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ANALYSIS OF THE PROPOSED APPLICATION OF THE INSOLVENCY TEST IN THE DRAFT LAW ON BANKRUPTCY AND POSTPONEMENT OF DEBT PAYMENT OBLIGATIONS BASED ON THE LEGAL SYSTEM IN INDONESIA

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Abstract

Insolvency Test is a method used to determine the viability of the debtor's business that will then be used to gauge the reasonableness of the debtor to be declared bankrupt. Nowadays, the insolvency test is implemented in some countries, including the United States of America, England, and Thailand. The implementation of insolvency test in some countries then becomes the basis idea for Asosiasi Pengusaha Indonesia/Indonesian Entrepreneurs Association (APINDO) to suggest that insolvency test must be included in the draft amendment of the Bankruptcy Law of Indonesia, because APINDO believes that the requirements for declaring bankruptcy to the debtor in Indonesia are overly simple. This suggestion aligns with several academics' opinions, saying that Indonesia needs to implement an insolvency test. The insolvency test is an interesting topic to be researched, considering that Indonesia has a different understanding of concepts related to insolvency and bankruptcy because Indonesia does not recognize the insolvency test. However, in practice, fulfilling the evidence in the insolvency test related to the financial statements of the debtor (especially for corporate debtors), valuation of assets and non-performing assets is not easy and tends to be more unreliable.

Keywords: Insolvency Test, Bankruptcy, Draft Amendment of Bankruptcy Law, Indonesian Legal System.

INTRODUCTION

In the last five years, there has been a marked increase in the filing of bankruptcy applications for debtors, both individuals and legal entities, in Indonesia. In 2018, the total number of bankruptcy cases in all commercial courts in Indonesia was 406, then in 2019 there were a total of 552 cases, in 2020 there were 660 cases, the highest peak in the last 5 years occurred in 2021 which coincided with Covid-19, namely 863 cases and in 2022 there was a decline with a total of 676 cases, while in 2023 up to in June there were 176 cases [1]. This increasing trend is thought to have occurred partly due to the easier requirements for filing bankruptcy for Debtors.

According to the provisions of Article 2 in conjunction with Article 8 of the UUKPKPU, the conditions for a debtor to be declared bankrupt are if he has at least two creditors and fails to pay off at least one debt that is due and collectible, and can be proven simply. The ease of the requirements for declaring bankruptcy can be understood if you look at the weighing points in the UUKPKPU which states that the UUKPKPU was created as a solution to overcome the big challenges faced by the business world in resolving debt and receivable problems so that they can continue their operations. However, there are other opinions which think that the ease of bankruptcy requirements can trigger bad intentions from various parties to bankrupt a person or business entity, one of these opinions comes from the Indonesian Employers' Association (APINDO). APINDO sees that the requirements for declaring bankruptcy for debtors in Indonesia are too easy, so there is a need for an insolvency test in the requirements for filing a bankruptcy application. This proposal was then also submitted as input in the Draft Amendment to the UUKPKPU.

The insolvency test is an effort taken to test the financial condition of the bankruptcy respondent both in terms of cash flow and the company's balance sheet. Evaluation of the financial situation of debtors submitted for bankruptcy is carried out through an audit process by an independent public accounting firm. The aim is to objectively ascertain whether the

debtor is truly in a financial position where it is no longer possible for him to fulfill his payment obligations. In other words, this audit is used to confirm whether the debtor has experienced a real insolvency situation [2].

In practice, the insolvency test has been introduced and applied in several countries *Anglo-Saxon* such as the United States and England. United States as a country *common law* often serves as a reference for the formation of laws for other countries, one of which is related to bankruptcy regulations, namely *Bankruptcy Laws* or *Bankruptcy Reform* Act of 1978, otherwise known as bankruptcy law. Before this bankruptcy law was enacted, America used the 1898 Bankruptcy Code [3]. Despite the new bankruptcy law, the fundamental debate about which bankruptcy review procedure is most appropriate and should be used for all bankruptcy filings is still ongoing. This was reinforced by the opposition from practitioners who at that time felt unsure about the application of the bankruptcy test due to the difficulty of providing advice on restructuring a company [4].

The implementation of insolvency tests in the United States is also carried out in several other countries such as England, India, Singapore and Thailand. The proposal regarding the implementation of the insolvency test was also voiced by APINDO as well as academics and legal experts, which was then formulated in the UUKPKPU Draft Academic Text. The Academic Paper explains that the bankruptcy requirements applied in several countries are based on an insolvency test, so it would be a good input if the insolvency test were applied in Indonesia to be used as a basis for determining the bankruptcy state of a debtor, which would later be carried out before or during the implementation of the judicial process [5]

The inclusion of the proposal for an insolvency test as a consideration in drafting the UUKPKPU Bill has received many reactions from practitioners and academics. The author also believes that the relevance of the level of ease of applying for a bankruptcy declaration and achieving justice for the parties with the plan to implement the insolvency test in Indonesia is not necessarily appropriate. The author then tries to map out what problems will become obstacles if the insolvency test is implemented in Indonesia, including issues related to financial reports from debtors, asset value valuation, problems with non-current assets, the evidentiary system and the role of judges in trial examinations. This background is what prompted the author to conduct an analytical study related to the application of insolvency tests in the design UUKPKPU.

RESEARCH METHODS

The research method carried out by the author uses normative juridical research methods, with analysis legislation as a reference and compare the applicable regulations with the proposals that appear as improvements to the regulations and the possibilities that could arise as a result of the proposed improvements.

This research utilizes secondary data, namely data obtained not directly through collection in the field, but through reviewing various library sources or literature studies that are relevant to the topic discussed [6]. Secondary data in research can be obtained from primary, secondary and tertiary legal sources. Material Primary law is the actual source of law, including laws and court decisions related to the formulation of regulatory patterns that provide a comprehensive picture of the analysis of the urgency of the proposed application of the insolvency test in the draft bankruptcy law in Indonesia. Meanwhile, secondary legal materials contain legal studies in legal literature and journals. The results comprehensively present the level of urgency of the proposed application of the insolvency test in the draft bankruptcy law in Indonesia.

RESULTS AND DISCUSSION

Concept of Invention Test in Academic Text of Draft Law concerning Amendments to Law of the Republic of Indonesia Number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations.

In the Academic Paper on the Draft Law on Amendments to UUKPKPU, it is emphasized that in bankruptcy cases, ideally the debtor who can be declared bankrupt is the debtor who is truly in a state of insolvency. This means that financially, the debtor is no longer able to fulfill some or all of his debt obligations to his creditors, or when the total value of his debt exceeds the total assets and wealth owned. A debtor cannot be said to be insolvent if he is only in arrears in payments to one creditor, while other creditors are still carrying out their obligations, unless the unpaid creditor is the holder of the majority of the debtor's debt. From this narrative, the urgency of the need for a measuring tool that is able to distinguish between conditions of temporary financial difficulty where debts have not been paid but assets are still sufficient and conditions of true insolvency, namely when the amount of debt has exceeded the entire value of the assets owned, emerges. This measuring instrument became known as the insolvency test [5].

The insolvency test is an evaluative approach used to assess the financial health of a business entity, the results of which become the basis for consideration in determining whether the debtor meets the criteria to be declared bankrupt or not. The application of the insolvency test model has been carried out in several countries outside Indonesia as written in the UUKPKPU Draft Academic Text, which is essentially as follows:

United States of America

The American legal system applies 3 (three) types of insolvency tests in corporate and bankruptcy law, namely [7]:

a) *Cash-flow insolvency,* or also known as *the ability-to-pay solvency* test or *equitable solvency*, is a testing method used to assess the debtor's ability to fulfill their debt obligations on time. This test focuses on cash inflows and outflows to determine whether the debtor has sufficient liquid funds to make payments. Based on The Uniform Commercial Code article 1-201 (b) (23) (A) and (B), insolvency is defined as a cumulative situation in which the debtor:

i. The debtor has debts arising from the ordinary course of business, not from *bonafide dispute*; and,

ii. The debtor is unable to pay his debt when it is due.

Approach *cash-flow insolvency test* does not just assess the debtor's current financial condition, but focuses on projecting the debtor's financial ability in the future to fulfill its debt payment obligations. The assessment of "ability to pay" is not only based on cash flow predictions that show a surplus over the amount of debt, but also takes into account the debtor's real readiness and capacity to pay off the obligations on time when they fall due. This is a common occurrence for a company, namely when *cash flow* the big one in the future.

b) Insolvency test *balance-sheet* used to evaluate whether the total assets owned by the debtor exceed the amount of liabilities or debts that must be borne. This test can be related to the decision to continue operating the company even though it has experienced bankruptcy (*going concern*) or carry out liquidation. This test process consists of two main stages. The first stage involves assessing assets using the best and highest expenditure analysis method, which aims to estimate the value of assets that can be utilized optimally. Based on the results of this analysis, an analyst can assess the company's sustainability potential in the future if the company continues to operate. The second stage focuses on the comparison between the debtor's total assets and liabilities. At this stage, the fair value of assets owned by the debtor, whether in the form of movable or immovable property, is

calculated based on the selected value premise. Next, the analyst calculates the amount of debt that must be paid by the debtor, including debt that is due and obligations that will arise in the future.

c) *Capital-adequacy test*, is a procedure used to assess whether a company has adequate capital. Under American law, the bankruptcy test is carried out by evaluating the debtor's balance sheet in accordance with the provisions contained in Section 101 (32) *Bankruptcy Code*. This method aims to determine whether the debtor's obligations are greater than the assets he owns, taking into account normal conditions (balance sheet insolvency test), without including assets transferred to other parties to avoid debt payment obligations (assets transferred fraudulently) and assets included in inheritance.

2) Thailand

Bankruptcy in Thailand is regulated under the Thai Bankruptcy Act B.E. 2483. Before being declared bankrupt, a debtor must go through 2 (two) tests, namely the first is an insolvency test, to determine and measure the debtor's financial health condition. If the insolvency test shows good results regarding the debtor's financial condition, then the debtor will then go through a second test, namely the reorganization test. The reorganization test is carried out to reorganize the debtor's management, including the debtor's financial reorganization.

3) England

The UK uses various types of tests to determine whether filing for bankruptcy is the right step for a company. Apart from the insolvency test which is used to assess the debtor's financial condition, there is also a legal test which aims to evaluate whether there has been previous legal action taken to try to resolve debt payment obligations by the debtor to the creditor. The following is a series of tests that must be passed in this process:

a) The cash flow test, which is regulated in Article 123 paragraph (1) letter (e) of the 1986 Insolvency Act, indicates that a debtor company is declared unable to pay its obligations if the court proves that the company is unable to fulfill its debt payments when they are due. In applying the cash flow test, the court considered that what was counted was an obligation that had to be paid immediately (*immediately payable*) as well as obligations that will be due in the near future *(falling due in the reasonably near future).* Determining when the debt is due is influenced by various conditions existing in the company.

b) Balance test, which is regulated in Article 123 paragraph (2) *Insolvency Act* 1986, states that a debtor company is considered insolvent if it is proven in court that the total value of assets owned by the company is lower than the amount of obligations that must be fulfilled, including obligations that are contingent or that will arise in the future.

One of the important court decisions related to the balance sheet test occurred in the case of Ors v. Eurosail-UK. In this case, even though the company fulfills the elements of Article 132 paragraph (2) which states that its assets are lower than its liabilities, which generally indicates that the company is in a condition of "*balance-sheet insolvent,*"The results of the court's decision show that this condition cannot be understood literally. This means that just looking at the obligations recorded in the company's balance sheet is not enough to declare the debtor insolvent. The court considers various other factors, including contingent and prospective obligations that may arise in the future, as well as the company's ability to fulfill these obligations in the long term. In this case, Eurosail is considered still solvable even though its assets are lower than its liabilities, because the company is estimated to still be able to fulfill its debt payment obligations which are due in around 30 years. The court decide that the company can still survive and fulfill its obligations, taking into account the balance between assets and liabilities, both current and future.

c) Test legal action (*legal action test*) is a method used to assess whether a company has a number of outstanding claims or claims for payment from court. If the company fails to fulfill its payment obligations for claims resulting from lawsuits (*statutory demands for payment*) which exceeds £750 (seven hundred and fifty pounds sterling) for companies, or £5,000 for individuals, then it is likely that the company will be processed for dissolution (*wind-up*). This large amount of bills is an indication of the company's inability to pay its debts and can be used as a basis for filing a bankruptcy application.

In contrast to these countries which use an insolvency test as a preliminary process before submitting a bankruptcy application, the Netherlands has a bankruptcy application system that is similar to Indonesia. In the Netherlands, the process of submitting an application for bankruptcy is carried out through a test known as *Liquidation Test.* The court can decide to declare the debtor bankrupt if the debtor no longer makes debt payments (*cease to pay*). Before filing a bankruptcy petition, creditors must submit sufficient evidence to support their application. Just like in Indonesia, the Liquidation test in the Netherlands requires two main conditions to be met, namely: (a) there are several creditors and one of the creditors has a debt that is past due, and (b) the debtor has stopped paying his debt to that creditor.

Liquidity Test carried out when the debtor is unable to pay his debts (*unable to pay*). In the event that a creditor applies for bankruptcy, the creditor only needs to provide simple evidence showing that there are two creditors whose debts have not been repaid. This Liquidity Test process does not involve examining financial balance sheets or documents containing figures, but rather focuses on the condition of payments of outstanding debts of debtors.

The main focus of evidence in the Liquidity Test is the fact that the debtor has stopped paying debts to his creditors, which shows that the problem is not only due to the debtor's lack of funds, but can also be caused by the debtor's reluctance to pay (*unwilling to pay*). In addition, in the Netherlands, the process of selling assets to pay off debts is considered more practical than holding meetings between creditors (*creditors meeting*) to prepare a debt restructuring offer.

System *Liquidation Test* in the Netherlands this is considered better for them because *balance sheet test* which is carried out in countries such as England and the United States in practice allows data to be manipulated in such a way by debtors.

A Study on the Application of the Insolvency Test in the UUKPKPU Plan Based on the Legal System in Indonesia

a. Discussion of Practical Obstacles in the Concept of Implementing the Insolvency Test in Indonesia

The formulation of the UUKPKPU Draft Academic Paper, especially regarding the proposal to implement an insolvency test, has given rise to several pros and cons reactions from various groups. AKPI counter reaction. The General Chairperson of AKPI for the 2019 – 2022 period believes that the insolvency test system is irrelevant and difficult to implement in Indonesia. If this insolvency test is applied, the creditor must prove that the debtor is insolvent through the debtor's financial report, whereas this is difficult to do because the creditor does not necessarily have access to the debtor's financial report, especially if the company is a closed company [8].

The proposal regarding the existence of an insolvency test as a legal basis for debtors to be declared bankrupt is contained in the Academic Paper, although there are still pros and cons related to this. In the past, when Indonesia still used it *Bankruptcy Regulation Gazette* 1905:217 *in conjunction with the Staatsblad* 1906:248 (hereinafter referred to as "*Bankruptcy Ordinance*") as the basis of Indonesian bankruptcy law, there are still provisions for insolvency tests in declaring bankruptcy for debtors, as stated in Article 1 paragraph (1) *Bankruptcy Ordinance* which emphasizes more on evidence of the debtor's incapacity (*inability to pay*) to

pay his debts through the use of the phrase “stop paying his debts”. This arrangement was then changed through Article 2 paragraph (1) of the UUKPKPU, so that there is sufficient evidence that non-payment of a minimum of one debt that has been proven to be due and collectible will result in the debtor being declared bankrupt. these provisions *by changing* also applies to requests for Postponement of Debt Payment Obligations (hereinafter referred to as "PKPU").

Ricardo Simanjuntak in his book entitled: Indonesian Bankruptcy Law and PKPU Theory and Practice, said that those who are pro for the insolvency test tend to argue that changes to the requirements for declaring a debtor bankrupt from the obligation to prove that the debtor is insolvent (*insolvency test*) based on Article 1 paragraph (1) of the Bankruptcy Ordinance becomes sufficient only on the basis of the estimated inability to pay the debt (*presumption of inability to pay a debt*) or *presumption of insolvent* as regulated in Article 2 paragraph (1) of the UUKPKPU, in fact it is not simply accepted in its application [9]. Some legal experts actually argue that the doctrine *presumption of insolvent* In fact, it will result in uncertainty and unfairness in business, because it will be very easy for a debtor to go bankrupt in Indonesia, even though the debtor's financial situation may still be solvent.

b. Pros and Cons of Implementing an Insolvency Test

The author will convey the pros and cons of implementing insolvency tests in Indonesia with a description of the obstacles and advantages of implementing insolvency tests as follows:

1) Advantages of Insolvency Tests

Opinions that support the application of the insolvency test come from the perspective of protection for debtors, so it is important to first ascertain whether the debtor is in a state of insolvency, namely a situation where the debtor is unable to pay the debts he has because the total value of his debts exceeds the value of all the assets he owns.

The insolvency test is used as a tool to carry out initial selection of bankruptcy applications submitted to the commercial court, so that bankruptcy is not used as a means by parties who have bad faith towards the debtor (destroying the debtor's business) as a result of the easy requirements for applying for a bankruptcy declaration.

2) Obstacles in Implementing Insolvency Tests

Groups that oppose the implementation of the insolvency test tend to convey the following in terms of the obstacles that may be faced:

Debtor's Financial Report (Balance Sheet Insolvency Test)

Financial Reports are documents that contain information related to company finances based on accounting periods [10]. The information in the financial reports will be the basis for assessing the company's performance in that period. This is because the financial report will describe information related to the company's profits and losses, the company's cash flow, changes in the company's capital, the company's financial position and records of all the company's financial conditions. The purpose of this reporting is to provide information related to financial elements that is useful for stakeholders as a reference for comparing and assessing the financial impacts arising from economic decisions made by the company which have an impact on performance achievements in addition to those related to company management. Financial reports must be prepared in such a way that they are easy to understand, relevant, reliable and allow for comparison. Financial reports are considered relevant if the information contained in them is able to influence users' decisions. However, in practice, the obligation to disclose financial reports applies more to public companies, while closed companies are not required to fulfill this obligation.

Public Companies and Closed Companies in the provisions Law Number 40 of 2007 concerning Limited Liability Companies is a company or limited company that is established

based on an agreement between several people to invest capital and carry out certain businesses to seek profits which separates personal assets from company assets [11]. The difference between a public company and a closed company is the shareholders. The public can own shares in a public company, so often the term public company is a public company. Public companies in Law of the Republic of Indonesia Number 8 of 1995 concerning Capital Markets are companies whose shares are owned by at least 300 shareholders and have paid-up capital of at least IDR 3,000,000,000.00 (three billion rupiah) or another amount specified in government regulations. The name of a public company is followed by the abbreviation "Tbk" at the end of the company name [12]. In its implementation, this condition of share ownership being permitted to be owned by the public has consequences for public companies to carry out transparent management so that one of the logical consequences that arises is that public companies are required to make information disclosure policies and financial reports which according to the provisions at least in 1 (one) year submit 4 (four) reports [13]. this condition This is different from the provisions for closed companies, where closed companies generally do not have such strict obligations as open companies, so that the financial condition of closed companies is not known to the public and it is not easy for creditors of closed companies to gain access to these financial reports [14].

The difficulty of accessing debtor financial reports, especially in closed companies, is one of the obstacles if this insolvency test system is implemented in Indonesia, because when a creditor wants to file a bankruptcy petition against a debtor, the creditor must first have proof that the debtor is insolvent (no longer able to make debt payments to its creditors) based on the debtor's financial report. In practice, even for bank creditors, debtors' consistency in providing financial reports does not always run smoothly. This condition is sufficient to prove that the rules which impose the burden of proving the debtor's financial statements on the bankruptcy applicant (creditor) will be difficult to implement.

1.1 Asset Value Valuation Test (*Capital Adequacy Test*)

If the creditor succeeds in obtaining the debtor's financial report which is then used as evidence in court, there is still another debate in determining the debtor's insolvency situation. This is the basis for determining whether accounting is appropriate for the debtor to be declared bankrupt or not based on the results of the financial report submitted in the trial of the application for declaring bankruptcy in court and how and how to determine the value of the debtor's assets.

The debtor's financial report should include assets as one of the substantive components in the report, whether these assets are included as current or non-current assets. To find out the value of the debtor's assets and use them as valid evidence in court, the debtor's assets must be assessed (evaluated), whether they are actually less than the debtor's debts or not. Asset appraisal or asset valuation (*asset valuation)* is a mechanism used to determine the value of each asset owned by the company, whether in the form of shares, tangible assets, or intangible assets. This assessment aims to calculate the total value of the net assets owned by the company, which in the event of bankruptcy, this asset assessment will be a determining part of determining the amount of wealth of the debtor company and will later become the basis for determining the assessment of the debtor's ability to repay its debts [15].

Valuation of debtor assets often gives rise to differences of opinion, one of which is caused by differences in interpretation regarding the basis of the assessment, whether to use book value or actual value based on market prices. *(market price),* fair value *(fair value),* or liquidation price *(liquidation value).* Apart from that, this difference can also arise related to the choice between calculating the value of assets assuming the debtor is still carrying out business activities (*going concern value*) or based on unit asset value or retail sales (*break-up sale*

*value)[16].*These regulatory provisions are important to take into consideration and attention in the proposed application of the insolvency test.

1.2 Evidence System in the Examination of Bankruptcy Applications in Indonesia

The system of proof for filing a bankruptcy petition in Indonesian Bankruptcy law is regulated in Article 163 HIR which stipulates that every party who claims to have a right or discloses an action to support or refute that right, is obliged to prove the existence of the right or event in question. In the context of the insolvency test, Article 163 HIR strictly regulates that creditors, when submitting a request for a bankruptcy declaration, have the burden of proof to show that the debtor is insolvent, which can be proven through the debtor's financial statements., because the debtor's financial report is a form of evidence as regulated in Article 1866 of the Civil Code.

A very basic question, how can a creditor prove a debtor's financial report in court if the creditor does not have access to the debtor's financial report? Even if the debtor is a public company, how do creditors have access to the debtor's financial reports? The author also sees that it will be an obstacle for creditors to prove their arguments because the panel of commercial court judges will ask to show the original financial statements proven by the creditor, which the creditor will most likely not be able to fulfill. Article 1888 of the Civil Code clearly stipulates that the evidentiary power of a writing lies in the original deed. If the original deed is available, the copy or extract can only be considered valid to the extent that it corresponds to the original, which can be ordered to be produced. In this case, the judge will only assess the evidence submitted by the applicant (creditor) if the creditor can prove the existence of original documents from the evidence submitted at the trial.

Apart from the fact that creditors will find it difficult to obtain evidence of debtors' financial statements, Philip R. Wood, in his book entitled *Principles of International Insolvency* also stated that the doctrine *balance sheet test* not easy to implement, because determining the value of assets (*assets value*) must be based on the debtor's latest financial statement of profit and loss (*up to date audit*) as well as on the calculation of capability and continued operation (*going concern*) debtor's business [17].

Existing facts related to the difficulty of implementing financial statement verification (*balance sheet test*) as a basis for bankrupting debtors is consistently applied by the panel of judges, such as in the case of the petition for bankruptcy declaration submitted by PT Bumijaya Tanjung against PT. Asuransi Tugu Indonesia, even though PT Bumijaya Tanjung (as Bankruptcy Petitioner) succeeded in submitting evidence of the Bankruptcy Respondent's Financial Balance Report as of December 2000 and 1999 which was obtained from the Bankruptcy Respondent's publication in the Indonesian Business Daily on 28 May 2000. Evidence of the Bankruptcy Respondent's Financial Balance Report stated that the Bankruptcy Respondent had an affiliated debt to a third party/debtor amounting to Rp. 111,895,000,000,-. In the legal consideration section, the Panel of Judges at the cassation level chaired by Supreme Court Judge Mrs. Mariana Sutadi. S.H., rejected the Bankruptcy Petitioner's argument on the grounds that the company's profit and loss calculation balance sheet obtained from the announcement in the Bisnis Indonesia daily on May 28 2001, could not be used to prove the existence of other creditors in the bankruptcy declaration application [18].

This is interesting to study further, if the applicant (creditor) with all his efforts succeeds in proving his argument that the debtor is insolvent (through financial reports that prove that the debtor's debts are greater than his assets), but in fact the debtor still has outstanding receivables from other parties, can the debtor be declared bankrupt? What about doctrine *presumption of insolvent* which is still adhered to by UUKPKPU, where debtors may in fact be able to pay their debts to creditors, but the debtor does not want to pay them (*unwilling to pay*).

Facts related to the difficulty of proving a bankruptcy application through an insolvency test mechanism (*balance sheet test*), both proof of the financial statements and proof of the existence of other creditors is sufficient to prove that the application of the insolvency test in bankruptcy law in Indonesia is still quite difficult to carry out.

Irrelevant Insolvency Test Included in UUKPKPU Change Plan

Based on the descriptions regarding the advantages and obstacles of implementing the insolvency test, the author does not see any urgency in including provisions governing insolvency tests in the Draft Amendment to the UUKPKPU at this time. This is due to obstacles that may be very vulnerable to being faced in the future if the provisions for the insolvency test are regulated.

Tracey Evans Chan in her article entitled "*Winding up*" legally states that to determine whether a debtor is bankrupt or not, it should not always be through proving that the amount of debt the debtor has is greater than the value of the assets he owns (*insolvency test*). Tracey Evans Chan then explained further that a creditor would be greatly hampered in his right to file a bankruptcy petition if the provisions "*the company is unable to pay debts*" as intended in Article 254 paragraph (1) (e) of the Singapore Company Act 1994 must be proven through the financial reports of the debtor of the company that is requested for bankruptcy, bearing in mind that creditors generally do not have access to their debtors' financial reports, in fact in many cases creditors do not know the debtor's financial condition.

There is doctrine *presumption of insolvent* it is still very relevant to be applied in UUKPKPU, considering that this doctrine still protects the interests of both creditors and debtors. It doesn't matter whether the debtor doesn't want to pay the debt (*unable to pay*) or unwilling to pay (*unwilling to pay*) its debts to its creditors. The principle emphasized by this doctrine is that debtors are obliged to make debt payments to their creditors when the debt is due and can be collected. This doctrine does not matter whether the debtor still exists *solvent* or not, because it could happen that the debtor still has the ability to pay the debt (*solvent*) but the debtor does not want to pay the debt (bad debtor). There is a limitation that when the debtor's debt is due and collectible, the legal consequence is that the debtor can be filed for bankruptcy by his creditors, if the creditor can prove that the debtor has a debt that is due and collectible and that there are other creditors. The principle is, if the debtor does not pay the debt which is due and can be billed to the creditor (it does not matter whether the debtor does not want to pay or is unable to pay the debt), then the creditor can apply for a bankruptcy statement against the debtor. This is sufficient to provide justice for both debtors and creditors and avoid debtors who do not have good intentions who deliberately do not want to pay their debts to their creditors. Apart from that, it is important to remember that bankruptcy means are sometimes the answer for debtors to get out *financial distress* through the peace proposal he offered.

When the debtor who is still continuing his business (*going concern*) feels that the petition for bankruptcy declaration submitted by the creditor is inappropriate, then the debtor can repel it with a PKPU petition in the middle of the trial of the petition for bankruptcy declaration as regulated in Article 222 paragraph (2) UUKPKPU in conjunction with Article 229 paragraphs (3) and (4) UUKPKPU, which essentially states that the PKPU petition must be decided first if there is a PKPU petition submitted after the petition for bankruptcy declaration against the debtor. In the PKPU process, debtors can offer a peace plan to their creditors, so that if the majority of creditors accept the peace offer submitted by the debtor, then there will be peace between creditors and debtors (homologation) through a peace agreement. In the PKPU process, the debtor can prove whether the debtor is still able to pay the debt or is no longer able to. If the debtor defaults on the peace agreement that has been agreed, or if the majority of

creditors reject the peace plan proposed by the debtor, then the consequence is that the debtor can be declared bankrupt. The existence of provisions governing bankruptcy petitions and PKPU petitions in the UUKPKPU actually provides sufficient space for debtors to try and settle their debts to their creditors, so that it is still not relevant that there is an urgency to change the requirements for bankruptcy petitions in the UUKPKPU as discussed in the UUKPKPU Academic Paper, especially in relation to insolvency tests.

CONCLUSION

The author concludes that the proposal to include an insolvency test in the UUKPKPU Draft as a basis for creditors to file for bankruptcy against debtors is still not relevant and even if it were forced to be included, it would be difficult to implement in Indonesia, because the insolvency test is not yet supported by supporting regulations in the Indonesian legal system. The rules relating to evidence (as a formal requirement in the process of examining cases at trial, including the examination of bankruptcy petition cases) as regulated in Article 163 HIR are now in line with UUKPKPU. Opinions regarding the lack of protection for debtors related to the PKPU or bankruptcy process can still be maximized through the presentation of an appropriate peace plan that can be accepted by creditors.

PKPU and/or bankruptcy applications are still quite relevant using principles *presumption of insolvency*, so that proof of the debtor's condition (capable or unable and willing or unwilling to pay the debt) can be properly proven by the creditor. In the event that the creditor cannot prove the existence of the debtor's debt and that there are at least 2 (two) creditors from the debtor, then the PKPU or bankruptcy application submitted by the creditor must be rejected by the panel of judges.

It is hoped that the preparation of comprehensive laws that provide balanced protection for the parties can fulfill the ideals of justice in the Indonesian rule of law and can bring prosperity to all levels of society, especially in business relations between creditors and debtors. For this reason, it is hoped that the parties who drafted the UUKPKPU Draft must be able to properly and comprehensively examine whether the insolvency test can be applied in Indonesia, in accordance with the legal system that applies in Indonesia.

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