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Legal Review of Bankruptcy Requirements for Limited Companies in Indonesia

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ABSTRACT

This research aims to analyze the bankruptcy requirements for limited companies and the urgency of implementing the insolvency test in Indonesia. This research uses a type of library research. The results indicate that Law No. 37 of 2004 regulates bankruptcy requirements, stating that a debtor must have more than one creditor and fail to pay a debt when it is due. This shows an easy and simple bankruptcy procedure. Apart from that, bankruptcy laws and regulations in Indonesia do not yet have provisions regarding the insolvency test. Without regulations regarding insolvency tests, limited liability companies which in practice are still able to pay debts (solvent) could experience bankruptcy, which would have far-reaching impacts and prevent foreign investors from investing their capital in Indonesia.

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1. Introduction

The global economy and business sectors are currently undergoing rapid development, making economic progress a primary benchmark for a country's advancement. Companies serve as essential engines for economic and business activities. Consequently, to ensure business continuity, companies frequently engage in debt and receivable transactions through capital injections from financial institutions or other entities. However, as companies evolve, they do not always maintain peak prosperity. Various challenges emerge, prominently including debt and credit issues. When a company accumulates substantial debt that exceeds its revenue, it becomes unable to meet its financial obligations, leading to bankruptcy. Bankruptcy is defined as a legal status where a debtor is unable to repay the debts owed to its creditors. This inability to pay is typically triggered by financial distress resulting from a severe decline in the debtor's business operations(Shubhan, 2008).

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Prior to 1998, bankruptcy and the suspension of debt payment obligations in Indonesia were governed by the Bankruptcy Regulation (*Faillissements-verordening*), promulgated in State Gazette (*Staatsblad*) No. 217 of 1905, in conjunction with *Staatsblad* No. 348 of 1906. Currently, Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations (hereinafter referred to as the Bankruptcy Law) defines bankruptcy as the general confiscation of all assets belonging to a bankrupt debtor, the management and liquidation of which are executed by a curator under the supervision of a supervisory judge.(Law Number 37 of 2004 Concerning Bankruptcy and Postponement of Debt Payment Obligations, 2004) Furthermore, Article 2, paragraph (1) of the Bankruptcy Law stipulates that a debtor can be declared bankrupt if there are two or more creditors and the debtor has failed to pay off at least one debt that has matured and become payable. Based on these provisions, three primary requirements must be fulfilled to file a bankruptcy petition: (1) the existence of a debt; (2) the existence of at least one debt that is due and collectable; and (3) the existence of at least two creditors. If these conditions are met, the judge must grant the bankruptcy declaration, provided the requirements can be summarily proven as mandated by Article 8, paragraph (4) of the Bankruptcy Law (Shubhan, 2008).

Furthermore, the COVID-19 pandemic, which began in early 2020, has profoundly impacted the economy due to government-imposed mobility restrictions under the Large-Scale Social Restrictions (PSBB) regime. During this period, only essential sectors, such as pharmacies, were permitted to operate fully. Non-essential businesses were severely restricted, paralyzing business activities and contributing to a surge in non-performing loans within the financial services sector. Unsurprisingly, this situation exposed numerous industries to bankruptcy lawsuits. According to Hariyadi Sukamdani, Chairman of the Indonesian Employers Association (APINDO), 747 companies filed for the Suspension of Debt Payment Obligations (PKPU) and bankruptcy across five Commercial Courts in 2020 (*Usaha Ajukan PKPU Dan Pailit Saat Pandemi*, n.d.). Currently, the Indonesian bankruptcy process is widely criticized for being overly swift and simplistic, as debtors are given a maximum of only 30 days before a bankruptcy declaration is rendered. This abbreviated timeframe denies debtors adequate opportunity to audit their financial records and prove their solvency. Prior to a formal bankruptcy declaration, debtors possess the legal right to control and manage their assets—a right that must be respected by law. Debtors are expected to continue fulfilling their obligations; however, once declared bankrupt, they automatically lose the legal authority to manage their estates. This procedural vulnerability underscores the urgent need for implementing a strict insolvency test within Indonesia's bankruptcy framework.

2. Method

The type of research used by researchers in writing this thesis is library research with a normative (legal) research framework. This research uses secondary research data, namely written legal materials in the form of statutory regulations and several related literature which will then be processed to obtain a description of the results of the research analysis formulation until finally conclusions are drawn as answers to the problems described in this research.

3. Result and Discussion

3.1. *Terms of Bankruptcy Application*

Bankruptcy requirements are nothing but several things that must be fulfilled in order to be declared bankrupt by the court. The requirements for declaring bankruptcy were first contained in Faillissement Verodening (abbreviated as FV) which was later revised in the Bankruptcy Law. Article 1 FV states that:(Irianto, 2015)

> *"Every debtor who is in a state of ceasing to pay his debts, by a judge's decision, either on his own report, or at the request of one or more of his debtors, is declared bankrupt."*

There are several requirements that must be met to be declared bankrupt as intended in Article 2 paragraph (1) of the following UUK and PKPU.

> *"A debtor who has two or more creditors and does not pay in full at least one debt that is due and collectible, is declared bankrupt by a court decision, either at his own request or at the request of one or more of his creditors."*

Based on the article above, it can be interpreted that there are at least three conditions that state that a company is experiencing bankruptcy, namely as follows.

3.1.1. The Existence of Two or More Creditors (concursus creditorium)

This requirement is a philosophy that bankruptcy law exists as a realization of article 1132 of the Criminal Code. In this case, if bankruptcy occurs, it is hoped that the repayment of the debtor's debt to the creditors can be carried out in a balanced and fair manner. If there is only 1 (one) creditor, then bankruptcy will be meaningless because creditors do not need to bother fighting over the debtor's assets to pay off their receivables. Apart from that, there is also no distribution of creditors' receivables on a pro-rata basis and this clearly shows that a debtor cannot be sued for bankruptcy if he only has one creditor. Based on this article, one of the conditions that must be met is that the debtor must have two or more creditors. Thus, this law only allows a debtor to be declared bankrupt if the debtor has at least two creditors. The requirement that there be a minimum of two or more creditors is known as concursus creditorum.(Sjahdeini, 2002)

3.1.2. There Must Be Debt

Article 1 paragraph (6) of the Bankruptcy and PKPU Law states "Debt is an obligation expressed in the amount of money in either Indonesian or foreign currency, either directly or which will arise at a later date, which arises due to an agreement or law and must be fulfilled by the debtor and if it is not fulfilled, it gives the creditor the right to obtain the fulfillment from the debtor's assets.

3.1.3. There is a Debt that is Overdue and Can

The requirement that the debt must have matured and can be collected shows that the creditor has the right to demand that the debtor fulfill its achievements. Jono expressed his opinion that this condition shows that the debt must arise from a perfect agreement (the existence of schuld and haftung). Thus, it is clear that debts arising from natural obligations (the existence of a schuld without haftung) cannot be submitted for application for a bankruptcy declaration. For example, debt born from gambling. Even though the debt arising from gambling has matured, this does not give rise to the creditor's right to collect the debt.

Hadi Subhan is of the opinion that this condition shows that if only one debt from a debtor is due and has not been paid, then a bankruptcy petition can be filed against that debtor(Shubhan, 2008). Based on the provisions of Article 8 paragraph (4) of the Bankruptcy Law and PKPU it is stated as follows.

> *"A bankruptcy petition must be granted if there are facts or circumstances that are simply proven, the requirements for being declared bankrupt as intended in Article 2 paragraph (1) have been fulfilled."*

What is meant by "simple proven facts or circumstances" in the above article is the fact that there are two or more creditors and the fact that debts that have expired are not paid. Meanwhile, the difference in the amount of debt claimed by the bankruptcy applicant and the bankruptcy respondent does not prevent the decision to declare bankruptcy from being made.

3.1.4. Commercial Court Bankruptcy Decision

Based on the requirements for the bankruptcy petition above, several decisions regarding bankruptcy from commercial courts in Indonesia will be described as follows.

1) Application for bankruptcy declaration by PT Prima Jaya Informatika against PT Telkomsel. PT Prima Jaya Informatika as a creditor is able to fulfill the requirements for a bankruptcy declaration application, namely:
   (a) There is a debtor, namely PT Telkomsel;
   (b) The existence of two or more creditors, namely PT Prima Jaya Informatika and PT Extend Media Indonesia;
   (c) There are debts, namely debt to PT Prima Jaya Informatika amounting to IDR 5.3 billion and debt to PT Extend Media Indonesia amounting to IDR 21,031,561,274 and IDR 19,294,652.52;
   (d) Failure to pay off at least one debt that has matured and can be collected, namely the debt to PT Prima Jaya Informatika.

So the Central Jakarta Commercial Court granted the petition for bankruptcy declaration against PT Telkomsel based on Bankruptcy Decision Number: 48/PAILIT/2012/PN.NIAGA.JKT.PST. In fact, if you look at the number of assets owned by PT Telkomsel, it far exceeds the debt owed to PT Prima Jaya Informatika. PT Telkomsel throughout the first quarter of 2012, has managed to record a net profit of IDR 3.5 trillion. This certainly proves that PT Telkomsel is a solvent company that has a ratio of assets far above liabilities. Therefore, if PT Telkomsel is declared bankrupt, then in fact this will not provide justice. There will be more negative impacts than positive impacts if the request for a bankruptcy declaration is granted, such as the company's inability to manage and carry out the company's activities when it is declared bankrupt because all assets are subject to general confiscation and workers who can no longer work when the company is declared bankrupt because they don't have legal skills.

2) Application for bankruptcy declaration by PT Trimitra Dayatama Usaha against PT Wahanayasa Trans Energi.

PT Trimitra Dayatama Usaha as a creditor is able to fulfill the requirements for a bankruptcy declaration application, namely:

   (a) There are debtors, namely PT Wahanayasa Trans Energi;

(b) There are two or more creditors, namely PT Trimitra Dayatama Usaha and Sriyono Dio Pamungkas;

(c) There is a debt, namely a debt to PT Trimitra Dayatama Usaha amounting to Rp. 2,152,435,588,- (two billion one hundred fifty-two million four hundred thirty-five thousand five hundred eighty-eight), rupiah); and the debt to Sriyono Dio Pamungkas is IDR. 1,149,310,016,- (one billion one hundred forty-nine million three hundred ten thousand and sixteen rupiah).

(d) Failure to pay in full at least one debt that has matured and can be collected, namely the debt to PT Trimitra Dayatama Usaha.

So the Central Jakarta Commercial Court granted the petition for bankruptcy declaration against PT Wahanayasa Trans Energi based on the bankruptcy decision number: Pdt.Sus-Pailit/2023/PN.Niaga.Jkt.Pst. The panel of judges considered that in order for a bankruptcy petition to be granted, it must fulfill the provisions of Article 2 paragraph (1) in conjunction with Article 8 paragraph (4) of Law Number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations, namely (1) The debtor has 2 (two) or more Creditors; (2) Failure to pay off at least one debt that is due and collectible (3) There are facts or circumstances that are simply proven.

3.1.5. Analysis of Bankruptcy Conditions Based on the Results of the Decision Above

The bankruptcy case decision that the researcher studied was also one of the consequences of simple bankruptcy requirements. Although in the end the panel of judges rejected the bankruptcy application on the grounds that the amount of debt was too small. However, cases like this should be an evaluation for the need to change the bankruptcy requirements to be more comprehensive so that no solvent companies are bankrupted. So bankruptcy law does not provide opportunities for creditors to take advantage of bankruptcy to collect their debts from solvent companies. One of the causes of bankruptcy case decisions that are not in line with the objectives of bankruptcy law is the lack of equal and fair legal protection for creditors, debtors and stakeholders. As mandated by one of the principles of bankruptcy law which must provide balanced legal protection, insolvency regulations must not only protect creditors, but also protect debtors and stakeholders. However, debtors, creditors and stakeholders are mutually sustainable parties and have an important role in a company because the functions of all parties can influence how the business runs.

A limited company that is declared bankrupt does not immediately stop and dissolve but still exists as a legal entity. In certain circumstances, it can still operate as a normal limited liability company without going bankrupt and can still carry out its business activities. This is because the company declared bankrupt has an economic value that is much higher than the value of the company's assets. Because bankruptcy is actually intended for companies that have negative assets. However, the decision to continue the company in bankruptcy results in the power of directors in a limited company. However, with the declaration of bankruptcy, the debtor by law loses the right to control and manage his assets which are included in the bankruptcy assets starting from the day of the decision to declare bankruptcy.(Erlina, 2017)

The things stated in the bankruptcy law can certainly be a warning sign for business actors who are debtors. Basically, bankruptcy should be the final solution for the parties in dispute. The Bankruptcy Law also seems to provide a loophole for creditors to bankrupt debtors who do not pay their debts when they are due without first looking at the debtor's financial condition. This is because the bankruptcy law does not discuss bankruptcy requirements regarding the debtor's financial condition. This means that creditors can easily file a bankruptcy petition as a form of threat or as a bluff against debtors who have not paid their debts when they are due.

The situation of being unable to pay is usually caused by financial distress experienced by debtors from businesses experiencing setbacks3. The Bankruptcy Law itself in Article 2 regulates that if the bankruptcy requirements have been met, then the debtor can easily be bankrupted. This creates difficulties for the debtor to run his business because his assets which have become bankrupt are controlled by the curator.

Of course, this can give rise to a stigma that such bankruptcy conditions do not accommodate balanced legal protection for business actors or investors who are debtors and conduct business in Indonesia. It is as if the bankruptcy law does not provide a solution for business actors who file for bankruptcy or are bankrupted while running their business.

3.2. *The Urgency of Implementing the Incolvency Test in Determining Bankruptcy Standards in Indonesia*

Removing the Insolvency Test requirement in the laws and regulations governing bankruptcy and PKPU is very beneficial for creditors(Tan, 2022). In the absence of an Insolvency Test as a requirement for bankrupting a debtor, in Indonesia there are many cases of companies that are solvent but have been declared bankrupt by the commercial court. UU no. 37 of 2004 which does not regulate the insolvency test, researchers can assume that the debtor's ability to pay is not a basis for consideration in deciding bankruptcy cases. This has resulted in many cases in Indonesian commercial courts being misapplied because solvent companies have been declared bankrupt and insolvent companies have been decided by PKPU. The Insolvency Test is defined as a test of the debtor's ability to pay their debts which includes cash flow tests, balanced tests and others. (Pratama, 2014)

Bankruptcy uses an insolvency test as a condition in determining bankruptcy cases. Some examples of financial testing in determining a company's ability to pay are the cash flow test, namely testing the ability to pay debtors after the maturity date; balance sheet test, namely testing the fairness of the debtor's asset value in covering its debts; and capital adequacy test, namely testing the debtor to determine adequate capital. Thus, bankruptcy should be the last resort in resolving debts that the debtor cannot afford. So if the debtor does not meet the insolvency requirements after carrying out the insolency test, the application must be rejected.

The principle of business continuity or what is also known as going concern is one of the principles adhered to by the Bankruptcy Law and PKPU. The principle means that a company or debtor that is able to maintain its business in the long term is not liquidated in the short term. A company's financial report is required to be prepared by an auditor as a competent party in determining the feasibility of carrying on a company's business. Consideration of the suitability of a company must be prioritized to protect the rights of debtors apart from fulfilling debts to creditors. Companies are part of state assets which are a source of state income, so if in a country there are many countries that are declared bankrupt, the state will experience a decrease in income in the form of taxes. The Bankruptcy Law and PKPU do not use the principle of business continuity in considering the suitability of a company for bankruptcy. By strengthening Article 2 paragraph (1) in conjunction with Article 8 paragraph (4) of the Bankruptcy Law and PKPU regarding bankruptcy requirements, it is easier to bankrupt a company without considering the company's future prospects.(Irianto, 2015)

Companies that have good prospects in the future can be measured by conducting an insolvency test. According to researchers, the insolvency test is legal protection for debtors who have good intentions in resolving debts. Apart from that, the insolvency test can also prevent creditors with bad intentions from bankrupting debtors for their own interests. The insolvency test is closely related to the debtor's bankruptcy objectives. In short, the purpose of bankruptcy is to collect the debtor's assets and then settle the debtor's debts to his creditors. This is useful in preventing debtors from transferring their assets to avoid debt settlement, protecting and guaranteeing settlement of debtor debts and preventing creditors from seizing debtor assets. However, this will be different from solvent debtors who have good intentions because the assets they own are sufficient to pay existing debts. Debtors who pass the insolvency test cannot enter the realm of bankruptcy because they are still solvent, but these debtors can enter the realm of PKPU to provide certainty of debt settlement without having to settle the company. The researcher assesses that the application of the insolvency test will provide distributive justice to the parties concerned in accordance with the principles of the content of statutory regulations. The insolvency test should be applied in selecting bankruptcy or PKPU cases in implementing law in Indonesia. This selection is useful for increasing the effectiveness of law implementation in Indonesia because Indonesia itself is a rule of law country.

This article explains that only debtors who are unable to pay their debts can be declared bankrupt. The debtor's inability to pay his debt can only be known if an insolvency test has been carried out. An insolvent condition is a condition when the debtor has asset value. all of which are smaller than the total debt owed to creditors

The purpose of the insolvency test is to determine whether the debtor's total assets are greater or less than the value of all debts owned by the debtor (balance sheet insolvency). The debtor's inability to pay his debts to creditors can be seen if the total value of the debtor's debts is greater than the entire value of the assets he owns. This is because even if all of the debtor's assets are sold, they still cannot pay off all of their debts to creditors. The insolvency test can be carried out by a public accountant/independent auditor appointed by the debtor and creditor, or if the debtor and creditor cannot agree on which auditor to appoint, then the court can appoint that auditor.

According to researchers, cases that are wrong in determining the realm of bankruptcy or PKPU will also waste government resources in carrying out the process of examining the case so that it is appropriate to carry out selection from the start of the case starting with an insolvency test. Cases of companies that are solvent and have good prospects for the future but are declared bankrupt, such as PT. Manulfie Life Insurance, PT. Prudential Life Insurance and PT. Cellular Telecommunications should not happen in Indonesia because these companies will participate in developing the Indonesian economy and contribute to improving the welfare of the Indonesian people. Debt cases that will be resolved through litigation should use the PKPU facilities that have been provided on condition that the debtor is still solvent. Bankruptcy of a company will have an impact that will not only be felt by debtors and creditors but will also have an impact on the company's employees, the state and other parties who may be involved.

The requirements for applying for a bankruptcy declaration in Article 2 paragraph (1) of the Bankruptcy Law and PKPU are considered too simple which often causes problems. The implication of the implementation of these requirements is that there are court decisions that raise doubts about these provisions. One of the cases is Bankruptcy Decision Number 48/Pailit/2012/Pn.Niaga.Jkt.Pst. The bankruptcy application was submitted by PT. Prima Jaya

Informatika against PT. Cellular Telecommunications for maturing debts. The problem is PT. Telekomunikasi Selular has a debt of IDR 5,260,000,000.00 to PT. Primajaya Informatika which is past due and not paid. PT. Telekomunikasi Selular refused to pay the debt because PT. Primajaya Informatika has defaulted on the cooperation agreement. 104 PT. Cellular Telecommunication had the status of the largest company at that time, with total assets recorded at more than IDR 111,000 billion and liabilities recorded at IDR 44,391 billion so that the financial condition of PT. Cellular Telecommunications is in good condition and does not exceed the estimated debt amount (*Telkom Indonesia Annual Report 2012*, n.d.).

This is where the role of legislation and also the role of judges is to be able to sort and choose which solvent debtors deserve protection and which solvent debtors do not deserve such protection. Before there are changes to the Bankruptcy Law, as regulated in Law no. 37 of 2004 concerning Bankruptcy and PKPU which do not regulate the insolvency test, in the context of implementing protection for debtors who have solvency, the judge can consider the solvency of the bankrupt debtor before declaring the debtor bankrupt. This means that the judge, even though the debtor has fulfilled the requirements of having an unpaid debt that has matured and can be collected and has two or more creditors, does not mutatis mutandis declare the debtor bankrupt. The judge can consider other conditions outside the conditions specified in Article 2 paragraph (1) of the Bankruptcy Law. Another consideration is the debtor's solvency and the debtor's good faith regarding non-payment of the debt. If the judge feels confident based on existing evidence that the debtor is solvent and that his non-payment of debt is due to good faith, then the judge can refuse to bankrupt the debtor. The judge's steps to consider things other than those required in Article 2 paragraph (1) of the Bankruptcy Law are based on Article 8 paragraph (6) letter a of the Bankruptcy Law. Article 8 paragraph (6) letter a of the Bankruptcy Law states that "Court decisions as intended in paragraph (5) must also contain certain articles from the relevant statutory regulations and/or unwritten sources of law which are used as the basis for adjudicating." These writings include, among other things, propriety, fairness, justice, legal doctrine, and the like. Meanwhile, for future regulations regarding the insolvency test, the following matters must be taken into account (Shubhan 2008):

a. An insolvency test is not required for all bankruptcy applications, but only for debtors who have good intentions.
b. The insolvency test is considered when the judge decides on the bankruptcy application, so that there is no need for a separate examination outside the bankruptcy application hearing.
c. Supporting evidence regarding the debtor's solvency is the results of an audit from an officially registered public accounting firm (KAP).

4. Conclusion

Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations defines bankruptcy as a general confiscation of all assets of a bankrupt debtor, the settlement of which is carried out by a curator under the supervision of a Supervisory Judge. Furthermore, in the same law it is stated that the condition for a debtor's bankruptcy is that he has more than one creditor and the debtor does not pay off one of his debts which is due. Of course, this can give rise to a stigma that such bankruptcy conditions do not accommodate balanced legal protection for business actors or investors who are debtors and conduct business in Indonesia. It is as if the bankruptcy law does not provide a solution for business actors who file for bankruptcy or are bankrupted while running their business.

Bankruptcy law in Indonesia does not regulate insolvency test regulations. Insolvency is the condition of a debtor who has a number of debts to all his creditors (without distinguishing the type of creditor) which exceeds the entire value of his assets. The purpose of the insolvency test is to determine whether the debtor's total assets are greater or less than the value of all debts owned by the debtor. The debtor's inability to pay his debts to creditors can be seen if the total value of the debtor's debts is greater than the entire value of the assets he owns. The insolvency test instrument can be used to provide protection for debtors who have good solvency and have good intentions. Insolvency test regulations can be included in changes to Law no. 37 of 2004 concerning Bankruptcy and PKPU by taking into account the interests of debtors and creditors. As long as there have been no changes to Law no. 37 of 2004 concerning Bankruptcy and PKPU, judges can provide protection for solvent debtors from misuse of bankruptcy instruments by creditors with bad intentions by using the principles of appropriateness, fairness and justice.

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