majority of creditors is also not compulsory. The debtor can be declared bankrupt by their employee or maid, who are insufficiently paid, even if the debtor's financial condition is still solvent. When the debtors cannot pay their debts only to one or more creditors and still manage to pay their debts to most of their creditors, their case should not be submitted as a bankruptcy case to the court for further examination. Instead, it should only be filed as a civil lawsuit case to an ordinary civil court. Insolvency regulation is required as a condition for bankruptcy petition for debtors to avoid them from going bankrupt in a solvent state [9]. This insolvency arrangement is accompanied by a nominal limitation of debt, as evidenced by proof of insolvency [10]. This measure can be used as an indicator to determine whether a debtor is in a state of bankruptcy and for debtors to learn the comparison of the debtor's total assets with the number of debts they have to their creditors.

The absence of insolvency proof in bankruptcy regulations in Indonesia is one of the weaknesses of the UUK and PKPU, in addition to unclear regulation in the provisions on the minimum amount of debt to be considered bankrupt or who is eligible to apply that eventually caused legal loopholes to file a bankruptcy petition. In addressing the issue of legal weakness from the aspect of the lack of regulation concerning proof of insolvency, a debtor whose income is still sufficient to pay debts can also be declared bankrupt by the court for the failure to comply with the provisions of Article 2 paragraph (1) of the UUK and PKPU. This is certainly can be detrimental to companies that are still solvent. As a result, many investors are no longer interested in investing in Indonesia due to losing confidence and trust in the legal system. The regulation on bankruptcy in Indonesia is considered substantially weak in almost all aspects. Inadequate regulations lead to legal uncertainty that can potentially lead to extortion and various acts of corruption to run rampant and cause obstruction to the flow of investment in Indonesia.

It is hoped that there will be legal reforms in the field of bankruptcy, especially amendments to the UUK and PKPU, to clarify the concept of insolvency and in line with the development of bankruptcy regulations in many countries in the world. This opinion is following the mandate of the Indonesian Constitutional Court, namely the need for inclusion in proofing insolvency when reforming the Bankruptcy Law. An insolvency test or financial test is needed to identify the actual financial capability of the company [11].

4 Conclusion

The study found that the insolvency test is irrelevant in the eyes of the law in declaring bankruptcy. The requirements for bankruptcy are only debts with a maturity date of a minimum of two creditors. The insolvency test is essential before filing a bankruptcy application for legal certainty in settling debt conflicts between debtors and creditors and for debtors who are still in a solvent state but imposed to declaring bankruptcy. The regulation regarding the insolvency test is to accommodate the interests involved in it, both from the material legal aspect and from the formal legal aspect. From the material legal aspect, it is necessary to emphasize, among other things, that the insolvency test is inapplicable if the debtor is an individual or a company that has no significant influence in the public eye.

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