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RESEARCH ARTICLE

INSOLVENCY OF DEBTOR AS THE BASIS TO APPLY DEFERMENT OF DEBT PAYMENT OBLIGATION (DDPO)

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ABSTRACT

Article 222 **of** Law 37 of 2004 regarding Bankruptcy and Deferment of Debt Payment Obligation (DDPO) explains two things: first, creditor cannot directly force the debtor to pay the debt and or the debtor's assets confiscation is delayed (moratorium); second, debtor restructures the debt by submitting reconciliation proposal. This research focuses on investigating how insolvency of debtor can become the ground of requesting for DDPO. The method used in this research is normative law study using five approaches including history approach, law approach, conceptual approach, comparative approach, and case approach. The analysis uses grammatical interpretation technique (language based interpretation) and comparative interpretation (comparing data to find the best law interpretation). This research concludes that insolvency of debtor as the ground to request for Deferment of Debt Payment Obligation is unknown in the law of Deferment of Debt Payment Obligation in Indonesia. Insolvency test is inapplicable in DDPO law, so there is no balance between creditor's and debtor's concerns in the DDPO. Therefore, insolvency test is important to be conducted to avoid multiple interpretations in the verdict which can lead to law uncertainty.

INTRODUCTION

Deferment of Debt Payment Obligation or DDPO aims to unable debtor to submit reconciliation proposal which involves the proposal of payment for some or all debts to the creditor. Deferment of Debt Payment Obligation is regulated in article 222 law no.37 year 2004 about Bankruptcy and Deferment of Debt Payment Obligation in fact covers two points: first, debtor cannot be forced to pay the debt and or the debtor's assets confiscation is delayed (moratorium). Second, debtor restructures the debt by submitting reconciliation proposal. This is in line with the philosophy of Bankruptcy Law which is to provide law protection to both parties involved in the case. Bankruptcy Law has brought significant changes in the law procedure regarding bankruptcy. Several new regulations covered in Bankruptcy Law present new grounds for law procedures in handling bankruptcy. Unfortunately, law no.4 year 1998 about bankruptcy has weaknesses which require correction. According to Hikmahanto Juwana, the amendment for bankruptcy mostly covers creditor concerns. This can be seen from the requirements for declared bankrupt as mentioned in article 1 no (1) that is when there are two or more creditors and the debtor fails to pay at least one debt which has matured and became payable, shall be declared bankrupt.

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However, in the amendment of bankruptcy law, there is no regulation which states that debtor shall be declared bankrupt when the debtor is insolvent. This of course against the universal philosophy of bankruptcy law which supposedly there to provide solution for debtor and creditor when debtor is in the condition of failing to pay the debt (Juwana, 2004). In PT. Dellpan Tunggal, Adi Dharma Nurhalim as the Chief Director of PT. Dellpan Tunggal as the one receiving the petition for DDPO submitted by CIMB Niaga Bank in 22 Mei 2018 and has been declared in the state of DDPO in 03 Juli 2018, the company has finally been declared as bankrupt in 13 September 2018 with the verdict number 67/Pdt.Sus/ DDPO/2018/ PN Niaga Jakarta Pusat. The creditor has rejected the reconciliation proposal submitted by PT. Dellpan Tunggal, AdiDharma Nurhalim who is also as the personal curator in the agreement with creditor requesting DDPO (PT. CIMB Niaga Bank) It also happens in PT. Broadbiz Asia bankruptcy which requests DDPO voluntarily for itself and is granted by the court on 28th of March 2018 with verdict 154/Pdt. Sus –DDPO/ 2018/ PN Niaga Jakarta Pusat but at the end is declared as bankrupt on 1th of October 2018 based on the verdict number 05/Pdt.sus-DDPO/2018/PN.Niaga Jkt.Pst in which PT. Bank Pembangunan Daerah Papua is as the applicant of the cancellation for reconciliation proposal because PT. Broadbiz Asia has defaulted the reconciliation proposal approved and assigned by commercial court with homologation number

154/Pdt.Sus-DDPO/2018/PN. Niaga.Jkt.Pst. However in fact, the assets of PT. Broadbiz Asia is still more than its debt, and PT. Broadbiz Asia works as developer of apartments and hotels which creditors are mostly from apartment buyers which is still regulated by Conditional Sale and Purchase Agreement and it covers hundreds consumers. Therefore DDPO is one of best solutions compared to bankruptcy because debtor still can run the business while the creditor still can get the debt payment. Debt case resolution through DDPO is considered more effective compared to institution handling bankruptcy because there is still possibility that debtor's assets will increase which will guarantee the debt payment. In fact, based on the studies discussing the application of DDPO, weaknesses in bankruptcy law are still found especially when dealing with Deferment of Debt Payment Obligation or DDPO, one of them is creditor cannot easily assess debtor whether the debtor is in the state of technical insolvency condition/solvent/insolvent as in bankruptcy. In the practice, bankruptcy assessment done by creditor created bad relationship with the debtor. This condition complicates the creditor and the management in collecting data or knowing and assessing debtor's capability state whether it is solvent or technically insolvent (assets are lower than liabilities). It is difficult for creditor to collect data or documents needed to agree with reconciliation proposal. Thus, court must appoint at least one public accountant to assess the financial condition of the debtor. Expert consultant must conduct insolvency test before deciding whether the company is solvent or insolvent.

It is actually unfair that bankruptcy law only gives chance of DDPO to the solvent company which temporarily has cash flow problems. In general, DDPO encourages restructuration to achieve reconciliation, and the reconciliation proposal will be accepted by creditor when the company is still in the condition of having the capability to pay the debt, while bankruptcy and assets confiscation is given to insolvent company. Such act is unfair when a company experiencing technical insolvency still has going concern or going business which means it is technically bankrupt but still operationally works. Supposedly, this type of company case is given a chance to submit reconciliation proposal in DDPO. So, the business prospect can be proven by accounting and financial parameter which is very important in the grant of DDPO. As a manifestation of fair law, company requesting DDPO must (obliged) to use insolvency test or financial test in the form of balance-sheet test, cash flow/equity test, and transactional analysis to identify the financial capability of certain company. The role of independent consultant is to give arguments before the declaration of DDPO which is as the requirement of DDPO that must be prepared before. Creditor's concerns and positive responses from debtors immediately to make plans in debt settlement in the form of composition plan are the main objectives of DDPO. With full awareness based on the understanding of the same interest between debtors and creditors, bankruptcy is not an appropriate choice, on the other hand by using DDPO regulations. It can be believed that debt settlement will be more quickly achieved, this will occur because based on the present reality most debtors who are filed for bankruptcy are technically insolvent (technically insolvent - greater debt than assets or unable to pay debts due to illiquid), therefore, with full legal awareness, especially between debtors and creditors. Certainly, in the future DDPO will not be the land of creditors, who can easily submit bankruptcy applications to debtors; similarly, debtors can no longer do financial statement engineering, which is actually, deliberately to avoid paying its debt. Bankruptcy law and DDPO do not only see the law as a set of rules and principles, which regulate society but also must include institutions and processes. Some of the concepts of legal principles above are the basic principles or foundation of thinking in making changes and renewal of bankruptcy regulations and DDPO so that its existence can be used as a regulator or a tool to create regularity in entrepreneurship. Based on the aforementioned background, the problem in this research is how insolvent in debtors as a base of requesting Deferment of Debt Payment Obligation and bankruptcy request.

MATERIALS AND METHODS

This research type is a normative law research namely doctrinal method or research. The research approaches used were statute approach, case approach, historical approach, comparative approach, and conceptual approach. The type of legal material in this study consists of primary, secondary, and tertiary legal materials. Primary, secondary and tertiary legal materials are obtained in libraries and related agencies as well as NGOs. The collection of legal materials was conducted through a documentation study in the form of primary, secondary, and tertiary laws through inventory, selection, and systematization, to explore the documents and literature according to the research problem. The technique of obtaining legal material is by searching the literature through libraries, both libraries of various universities and public libraries and through the internet. Legal materials that have been collected were analyzed qualitatively using inductive and deductive thinking processes so that they can be interpreted in the form of statements. The analysis technique used was grammatical interpretation or interpretation according to a language, and comparative interpretation is an interpretation by comparing, looking at the clarity of a constitution, in this case, is the constitution Number 37 of 2004 concerning bankruptcy and DDPO (Sudikno, 2010).

RESULTS AND DISCUSSION

Definition of Insolvency (Circumstance of Inability to Pay): In order to understand thoroughly on insolvency, then it needs to be firstly elaborated individually about insolvency as the followings:

According to Focema Andreae, a dictionary of Dutch Indonesian Legal Terms states that:

- Insolvable, inability to pay debts, the antonym of able to pay debts (solvable);
- Insolvent has terminated all debt payments, as opposed to being able to pay the debt (solvent) (solvent);
- Insolventie, Insolvency: in general: Staat van faillissement (in bankruptcy), the situation in which, after the meeting verificatie vergadering budel pailit (failliete boede) is because there is no ratification of the debt agreement between the bankrupt and the creditor (akkoord) by the Judge. In this case, curator needs to immediately settle the debts.

When the peace efforts do not exist in the bankruptcy process, due to the bankruptcy of the debtor, by not offering a peace, the bankrupt debtor, offering peace was later approved by the

creditors, but there was a rejection by the Commercial Court Judge, then the next is the stage of the insolvency process.
The juridical terminology of "insolvent" in the stage of the bankruptcy settlement has a specific meaning compared to the meaning of "insolvent" generally. Insolvency is generally the condition of a company whose assets are smaller than the passivity. In other words, the company's debt is greater than the company's assets. If this happens, it is usually referred to as technical insolvency. Whereas insolvency in the bankruptcy stage is one stage where it will occur eventually a peace cannot be achieved until homologized and in this stage will be performed a settlement stage of bankruptcy assets.

Effects of Debtors in Insolvency: The juridical consequence of bankrupt debtor insolvent is that a settlement will be performed to bankrupt assets. The curator will hold a settlement and sell bankrupt assets in public or under the hands and compile a list of shares with the permission of the supervisory judge, similarly to the supervisory judge is able to conduct a creditor meeting to determine the way of settlement.
The sales results of bankrupt assets plus the results of the collection of receivables minus the bankruptcy costs and the debt of bankruptcy assets are the assets which can be shared to all creditors with the sequence as follows:

- creditor with privileges (preference);
- remaining creditors' liabilities with liens, fiduciary guarantees, mortgages, or unpaid mortgages and for the remainder, the creditors are registered as concurrent creditors;
- concurrent creditors.

The separatist creditors have been paid with their material rights they hold such as liens, fiduciary guarantees, and hypothec. If the held guarantees are not adequate to pay the debts, then the rest of the debts will be the invoice as a concurrent creditor, and vice versa if there is excess money from the sale of the collateral object, it must be returned as bankrupt assets. From this philosophy, the provisions of Article 56 paragraph emerged (1) of the Bankruptcy Act concerning the period of stay for the separatist creditors. In Article 56 paragraph (1) the Bankruptcy Act states that the separatist creditor has been suspended for 90 days to execute the collateral held by him. The philosophy of this provision is that in practice the holders of guaranteed rights will sell their collateral at a very low price by only prioritizing the invoices, meanwhile if suspended for 90 days, it will give opportunities for curators to obtain an appropriate price and even the best price. Meanwhile, privileged curators (in which known as a preferred creditor in the bankruptcy constitution) are creditors who have preferences because the law gives preference to their bills outside the guarantee holders (separatist creditors). These preferred creditors do not have the right to initiate legal procedures to perform their rights; they are only obliged to propose their invoice to the curator to be matched so that the privileged creditor is burdened as bankruptcy costs in pro rata parte.

There are three categories of privileged creditors (preferred creditors), (Huizink, 1995):

- Creditors who have statutory priority;
- Creditors who have non-statutory; and
- Estate creditors.

The privileged creditors who have priorities based on the constitution consist of those who have special priorities as regulated in Article 1139 Civil Code (KUH Perdata) and who have general priorities as regulated in Article 1149 KUH Perdata whereas special creditors are not based on laws consisting of the right to hold goods, retention of title) debt meeting (compensation, set-off), the right of the seller to reclaim the goods, and the right to terminate an agreement. However, the estate creditor is a creditor who has bankruptcy assets such as curator wages, bankruptcy assets, employee wages from the date of bankruptcy. After the settlement of bankruptcy assets, there is a possibility that a condition of a bankruptcy will be sufficient to pay debtors' debts to their creditors will occur or on the contrary bankruptcy assets are inadequate to pay the debtors' debt to their creditors.

In terms of bankruptcy assets are able to suffice the debt payment of bankrupt debtors' debt to their creditors, then the next step is rehabilitation or recovery of bankruptcy debtor status becomes the full legal subject of his assets. The main requirement for rehabilitation is that the bankruptcy has paid all its debts to the creditor with a proof of repayment from the creditors that all the debts of the bankrupt debtor have been paid. Besides that, the request for rehabilitation must be announced in two newspaper newspapers appointed by the court. After two months advertised, the court must decide on the request for rehabilitation. The court decision regarding the acceptance or rejection of the request for rehabilitation is the final decision and no legal efforts to be made on that decision.
Meanwhile, if during the settlement process the bankruptcy assets are insufficient to pay the debtor's debt to their creditors, then:

- If the bankrupt debtor is a corporation, then for the sake of the law the corporation is dismissed. With the dismissal of the corporation then the corporation's debts which are not yet paid will only be a debt on a paper without a billing to be made since the corporation has been dismissed. In the meantime, the corporation whose assets are bankrupt and insufficient to pay all of its debts to its creditors, it cannot submit a revocation of bankruptcy. This is because by law this bankrupt corporation has been dismissed. There was a case where the assets of a limited liability company were insufficient (too small) to pay bankrupt debts and then the curator filed for bankruptcy of the bankrupt limited liability company and was found to be granted by the judge. This case occurred in the bankruptcy of Indomas Pratama Citra Limited Liability Company. The bankruptcy revocation of Indomas Pratama Citra Limited Liability Company is clearly contradictory to this concept.
- On the other hand, if the bankrupt debtor is human subject, thus that bankruptcy will be revoked by the court. By the revoked bankruptcy status of bankrupt debtor, therefore the bankrupt debtor becomes perfect legal subject without bankrupt status. In contrast, remaining liability that has not been paid still follow the debtor, and even theoretically the debtor can still be requested bankrupt again. This type of construction of law exists because in the bankruptcy law in Indonesia there is no debt forgiveness principle, thus there is no debt forgiveness for the bankrupt debtor (Asikin, 1991).
- In order to be able to handle this, it creates alternative of debt settlement of debtor, the arrangement of task force (Satgas) of Bank Indonesia credit restructuring is in order

to encourage the implementation of authority of bank credit restructuring to faster the recovery of banking and economic conditions. Related to the implementation of credit restructuring, it facilitates credit to the general banks in term of debt restructuring settlement. In this case, task force of credit restructuring has a role as a facilitator between debtor and creditor of bank in doing coordinative approach in total credit settlement, namely the debtor involves all credits that one debtor is funded by more than one credit.

Task force of credit restructuring has determined 8 stages of restructuring process, namely (Quo, 2003):

- Data collection of debtor and creditor;
- Meeting between creditor and arrangement of creditor;
- Negotiation between creditor and debtor regarding the method of settlement;
- Signing of Standstill agreement;
- Appointing financial advisor, auditor, and legal advisor;
- *Due dilligence* process;
- Negotiation of restructuring giving;
- Signing restructuring agreement.

Eventhough such stages of settlement have been determined, not all stages of the process must be passed, because it depends on the condition of the bank and non-performing loans. In those stages, the task force has supplied data of debtor's debt to the creditor banks, made a meeting between creditor and debtor, being an observer and mediator, provided technical assistance such as general explanations, conducted training in collaboration with the Bank Indonesia Institute (IBI) in order to prepare human resources of bank and conducted monitoring. The Task Force also balances credit restructuring models, such as the creditor committee model, the standstill period model and the restructuring methods model. The Task Force has collaborated with Prakarsa Jakarta in preparing clinical programs for handling non-performing loans in the small and medium enterprises sector. The program includes socialization of credit restructuring to banks, debtors and restructuring clinics that have been carried out in several big cities. By this program, it is expected that there will be applied models in handling non-performing loans for small and medium enterprises which will be disseminated through the mass media. Other activities carried out by the Task Force are intensive monitoring of the implementation of coordinative credit restructuring through bank periodic reports on the realization of the stages of the debtor-debtor restructuring process, and monthly meetings with banks in groups to discuss issues that arise in the restructuring process (Syahaldeini, 1998).

In carrying out its duties, the Task Force coordinates with the Indonesian Bank Restructuring Agency (BPPN) for settlement of loans, of which are financed by banks under the authority of BPPN, including the provision of debtors' data of general banks to be followed up by BPPN. In this credit restructuring process there are several problems, namely:

- The absence of openness from each of the related parties, namely the debtor and creditor, such as the bank is not realistic in determining the requirements for debtor credit restructuring and from the debtor's side the arrangement of a business plan is not in the actual conditions faced by the company, for example, the cash flow is arranged smaller.
- BPPN as a newly formed institution has weaknesses such as limited staff, experience and ability to make decisions thus the process of handling credit is based on different priorities from banks, consequently it makes the process of handling non-performing loans in a coordinative method.
- The obstacles experienced by state-owned enterprises (BUMN) banks that still have to deal with significant non-performing loans in addition to the merger of the four state-owned enterprises banks into Bank Mandiri retard the credit restructuring process.
- Facilitator institutions such as the *Prakarsa Jakarta* and the Bank Indonesia Task Force have limitations, both in financial and expert staff in the field of restructuring.
- Lack of coordination between facilitating institutions in the credit restructuring program.
- Legal instruments which are less effective.

On the other hand, the forms of credit restructuring efforts that can be taken are as follows:

- Rescheduling the debt repayment, including giving a new grace period or granting a moratorium to the debtor.
- Arranging new requirements for debt agreements (reconditioning).
- Debt takeover, either partially or wholly by the other party, by the takeover, it replaces the position of the debtor as the replacement debtor for the amount taken over.
- Taking over bills from one or more creditors by other parties, both for part or all of the bills that can be made by both existing creditors and third parties, by the takeover it replaces the position of creditors whose bills are taken over for the amount taken.
- Reducing the amount of haircut.
- Reducing interest rates.
- Reducing the amount of interest and / or overdue haircut.
- Giving new debt.
- Converting debt with transferable debt securities, both medium and long-term debt securities.
- Converting debt with convertible bond.
- Converting debt into the company's capital (debt for equity conversion).
- Injecting new capital by the old and new shareholders through direct placement or a public offering.
- Merging with other companies.
- Consolidating with other companies.
- Making an agreement to acquire the debtor's stock (acquisition of stock) by another party.
- Selling unproductive assets or indirectly needed for the company's business activities.
- Doing other things that are not contradictory to applicable laws and regulations.

The disadvantages of bankruptcy law and Deferment of Debt Payment Obligation (DDPO), especially in providing legal protection to debtors, that in the Bankruptcy Law and Deferment of Debt Payment Obligation it does not recognize the "Test Insolvency Agency", this is very detrimental to the interests of the Debtor, because many assets found from the

debtor exceeds the amount of debt, thus the debtor is actually able to pay all of his debts. According to the writers, the Test Insolvency Agency must be in the system of law enforcement for bankruptcy and Deferment of Debt Payment Obligation. The existence of this Test Insolvency Agency must be under the intervention of the Government, not managed by private institutions, which according to the writers this Insolvency test is under the authority of OJK (Financial Services Authority) or Bank Indonesia.

Conclusion

Insolvency on the Debtor as the basis for a request of Deferment of Debt Payment Obligation and there is no Bankruptcy Requests in the Bankruptcy legal system and Deferment of Debt Payment Obligation in Indonesia. Insolvency test which consists of balance-sheet test; cash flow test / equity test and transactional analysis conducted by an independent consultant is a legal strategy with the aim that the creditor understands the actual financial condition of the debtor, thus both creditors and debtors feel that they have the same interests and risks according to the creditors' bargain principle. However, this Insolvency test is not applied in DDPO or bankruptcy law in Indonesia. Therefore, there is no balance in the interests of creditors and debtors in DDPO, in several bankruptcy provisions.

REFERENCES

Asikin, Z. 1991. Hukum Kepailitan dan Penundaan Pembayaran di Indonesia. Jakarta: Rajawali Pers.

Goode, R. M. 1990. Principles of Corporate Insolvency Law. London: Sweet & Maxwell.

Hikmahanto, Juwana. 2004. Hukum Sebagai Instrumen Politik: Intervensi Atas Kedaulatan Dalam Proses Legislasi di Indonesia. disampaikan dalam Orasi Ilmiah Dies Natalis Fakultas Hukum Universitas Sumatera Utara ke 50, tanggal 12 Januari 2004.

Huizink, J.B. 1995. Insolventie. Kluwer Deventer. Alih Bahasa Linus Doludjawa.

Mertokusumo, S. 2010. Penemuan Hukum. cetakan ke 5. Yogyakarta: Universitas Atma Jaya.

Syahaldeini, S. R. 1998. Undang-Undang Kepailitan: Da/am Persfektif Hukum, Politik dan Ekonomi, Makalah disampaikan dalam diskusi tentang Undang-undang Kepailitan Dalam Persfektif Hukum, Politik dan Ekonomi" yang diselenggarakan oleh F-KP DPR-RI, Tgl. 7 Mei 1998, Jakarta.

Quo, Shirley. 2003. Current Issues Affecting Secured Creditors: Wheter Payment to Secured Creditors Can be recovered by Uquidators as Unfair Preferences. Insolvency Law Journal, Volume 11, Sydney, Law Book Company.

Laws and Regulations

Undang-Undang Dasar Republik Indonesia Tahun 1945.

Undang-Undang No. 37 Tahun 2004 Tentang Ke-pailitan dan Penundaan Kewajiban Pembayaran Utang. Tambahan Berita Negara, Lembaran Negara 4443. Pasal 222 ayat (1), Pasal 222 ayat (3), Pasal 242 ayat (1), Pasal 228 ayat (6) dan Pasal 229 ayat (1).

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