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SELECTION OF METHODS OF PROVING THE INABILITY OF DEBTORS TO PAY DEBTS AND THE APPLICATION OF PREJUDICE AGAINST MISUSE OF INSOLVENCY INSTITUTIONS IN INSOLVENCY LAW IN INDONESIA

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Abstract:
In determining the inability of the Debtor to pay his debts to the Creditor, known 2 (two) methods, namely: First, the Insolvency Test; Second, the use of prejudice of not being able to pay debts (Presumption of Inability to Pay). The Indonesian state uses the prejudiced method of being unable to pay debts (Presumption of Inability to Pay), so the bankruptcy terms become very simple. This article discusses the use of methods to determine the inability of the Debtor to repay debts associated with the prejudice to abuse (presumption of abuse) of the insolvency institution. The research method used in this article is normative juridical research with a statutory approach, a comparison approach, and a conceptual approach. There are several research results, namely; First, the politics of Indonesian insolvency law is time to change from prioritizing debt repayment to prioritizing Business Reorganization as found in the United States.; Second, it is time for the Indonesian state to abandon the prejudiced method of being unable to pay debts (Presumption of Inability to Pay) to use the Insolvency Test method to determine the incompetence of debtors in repaying debts.

Keywords: Presumption of Inability to Pay, Presumption of Abuse, Business Reorganization, Insolvency Test
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INTRODUCTION

In the introduction to this article, it will be briefly described the legal politics of the establishment of Law Number 37 of 2004 concerning Insolvency and Postponement of Debt Payment Obligations ("UUKPKPU") before entering into the discussion of the method of proving the inability of the Debtor in paying the Creditor's debt in insolvency law.

In the 2004 General Election ("Election"), the voting process was conducted simultaneously on April 5, 2004. As a result of the election, the top 2 (two) political parties were the Golkar Party ("PG") in first place with a result of 21.58% (twenty-one commas' fifty-eight percent), followed in second place by the Indonesian Democratic Party of Struggle ("PDIP") 18.53% (eighteen points fifty-three percent). The election results of the two parties are inversely proportional to the elections in 1999, where the PDIP was in first place won 33.74% (thirty-three-point seventy-four percent) of the vote, and PG came in second with 22.44% of the vote (twenty-two-point forty-four percent). At the time the draft bill ("RUU") of the UUKPKPU was submitted by the Government to the House of Representatives (DPR), which became the President of the Republic of Indonesia at that time was Megawati Soekarnoputri. President Megawati Soekarnoputri proposed the initiative of the Government to discuss the UUKPKPU Bill with 'Top Priority'.

The first meeting of the UUKPKPU bill between the Government and the House of Representatives ("DPR") was held on May 17, 2004. The bill was passed at the Plenary Meeting of

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the DPR on September 22, 2004, which means only about 4 (four) months after the UUKPKPU bill was processed in the DPR to be passed into law ("UU"). The period of 4 (four) months to complete a law full of formal and material law contents is reasonably fast. The DPR period at that time will end on September 30, 2004. Thus, UUKPKPU is one of the last bills to be passed into law during the term of office of the DPR: October 1, 1999, to September 30, 2004.

In the Working Meeting of the Government Bill with the House of Representatives during the discussion of the UUKPKPU Bill, it was discussed about the need to follow the insolvency law model in force in the United States, namely if it is necessary a measure the solvency rate of the Debtor who will be declared bankrupt so that it does not occur like the case of PT. Manulife Life Insurance Indonesia (PT. AJMI) and PT. Prudential Life Assurance (PT. PLA). Regarding the discussion, it was discussed about 'the state of the Debtor who does not want to pay the debt' or the 'state of the Debtor who is unable to pay the debt ', but the issue was resolved by way of 'only the Minister of Finance can apply for Bankruptcy/PKPU to the Insurance company'. In the end, the UUKPKPU Bill was passed into law.

The UUKPKPU passed has formulated bankruptcy requirements very simply: Debtors with two or more Creditors who do not pay in full at least one debt that has fallen over time and can be billed will be declared bankrupt. With the formulation of such straightforward bankruptcy conditions, the author argues that the insolvency law regime has since adhered to the bankruptcy conditions 'prejudice of the incompetence of the Debtor. to pay his debts' (Presumption of Inability to Pay Debt).

According to the author, the bankruptcy requirement, which is based solely on the prejudice of the Debtor not being able to pay his debt to the Creditor (Presumption of Inability to Pay Debt), is inappropriate.

Based on the background mentioned above, this article will discuss 1 (one) legal issue regarding the feud of methods of determining the proof of the Debtor's inability to pay its debts to Creditors, which universally puts forward the Insolvency Test rather than the 'presumption of inability to pay debt'.

This article uses a normative juridical writing method with a statutory, conceptual, and comparative approach. This article consists of several sections, namely; in the first part is the introduction, the second part discusses the method of proving the inability of the Debtor to pay debts and prejudice of misuse of the insolvency institution, followed by the third part discusses the insolvency test method to determine the inability of the Debtor in paying the debt, and in the last section is the concluding section containing the conclusions.

METHODS

The research method used in this article is normative legal research with statutory, conceptual, and comparative legal approaches. The comparative legal approach in this article is carried out in the United States compared to Indonesia. The statutory approach in this article is to compare Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations compared to Title 11 in Chapter 7 and Chapter 11 of the United State Bankruptcy Code. The conceptual approach used in this article is to compare article 2, paragraph (1) of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations compared to Title 11 in Chapter 11 of the United State Bankruptcy Code.

RESULT AND DISCUSSION

The very simple bankruptcy requirements on UUKPKPU are more beneficial to creditors than to debtors. Very simply, the bankruptcy requirement against the Debtor has made the insolvency

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law only as a means for the Creditor to collect his debt against the Debtor (as a guarantee that the creditor's debt is certainly paid off). Regarding this, it cannot be separated from using the 'Presumption of Inability to Pay Debt ' method compared to the Insolvency Test method.

Using the 'Presumption of Inability to Pay Debt' method in insolvency proceedings has made the insolvency law institution the same as a regular civil suit. The actual function of insolvency law is not as a tool for creditors to collect debts from debtors. Suppose the function of insolvency law is only as a tool for collecting debts. In that case, the function of insolvency law is far from its function as an ultimum remedium of debt settlement. It contradicts the United Nations World Institutions: United Nations Commission on International Trade Law ("UNCITRAL"), which states that insolvency should be Ultimum Remedium and not Primum Remedium.

The ease of bankruptcy requirements in the UUKPKPU, which relies on the 'prejudice of being unable to pay debts' (Presumption of Inability to Pay Debt), has understated the essential function of insolvency law. Insolvency law should pay more attention to its impact on the country's economy, both macro and micro. If many debtors' businesses go bankrupt, the macro will make economic growth falter, causing harmful social impacts, such as; much unemployment, minimal levels of public welfare, malnutrition, and low levels of education. Meanwhile, micro-micro will cause adverse social impacts such as; triggering an increase in the crime rate, slavery in the form of many Indonesian workers working abroad as menial workers, substance/drug use illicit such as narcotics, and the emergence of many prostitution activities.

Indonesia's insolvency law regime should not make it easier for bankruptcy to occur. Using the 'prejudice of inability to pay debt ' method in determining whether or not the Debtor can pay the debt has made a condition of Bankruptcy became so easy. The politics of Indonesian insolvency law should not only emphasize the payment of debts of debtors but should also emphasize the Reorganization of the debtor's business. It means that the debtor's business which is still a good prospect, does not need to be complicated. This matter contrasts with the United States, which prioritizes Business Reorganization rather than facilitating bankruptcy requirements.

If the determination of proof of the inability to pay the debtor's debt is based solely on the 'prejudice of inability to pay debt ' method, it will cause problems in insolvency law enforcement. The matter referred to concerns straightforward bankruptcy requirements, which can make both Debtors and Creditors abuse the insolvency institution. The presumption of abuse principle can be used to prevent the misuse of insolvency institutions by Debtors and Creditors

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Simply put, the presumption of abuse of the insolvency institution means that any bankruptcy petition filed by either the debtor or the creditor is presumed to have been filed with lousy intent (bad faith), and the party filing the bankruptcy petition must demonstrate that the petition was filed in good faith in order to disprove the presumption. In other words, the petitioner must demonstrate that the bankruptcy application is being submitted in good faith. However, in some instances, the burden of proof is not imposed on the Bankruptcy Petitioner but on the respondent (Creditor).

The United States insolvency law provides for 'discharge' and 'fresh start' for Individual Debtors. Discharge is a condition in which a debtor in good faith is granted relief and/or debt write-off so that the Debtor who gets the discharge can start a new life with no debt burden. The new life or new state is called a fresh start in the case of an individual Debtor filing an individual voluntary petition, followed by the Debtor being granted a discharge by the Court. Creditors who object to the discharge obtained by the Debtor or the Creditor suspect that the Debtor obtained the discharge in bad faith, then the burden of proof in this situation is charged and addressed to the Creditor.

In 2005, the United States promulgated the Bankruptcy Abuse Prevention and Consumer Prevention Act ("BAPCPA"). This law provides for a 'meant test' for individual Debtors who will get

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a discharge in their insolvency proceedings. An individual debtor as a Bankruptcy Applicant who wishes to obtain a discharge must undergo a 'meant test'. The rule of 'meant test' is motivated by the prejudice that any individual Debtor filing an Individual Voluntary Petition is a legal subject intending to Abuse the institution of insolvency (presumption of abuse). The purpose of bapcpa's lawmakers making rules on 'meant tests' is to ensure that individual Debtors filing for bankruptcy can pay their debts to creditors to the fullest extent possible. Suppose it turns out that after the Debtor conducts a 'meant test', it is found that the Debtor has sufficient income to make payment of his debts to the Creditors Concurrently. In that case, the Debtor is deemed to have misappropriated the discharge facility provided under United States insolvency law.

The procedure for conducting a 'meant test' to the Debtor of the Bankruptcy Applicant is carried out in the following ways: First, the Debtor reports the total of all his income for 6 (six) months before the bankruptcy application. The debtor is filed. The total income of the 6 (six) months is divided by 6 (six) to find out the average monthly income of the Debtor; Secondly, after the first step has been taken, the court will then supplement the monthly income with the spouse's income from the Bankruptcy Applicant Debtor (husband or wife) which then multiplies it by 12 (twelve) to calculate how much the accumulated income per year of the Debtor (husband and wife spouse); Third, if it turns out that the annual income of the Debtor is equal to or less than the average annual income of the family in the state where the Debtor is domiciled it is located, which is measured by the same family size. Thus, the Debtor is deemed not to be abusing the insolvency institution (no prejudice is found to be abusing the insolvency institution); Fourth, if it is found that the annual income of the Debtor exceeds the average annual income of the family in the state where the Debtor's domicile is located, which is measured by the same family size. Thus, the Debtor must report again the total allowed monthly expenses (total allowed monthly expenses); Fifth, the purpose of calculating the total monthly expenses of the Debtor is to calculate whether the Debtor has the ability for the next 5 (five) years to paying his debts to his Concurrent Creditors for a certain amount; Sixth, the debtor's expenses per month that are allowed are determined in 5 (five) categories, namely: (1) Basic needs such as food, household necessities, toiletries, hygiene needs and the like that depend on the size of the Debtor's household; (2) Housing costs, transportation costs and debtor equipment costs; (3) The expenses of the Debtor fixed by the court, for example; fees for certain family members; (4) Payment of the Debtor's debt to the Separatist Creditors; (5) Payment of the Debtor's debt to the Preferred Creditor, for example; payment of taxes, child support, payment of damages and fines based on a court decision; Seventh, after calculating the total monthly expenses of the Debtor allowed, then the court will reduce the monthly expenses of the Debtor by the income of the Debtor every month, which is then multiplied by 60 (sixty). The value obtained determines whether, in the next 5 (five) years, the Debtor can pay off his debts to his Concurrent Creditors. The calculation results obtained are known as the 'repayment amount'; Eighth, the court will then calculate the total debt of the Debtor to its Concurrent Creditors, which then divides it by 4 (four). If the remaining total debt is less than or equal to US$ 8,175, then the threshold of the Debtor's debt is US$ 8,175, and if the total debt of the Debtor turns out to be found to be greater than US$ 8,175 but less than US$ 13,650, then the threshold of the Debtor's debt is the same as the value of the debt. If the debt value of the debt is more than US$13,650, then the debtor's debt threshold is US$ 13,650; Finally, the court will compare the amount of return (repayment amount) of the Debtor with the threshold. Suppose it is found that the amount of the Debtor's return is less than the threshold. In that case, the Debtor may be deemed not to violate the principle of 'prejudice ' (presumption of abuse) of the institution's insolvency. Then, suppose it is found that the amount of return (repayment amount) is equal to or greater than the threshold. In that case, the Debtor is considered to have violated the principle of ' prejudice' (presumption of abuse) of insolvency institutions.

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After the 'meant test' test result is obtained, and it turns out that the Debtor failed to pass the test, the court will reject the bankruptcy application filed by the Debtor. If the court rejects the Debtor's bankruptcy application, the court may give the Debtor a choice to have the Debtor convert his bankruptcy application into Reorganization.

The Non-Use Of The Insolvency Test Method To Determine The Inability Of The Debtor To Pay The Debt Is A Form Of Impartiality Towards The Debtor. As outlined, it is found that the UUKPKPU adheres to the method of determining the proof of the debtor's inability to pay debts using the method of 'prejudice of incapacity. Paying a debt' (Presumption of Inability to Pay Debt) compared to the Insolvency Test method, which is already universal. The non-application of the Insolvency Test method in the Indonesian insolvency law regime is a form of impartiality towards debtors (UUKPKPU is more partial to creditors).

In UUKPKPU, to make the Debtor bankrupt does not require the Debtor to be in a state of insolvency. This kind of condition is very clearly a form of partiality to creditors. Debtors who are still in solitary under the UUKPKPU will fall into bankruptcy. It is because UUKPKPU does not consider whether the Debtor's financial situation is solvent. If one debt has matured from at least 2 (two) Creditors, and the Debtor does not make payments on the maturing debt, then the debtor falls into bankruptcy. UUKPKPU defines the state of insolvency as a state of inability to pay, and the occurrence of insolvency in UUKPKPU is after the Debtor falls into bankruptcy first. It is not that the debtor's insolvency then just fell into bankruptcy, but bankruptcy first happened, and then there was an insolvency state.

The state of insolvency is not a condition for insolvency. However, it is a condition for liquidating bankrupt property. In essence, insolvency in Indonesia is not about solving or not solving the financial situation of the Debtor. However, insolvency in Indonesia is 'General Confiscation' as article 1 number 1 UUKPKPU, which has formulated insolvency as 'General Sita', not on the insolvency of the Debtor.

Solved has a broader meaning than solvency (the company's ability to pay off all existing debts using all its assets). It is not only measured as limited to assets owned by a company that can cover all liabilities if its assets are liquidated (Balance Sheet Test). However, the solvent can be derived from the company's cash flow which can meet all the company's obligations at each time due for payment of the company's obligations (cash flow solvent), and Solven has other meanings, namely: that the company's business continuity is in good condition (going concern solvent).

Insolvency according to Sutan Remy Sjahdeini, a Debtor is in an insolvent state only if the Debtor cannot pay most of his debts to the Creditor. A Debtor cannot be said to have been in an insolvent state if only to a Creditor, the Debtor does not want to pay his debts. Meanwhile, for other creditors, it turns out that the Debtor continues to pay his debts. It may happen that the Debtor is not unable to pay the debt but does not want to pay off the debt because the Debtor has specific reasons why he did not want to pay the debt to the creditor, in the condition that the Debtor does not want to pay his debts for specific reasons, which is not due to the state of being unable to pay the debt. Such circumstances, then, cannot be said that the Debtor has been in a state of insolvency.

If the Debtor does not pay the debt to 1 (one) or 2 (two) creditors while to other creditors, it turns out that the Debtor is still paying his debts. Thus, against the said Debtor cannot be filed for Bankruptcy in the Commercial Court but instead filed with the District Court in an ordinary civil suit. Suppose the civil suit has been proven and has permanent legal force. In that case, the claim for payment of the Creditor's debt against the Debtor can be carried out utilizing execution of the civil judgment in the District Court.

The absence of an insolvency test in the UUKPKPU clearly shows that Indonesia's insolvency law politics protects the interests of creditors more than debtors. The bankruptcy charge against the

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Debtor is supposed to be an ultimum remedium. However, this is contrary to the legal politics of the UUKPKPU, which provides enormous leeway for the occurrence of a state of bankruptcy. It is in line with the legal considerations of the Constitutional Court judges who held that the requirements given by the UUKPKPU in the case of filing a bankruptcy application are very loose. It is an omission by lawmakers in formulating Article 2, paragraph (1) of the UUKPKPU. When compared with the provisions contained in Article 1 paragraph (1) of Faillisement-Verordening (Stb. 1905-217 Jo. 1906-348), which reads:

"De schuidenaar, die in den toestand verkeert dat hij heeft opgehouden te betalen, wordt hetzip op eigen aangifte, hetzij op verzoek van een of meer zijner schuldeischers, bij rechterlijk vonnis in staat van faillisement verklaard"

The Constitutional Court of the Republic of Indonesia ("MKRI") held that the phrase "Hij heeft opgehouden te betalen" (state of inability to pay) was not contained in the formulation of Article 2 paragraph (1) of the UUKPKPU. Thus, in the absence of the requirement of "inability to pay", it has created a state where the Creditor can easily apply for bankruptcy against the Debtor who is without the need to prove whether the Debtor is in a state of being able to pay or not.

The non-necessity of the insolvency test as a condition of the application to file for bankruptcy has resulted in the fact that the debtor still in insolvency is declared bankrupt by the Commercial Court. It is clearly in favor of the interests of the Creditors alone.

CONCLUSION

Using the 'prejudice of the Debtor's inability to pay debt' method in determining the Debtor's inability to pay the debt has made the insolvency institution a tool to collect debts. The Indonesian state should use the Insolvency Test method to determine the inability of debtors to pay their debts. Using the Insolvency Test will make debtor companies that are still solving not easy to solve.

It is time for Indonesia's insolvency law politics to change from initially prioritizing debt repayment to prioritizing Business Reorganization. It means that companies with good prospects can stay safe.

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