

Bankruptcy Practice in Indonesia Relating To Legal Protection for Solvent Debtor

Maswandi^{1,5}, Tan Kamello², Budiman Ginting³, OK. Saidin⁴

¹PhD Student (S3), Faculty of Law, North Sumatera University (USU), Medan, Indonesia

²Chief Supervisor Postgraduate Faculty of Law, North Sumatera University (USU), Medan, Indonesia

³First Supervisor Postgraduate at Faculty of Law, North Sumatera University (USU), Medan, Indonesia

⁴Second Supervisor Postgraduate at Faculty of Law, North Sumatera University (USU), Medan, Indonesia

⁵Faculty of Law, Medan Area University (UMA), Medan, Indonesia

Abstract: Philosophically and the purpose of bankruptcy law is to make the entire assets of the debtor can be used as collateral for the payment of his debt to the creditor. A company is insolvent when it is unable to pay his debts. The concept is simple enough but as we shall see there is more than one test of inability to pay debts and in marginal cases it may be far from easy to determine whether the test is satisfied as at the relevant time. It is a disaster for the solvent debtor to cut with a declaration of bankruptcy due to ease requirements for bankruptcy as stipulated in laws, other than in UUKPKPU. When the case of bankruptcy begins, the judge may request that the applicant for bankruptcy to prove in advance, whether the debtor is really in a state incapable by appointing public accounting firm to examine the financial statements.

Keywords: Bankruptcy; Solvent Debtor; Accounting Firm; Judge

I. Introduction

Act No. 37 of 2004 on Bankruptcy and Suspension of Payment (UUKPKPU) in lieu of the Regulation in Lieu of Law (decree) No. 1, 1998 Jo. UU no. 4 of 1998 which nowadays prevailing in Indonesia is unique. The uniqueness of it because there is a contradiction between the philosophical and the purpose of bankruptcy laws itself with the practice in force when the judge in the Commercial Court to decide disputes filed bankruptcy. Philosophically, bankruptcy laws is used to overcome the debtor which has insufficient property to pay all debts to the creditor. Similarly, the purpose of bankruptcy laws is to avoid the seizure of property when there are many creditors would like to take the the debtor property.

Both philosophically and the purpose of bankruptcy law is to make the entire assets of the debtor can be used as collateral for the payment of his debt to the creditor. Because of the manifestation of the inability of the debtor, Commercial Court can make arresting over all assets of the debtor. The creditors fear and would like to pick up the assets. That is why, it needs a regulation so that the division of debtor property can be done fairly and equitable to pay creditor's bills.

If the inability of a debtor, individually or company, who does not have assets to pay the his debt, he can apply to the Commercial Court to declare that he is bankrupt with the goal all of debtor's assets can be distributed as a return of debts to the creditors. However, some cases declared bankrupt by the Commercial Court because the debtor does not have the assets or the debtor is not capable to pay off debts, but debtor is rich enough and has much money (debtors solvent). Bankruptcy declaration decision is not only addressed to the debtor which is no longer has the ability to restore its debts, but the debtor is capable (solvents) can also be declared bankrupt declaration by providing all of the requirements. It means Act no 37, 2004 (UUKPKPU) yet or there is no legal protection against the debtor solvent, so it is not surprising if the decision of the Judge of the Commercial Court is not only declared bankruptcy against a debtor who can not afford, but also for debtor who has much money, but does not want to pay his debt due to many reasons. Even if it is obvious that the result does not rule out the possibility for foreign companies that have large assets will feel unsafe to invest in Indonesia, and this will certainly affect the economic development of the country, whereas the purpose of the establishment of a law is to welfare society.

II. Discussion

2.1. Requirements of Bankruptcy and Simple Prove

Commercial Court is the only court that has a competent to adjudicate disputes applicable bankruptcy in Indonesia, even though the authority of the Commercial Court is not only adjudicate disputes bankruptcy alone. There are many other disputes that can be tried in the Commercial Court. The tasks of the Commercial Court that under Article 300 UUKPKPU apart from checking out and decide upon the declaration of bankruptcy and suspension of debt payments, the Commercial Court also examines other matters in the field of commerce which are decided stipulated by law, such disputes in Treasure Intellectual Property (IPR) Act No. 14 of 2001 on Patents, Act 15 of 2001 on Trademarks, Act 31 of 2000 on Industrial Designs, Act No 32, 2000 on Layout Designs of Integrated Circuits, Act No 19 in 2002 on Copyright, Act No 30 in 2000 on Trade Secrets, ActNo 29 in 2000 on Plant Variety, and so on. To judge handling the bankruptcy cases filed to them is not too difficult to declare the debtor bankrupt or not. Having fulfilled the requirements for bankruptcy, then the proof is simple, as determined pursuant to Act 2 paragraph (1) and Act 8 (4) UUKPKPU Judge of the Commercial Court to be granted by cutting a declaration of bankruptcy for a debtor. It is not questioned whether the debtor has assets in excess of the sum of all his debts to the creditor but do not want to pay or the debtor has no longer ability to repay his debt due to he does not have sufficient assets to return all existing debt.

In Act 2 (1) UUKPKPU as a condition of bankruptcy mentions: "Debtors who have two (2) or more creditors and do not pay off at least one debt due and collectable, declared bankrupt by a court decision, either on the petition itself and on request of one or more creditors". While Act 8 (4) UUKPKPU states: "Application for a declaration of bankruptcy should be granted if there are facts or circumstances which proved simply that the requirement for otherwise referred to in Act 2 paragraph (1) have been fulfilled".

If we see from the wording of Act 2 paragraph (1) and Act 8 (4) which is an integral UUKPKPU, this is not too difficult (easy) to declare the debtor bankrupt, enough to meet the three (3) terms, namely:

1. The debtor must have two creditors or more. Creditors in this regard include concurrent creditor, and creditors preferred separatists. With the two creditors or more, it will give birth to the right of certain parties to file for bankruptcy, which are apart from the debtors and creditors, the attorney for the public interest. Bank Indonesia if the debtor is from banks. Capital Supervisory Board (Bapepam) if the debtor is securities company, the Stock Exchange, Clearing and Guarantee Corporation, if the debtor is the Central Securities Depository. Minister of Finance if the debtor is insurance company, reinsurance, pension fund, or the State Owned Enterprises (SOEs).
2. The debtor does not pay off at least one debt to one of its creditors. Debt in this case is the key of bankruptcy. The debt without a bankruptcy is not exist. Debt can be derived from the agreement of debts, but can also come from achievement (liabilities) payment is not carried out. For debtors who do not pay off the debt, regardless of whether the debtor has debts of only Rp. 1000, -, or the debtor does not want to pay the debt, even though the debtor has assets in excess of debts. Debtors can thus be petitioned for bankruptcy by creditors.
3. Debt is not paid if it should have matured and can be charged (due and payable).

The phrase "due and collectable" is a convoluted sentences. It is enough with the phrase "debt billable" would have covered the meaning of "debt has maturity", the debt may not be billed if it has not fallen due course. So according to the explanation in UUKPKPU, debt is an obligation to pay. Thus the debt can be derived from agreements or obligations arising from legislation. Where the terms of bankruptcy have been met by proving a simple, whereas the meaning of simple proof itself can be seen as mentioned in the explanation of Act 8 (4) of the Labor Law & PKPU gives the sense that the facts or circumstances which proved to be simple is the fact two or more creditors and the fact that the debt due and not paid. While the difference in the magnitude of the alleged amount owed by the applicant and the defendant bankrupt of the ruling does not preclude a declaration of bankruptcy. Then there is no reason for the judge handling the bankruptcy case is not granted. Simple understanding of proof which is commonly known as a proof of this summary according to Kartini Muljadi and Gunawan Widjaja, intended to simple proof is about:

- a. The existence of a debt filed bankruptcy, which has matured.
- b. The existence of two or more creditors of the debtor filed bankruptcy.

Associated with this proof, it does not only apply in the case of bankruptcy, but in the case of any generally applicable, because after verification role or occupy a place that is very important in the Civil Procedure Code. The granting or refusal of a claim depends on the proven. So formally, rules of evidence that govern the way how to conduct verification as contained in the HIR (*Herziene Indonesische Reglement*) applicable in the area of Java and Madura and RBG (*Rechtsreglement voor de buitengewesten*) applies in the outside area of Java and Madura. While the material way, rules of evidence that can set whether or not acceptable proof by means of certain evidence in court as well as the strong evidence of it.

As in the case of proof generally applicable to a case can be derived from the Plaintiff or Defendant, so each party must be able to prove its claims as defined in Act 1865 of the Civil Code. Party-litigants can express the events that can be used as a basis for affirming the civil rights or to deny the civil rights of others. These events is certainly not simply stated, either in writing or orally. However, it must be accompanied by evidence of lawful order which can be ascertained the truth. In other words, the events must be accompanied by evidence legally. Thus, the definition of proof is the presentation of evidences lawful to the judge who examined a case in order to provide certainty about the truth of the events proposed.

Such thing is very easy for the debtor to be declared bankrupt. Even if the debtor has the ability of great wealth and have a prospective employer, despite the debtor has a debt with little value, but do not pay, then the debtor can be declared bankrupt. The number of national and international company that has much declared bankrupt by the Commercial Court only because the company has very little debt in spite of its value, can be seen from several cases:

1. Decision of the Commercial Court, between PT Telkomsel (Cellular Telecommunications) with PT Prima Jaya Informatika in case number: 48 / Bankrupt / 2012 / PN.NIAGA.JKT.PST that led to the declaration of bankruptcy for PT Telkomsel on September 14, 2012, when PT Telkomsel has assets of approximately 58 trillion with 120 million subscribers can be declared bankrupt due PT Telkomsel has a bill of around 5 billion rupiah against PT. Prima Jaya Informatik.
2. Decision of the Commercial Court of Medan in case number: 02 / Bankrupt / 2012 / PN.Niaga.Mdn between CV. Erin Pillar Mutiara Abadi PT Multi Sarana Utama CV Erin grant and declare bankruptcy due to Mutiara Abadi. CV Erin Mutiara Abadi is unable to perform its obligation to meet the bill from PT **Pillar Multi Sarana Utama** making elevator development, amounting to approximately Rp. 180 million, while assets of CV Erin Mutiara Abadi is approximately Rp. 20 billion.

Both of the above cases are part of a number of cases were terminated bankrupt by the Commercial Court is a proof that UUKPKPU not provide legal protection for debtors who still have the ability and prospective (solvent). Bankruptcy and verification requirements are modest as stipulated in Act 2 paragraph (1) Jo. Act 8 paragraph (4) UUKPKPU may be regarded as a source of disaster for the debtor solvent. This provision is not something that is impossible as a barrier for foreign investors to invest is because they are afraid the company threatened bankruptcy.

2.1 The Absence of Provisions Providing Legal Protection for Solvent Debtor

In many countries that adopts a Common Law (Anglo-Saxon), such as the United Kingdom, Singapore, Malaysia, USA, and so on, a provision that the Court judge handling the bankruptcy case does not make it easier to declare the debtor bankrupt. Before the bankruptcy case is processed, the judge first to test the financial capability (insolvency test) for the debtor through public accountant, whether the debtor company is really in a state of not being able, this is in line with the philosophical value of the bankruptcy institute itself. But in Indonesia, in UUKPKPU the is no requirement to debtor filed for bankruptcy in a state really can not afford, so sometimes not the least solvent debtors who turned out to be declared bankrupt by the Commercial Court judge.

Problem of insolvency in bankruptcy, according to Sutan Remy Sjahdeni, that bankruptcy law is not simply regulate the bankruptcy debtor who is not paying its obligations only to one creditor alone, but the debtor completely objectively and independently in a state incapable (insolvency) to pay off debts (not able to repay his debt). A debtor is in a state of insolvency where the debtor is simply not financially able to pay its debt to the majority of its creditors. A debtor can not be said to have been in a state of insolvency if it is only to a creditor of the debtor if he just does not pay its debts, while other creditors, the debtor should continue implementing his debt repayment obligations properly. If the debtor is still carrying out its obligation to execute the payment of debts to other creditors, such things can not be said that a debtor in a state of insolvency, when such things happen creditor can not file a bankruptcy petition to the Commercial Court, but creditors can file a civil lawsuit to the district court.

Even if this is the case of the bankruptcy law setting Indonesia is more geared to facilitate mempailitkan legal subjects (individuals or companies) without considering the capability (solvency) of financial subjects such laws, bankruptcy is positioned as a tool to collect debts. It looks still solvenya circumstances where the debtor is not a concern for lawmakers bankruptcy since the enactment of Government Regulation No. 1, 1998 until the UUKPKPU, whereas bankruptcy is caused by the inability of the debtor to pay. Roy Goode Thomson says: "A company is insolvent when it is unable to pay his debts. The concept is simple enough but as we shall see there is more than one test of inability to pay debts and in marginal cases it may be far from easy to determine whether the test is satisfied as at the relevant time".

Thus a company can be declared bankrupt if the company is really in a state incapable of the first tests of the company's financial ability. The absence of the application of insolvency test in UUKPKPU resulted in

many companies in Indonesia declared bankrupt in general. Easily legal subjects in the form of individual or legal entity declared bankrupt company with only pursuant to Act 2 paragraph (1) Jo. Act 8 paragraph (4) UUKPKPU, so that when the two chapters are met, then the court without considering the financial situation of the debtor can decide with a declaration of bankruptcy.

In UUKPKPU, no arrangements on Insolvency Test before the bankruptcy petition is checked, so that under Act 1131 and 1132 of the Civil Code is the source of the bankruptcy law makes debt. The debtor will continue to exist against the debtor until the debtor dies. It means that a debtor who has been declared bankrupt and all his property is distributed to the creditors not considered to expire before the debtor's debt actually been fulfilled to pay the debt. In this case, the debtor can be declared bankrupt many times throughout his debt has not been paid.

Relating to insolvency test, Indonesia can reflect on Rules of Bankruptcy in the UK insolvent Act 1986 and related laws also determine whether a company is considered bankrupt or do not have to go through various tests financial capacity for the purpose of the provisions of the legislation can be reached. The bankruptcy according to insolvent Act 1986, really will be reached after various financial ability test (insolvency test) as defined in Act 123 (1). In the United States, Insolvency Test consists of three tests that are complementary ie Balance Sheet Test (Test balance sheet), the second is Equity Test (Test of capital) or Cash Flow Test (cash flow), and the third is the Transactional Test (test transaction). On the basis of them, the judge may give legal considerations when a company or individual can be declared bankrupt or not. So it is not only based on a very simple thing to decide a company has been declared bankrupt or not.

Similarly, the bankruptcy law in Malaysia is mainly contained in the Law on Insolvency (Bankruptcy Act) 1967, a bankruptcy laws that went into effect on September 30, 1967. This Act applies throughout Malaysia and has been revised (Act 360) started effect from 1 January 2006. Only a bankruptcy petition filed by creditors can not be tried before being processed within six months prior to the presentation prior to the feasibility and appropriateness (insolvency test). However, unlike the case with a bankruptcy petition filed by the debtor, the bankruptcy petition for bankruptcy can be processed directly without due diligence. So the absence of regulation relating to the insolvency test in UUKPKPU is a proof that UUKPKPU not provide legal protection for the debtor solvent. In addition to the lack of regulation of the insolvency test, UUKPKPU also does not regulate the value of the debt limit to file a bankruptcy petition to the Commercial Court, so that the creditor who has receivables amounting to Rp. 1000, - may file a bankruptcy petition to the Commercial Court against the debtor which has assets of tens or hundreds of trillions of rupiah, of course, when the terms of bankruptcy have been met as specified in UUKPKPU. Then legally Judge of the Commercial Court to be granted by the decision of a declaration of bankruptcy for a debtor in good condition Debtors in a state of solvent or insolvent.

II. Conclusion

In the Act 2 (1) and Act 8 (4) UUKPKPU is a disaster for the solvent debtor to cut with a declaration of bankruptcy due to ease requirements for bankruptcy as stipulated in laws, other than in UUKPKPU. There are no provisions article which governs about the need to test the financial capability (insolvency test) by the Commercial Court of wealth or finance the debtor before the court bankruptcy examined and decided upon. So there is no regulation on the limit value of debt that may be filed for bankruptcy as applicable in countries that embrace common law system. Insolvency tests can be carried out by the Commercial Court in various ways, such as by using a cash flow test (test of financial flows) or Balance Sheet (Balance Sheet) or Profit and Loss Statement (profit and loss) based on financial audit carried out by an Office Public Accountant (KAP) which are independent. So on the basis of Act 2 (1) and Act 8 (4) and the lack of regulation of the insolvency test and the limit value of debt in the examination of cases of bankruptcy makes it very easy for the solvent debtor to be declared bankrupt by the Commercial Court, even though the solvent debtor has assets to support national economic development.

Synchronizing the philosophy of bankruptcy with the requirements of the state can not afford the application for bankruptcy is not reflected in UUKPKPU. The requirements of a state incapable through insolvency test can be done by the judge to appoint Public Accountant (KAP), which is registered in the Ministry of Justice before the case begins, not after the debtor is declared bankruptcy. When the case of bankruptcy began and the parties present at the first trial, the judge may request that the applicant for bankruptcy can prove in advance, whether the debtor is really in a state incapable by appointing public accounting firm to examine the financial statements of the debtor if the debtor in the form of a company or limited liability company.

References

- [1]. Ahmadi, Hendryi and Plenary P. Sugarda, Implementation Insolvency Law Test In Indonesia, Decision Study Bankrupt In
- [2]. Indonesia, Thesis, University of Gadjah Mada, Yogyakarta, 2013.
- [3]. Bogdan, Michael, Introduction to Comparative Legal Systems, Nusa Media, Bandung, 2010.

- [4]. Harahap, Krishna, the Civil Procedure Code, class action and arbitration and alternative, Grafitri, Bandung, 2003.
- [5]. Muljadi, Kartini and Gunawan Widjaja, Manual Handling Bankruptcy Case, King Grafindo Persada, Jakarta, in 2003.
- [6]. Ping, Khoo Kay, Law and Practice of Bankruptcy in Malaysia, Lexis Nexis Malaysia Sdn Bhd, 2003.
- [7]. Prinst, Darwan, Strategy Developing and Managing Civil Lawsuit, PT Citra Aditya Bakti, Bandung, 1996.
- [8]. Sastrawidjaja, Man. S Law, Bankruptcy and Suspension of Payment, Alumni, Bandung, 2006.
- [9]. Shubhan, M. Hadi, Bankruptcy Law, Principles, Norms and Practice in the Courts, Kencana Prenada Media Group, Jakarta, 2012, Sinaga, Syamsudin. M, Bankruptcy Law Indonesia, PT Tata Nusa, Jakarta, in 2012.
- [10]. Sjahdeni, Sutan Remy, Bankruptcy Law, Understanding the Law No. 37 Year 2004 on Bankruptcy, PT Pustaka Utama Graffiti, Jakarta 2010
- [11]. Sunarmi, Bankruptcy Law, 2nd Edition, PT Sofmedia, Jakarta, in 2010.
- [12]. Sunarmi, Critical Review Of Bankruptcy Act: Towards Bankruptcy Law That Protects Interests of Creditors And Debtors Graduate School Dissertation USU, Medan 2005
- [13]. Syahrani, Riduan, Books Basic materials Civil Procedure Code, PT. Citra Aditya Bakti, Bandung, 2004.
- [14]. Thomson, Roy Goode, Principles of Corporate Insolvency Law, Sweet & Maxwell Limited of 100 Avenue Road London NW3 3PF 2005 <http://www.Google.Com/>, Antara, Comments hayono isman, Verdict The Overwrite Telkomsel Terrible, accessed on December 28, 2012.
- [15]. Decision on Case Number. 02 / Bankrupt / 2012 / PN.Niaga.Mdn
- [16]. Decision on Case Number. 48 / Bankrupt / 2012 / PN.NIAGA.JKT.PST. Act No. 37 in2004 on Bankruptcy and Suspension of Payment.