PROBLEMS AND THE EFFECTIVENESS OF BANKRUPTCY IN INDONESIA

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ABSTRACT :

The Global Economic growth greatly influences the development of the law, especially commercial law which is the driving force of the economy. Globalization of law will lead to developing countries regulations on investment, trade, services and other economic sector approach developed countries. To adapt to the global economy, Indonesia to revise the entire legal economy. changes to the law of Indonesian economy performed well due to pressure from world bodies like the WTO, IMF, and the World Bank. The areas of law that were revised include bankruptcy law which is a legacy from In Indonesia, currently economic law is heavily influenced by the Anglo Saxon legal system. The problems is when a company as a debtor ot party who has debt due to an agreement or law whose repayment can be billed in court, cannot pay off the debt from the creditor or party who owes the agreement or law that can be billed, charged in court payments. Therefore, to guarantee justice for both parties, the government issued a bankruptcy law. Bankruptcy arrangement has existed since the Dutch colonial in era. To ensure legal certainty more certain then on April 22, 1998 was issued Regulation No. 1 of 1998 which was adopted by Act 1 of 1998. To ensure legal certainty more certain then on April 22, 1998 was issued Regulation No. 1 of 1998 which was adopted by Act 1 of 1998. Act 1 of 1998 are repaired and replaced by Act No. 37 of 2004 on Bankruptcy and Suspension of Payment of Debts

Keywords: Bankruptcy *Law, Bankruptcy Principle, Curator, Supervisory Judge, Act 37 of 2004*

ABSTRAK

Perkembangan perekonomian global membawa pengaruh terhadap perkembangan hukum terutama hukum dagang yang merupakan roda penggerak perekonomian. Bahwa dalam globalisasi hukum menyebabkan banyak peraturan-peraturan negara berkembang mengalami perubahan baik dibidang investasi, perdagangan, jasa-jasa dan bidang perekonomian lainnya mendekati negara maju. Dalam rangka menyesuaikan dengan perekonomian global, indonesia melakukan revisi terhadap seluruh hukum ekonominya. Namun demikian tidak dapat disangkal bahwa perubahan terhadap hukum ekonomi Indonesia dilakukan juga karena tekanan dari badan-badan dunia seperti WTO, IMF, dan Worl Bank. Bidang hukum yang mengalami revisi antara lain adalah hukum kepailitan. Hukum kepailitan sendiri merupakan warisan dari pemerintahan kolonial belanda yang notabenennya bercorak sistem hukum eropa kontinental. Di Indonesia saat ini dalam hukum ekonomi mendapat pengaruh yang cukup kuat dari sistem hukum Anglo Saxon. Permasalahannya adalah ketika suatu perseroan sebagai debitur atau pihak yang mempunyai utang karena perjanjian atau undang-undang yang pelunasannya dapat ditagih di pengadilan, tidak dapat melunasi utang dari kreditur atau pihak yang berutang pada perjanjian atau undang-undang yang dapat ditagih, ditagih dalam pembayaran pengadilan. Oleh karena itu, untuk menjamin keadilan bagi kedua pihak, pemerintang mengeluarkan undang-undang kepailitan. Pengaturan kepailitan sudah ada sejak zaman penjajahan Belanda. Untuk menjamin kepastian hukum yang lebih pasti maka pada tanggal 22 April 1998 dikeluarkanlah Perpu No. 1 tahun 1998 yang kemudian disahkan dengan Undang-Undang No. 1 Tahun 1998. Undang-undang No. 1 Tahun 1998 tersebut diperbaiki dan diganti dengan Undang-Undang No. 37 Tahun 2004 tentang Kepailitan dan Penundaan Kewajiban Pembayaran Hutang.

Kata Kunci *: UU Kepailitan, Prinsip Kepailitan, Kurator, Hakim Pengawas, UU No. 37 Tahun 2004.*

A. Introduction

The Global Economic growth greatly influences the development of the law, especially commercial law which is the driving force of the economy. Globalization of law will lead to developing countries regulations on investment, trade, services and other economic sector approach developed countries. The monetary crisis that occurred in Indonesia in mid-1997 had an unfavorable influence on the national economy, causing great difficulties for the business world in settling debts and receivables to continue their activities, and causing a detrimental impact on society. Various parties demanded changes to the Bankruptcy Law to better protect the interests of the business world and to accelerate recovery from the economic crisis that Indonesia is experiencing. The Econit Advisory Group Consultant (think tank) called 1997 a “Year of Uncertainty” while 1998 was a “Year of Correction” (A Year of Correction).

At that time many problems arose, including: In mid-1997 there was a drastic depreciation of the rupiah exchange rate against foreign currencies, especially the US $. minus 13 – 14%.The inflation rate increased from under 10% to around 70%. Many companies have difficulty paying their debt obligations to creditors and furthermore many companies are experiencing bankruptcy (bankruptcy). The fall in the rupiah exchange rate has at least brought out 3 (three) negative impacts on the national economy, namely:

1. Negative balance of payments; The negative balance of payments mainly occurs due to the soaring exchange rate in foreign currency (forex) when converted to rupiah. The relatively large debts of private companies and the government have accelerated the burden on the balance of payments while the increase in export values as a result of the "bonanza" from the depreciation of the rupiah cannot be enjoyed immediately.
2. Negative spreads; Negative spread mainly occurs in the financial industry. The government's policy of raising interest rates to curb the demand for foreign currency has caused bank interest rates to rise. Meanwhile, it is difficult to distribute funds collected from the public because there are rarely companies that are able to obtain margins above interest rates.
3. Negative equity. Companies that have already obtained bank credit experience negative equity because the value of their assets in rupiah is no longer sufficient and even differs greatly when compared to the rupiah value of foreign currency debt.

The above conditions resulted in many companies being threatened with bankruptcy due to the condition of the national economy and the inability to pay company debts, which were generally done in dollars. To overcome this problem, a law and regulation is needed that

regulates this debt and credit problem quickly, effectively, efficiently and fairly. Previously, there had been regulations, namely the old bankruptcy law. However, it is considered unable to meet the needs of business people to resolve their debt problems quickly, effectively, efficiently and fairly.

To anticipate the many companies that went bankrupt, Perpu No. 1 of 1998, became law. No. 4 of 1998 the government has made changes, additions and improvements to the articles contained in the Faillisement Verordening Stb. 1905 No. 217 Jo. Stb. 1906 No. 348. However, it is felt that these changes and improvements still contain some weaknesses, especially those that arise in practice. Then Law No. 4 of 2004 concerning the Law on Bankruptcy and Suspension of Payment of Debt, came into force on October 18, 2004. However, in practice this law still creates many problems. For this reason, a solution is needed to overcome it, so that what is the aim of making the bankruptcy law itself can be achieved, namely justice for the parties.

In legal practice, often a debtor (debtor) neglects to fulfill his obligations or achievements, not because of forceful circumstances (overmacht). Such a situation is called broken promise (default).

In civil law, there are three forms of default, namely:

1. The debtor does not fulfill the achievements at all.
2. The debtor is late in fulfilling the achievement.
3. The debtor performs not as he should.

And some entrepreneurs in Indonesia, through their companies, do not carry out a thorough calculation of debt through borrowing and borrowing with companies from outside the country. One of them, the company even experienced serious difficulties in fulfilling debt payment obligations so that creditors were economically disadvantaged. Under these conditions, bankruptcy law is needed to regulate the settlement of debt disputes between debtors and their creditors. When entering the world of commerce, if the debtor is unable or unwilling to pay his debts to creditors (caused by a difficult economic situation or forced circumstances), then the debtor can submit an application for Postponement of Debt Payment Obligations to resolve the issue. The debtor or creditor can also apply for a declaration of bankruptcy with the hope that the negligent debtor will be declared bankrupt by a judge through his decision.

Bankruptcy is a civil law institution as the realization of the two main principles contained in Article 1131 and Article 1132 of the Indonesian Civil Code. Article 1131 of the Civil Code stipulates as follows: "All the debtor's assets, both movable and immovable, both those that

already exist and those that will exist in the future, are borne by all individual engagements."

Furthermore, Article 1132 of the Civil Code stipulates as follows: "These objects are joint guarantees for all people who owe them, the income from the sale of these objects is divided according to the balance, namely according to the size of each receivable, unless among the debtors there are valid reasons to take precedence.

Bankruptcy Act is a general confiscation of all the Bankrupt Debtor's assets which management and settlement are carried out by the Curator under the supervision of the Supervisory Judge.Bankruptcy assets will be distributed in accordance with the portion of the size of the Creditor's demands. This bankruptcy principle is a realization of the provisions of Article 1131 and the Civil Code, namely that the debtor's property becomes joint guarantee for all creditors divided according to the principle of balance or "Pari Pasu Prorata Parte". [1]That if the debtor is negligent in fulfilling his obligations or his achievements the creditor is given the right to conduct an auction on the debtor's assets. The proceeds from the sale (auction) must be divided fairly and equally among the creditors in accordance with the balance of the amount of their respective receivables. In general, bankruptcy is related to debtors' debts or creditors' receivables. A creditor may have more than one receivable or invoice, and the different receivables or claims are also required differently in the bankruptcy process.[2]

It should be noted here that not all debtors who are negligent can be filed for bankruptcy, because according to Law Number 37 of 2004 concerning Bankruptcy and Suspension of Obligations for Payment of Debt, which is a manifestation of Article 1131 and Article 1132 of the Indonesian Civil Code, there must be several conditions that must be fulfilled, including that the debtor has two or more creditors and does not pay off at least one debt that is due and collectible (Article 2 paragraph (1) of Law Number 37 of 2004).

B. Focus Of Problem

Bankruptcy Problems are as follows :

1. Why does bankruptcy law cause problems in its application in Indonesia?
2. What are the efforts to overcome the existing problems in Bankruptcy Law in Indonesia?

[1] Jerry Hoff, Indonesian Bankruptcy Law, Translator Kartini Mulyadi, Jakarta: P.T. Tatanusa, 2000, page 13.

[2] Sutan Remy Sjahdeini, Bankruptcy Law (Understand of faillissementsverordening Juncto Undang-Undang No. 4 year 1998), Jakarta : Pustaka Utama Grafiti, 2002, page 89

C. Research Methodology

The type of research used is normative research. In this research, Statute Approach and Case Approach are used. These approaches are used to determine the suitability between the rules and the realities that occur. This research focuses more on a normative juridical approach because the main sources are primary legal materials and secondary legal materials, by collecting legal materials, both statutory regulations and library materials. The data for this study comes from two sources: primary data sources in the form of the primary book and secondary data sources in the form of explanatory or supporting books. Prime Data (Constitution, includes: Civil Code, Bankruptcy Law & Suspension of Payment) dan Secondary Data (Library Materials = Books, Articles, Law Journals).

D. Finding And Discussion

1. Definition of Bankruptcy

Article 2 paragraph (1) of Law Number 37 of 2004 (UUKPKPU) which defines bankruptcy as: "A debtor who has two or more creditors and does not pay off at least one debt that is due and payable, is declared bankrupt by a good court decision at his own request or at the request of one or more of his creditors".3

Article 2 paragraph (1) Law Number 37 of 2004 (UUK and PKPU)

From the definition above, it can be seen that the requirements for being declared bankrupt through a court decision are:

a. There are at least 2 creditors;

b. The debtor does not pay off at least one debt; and

c. The debt has matured and can be collected.

Article 2. Elucidation of Article 2 paragraph (1) UUK and PKPU explain that what is meant by overdue and collectible debts is the obligation to pay debts that are due, both because it has been agreed with the accelerated collection time as agreed, because of the imposition of sanctions or a fine by the competent authority, or because of a court decision, arbitrator, or arbitral tribunal. Regarding this matter, UUK does not provide an explanation, only states that the debt that is not paid by the debtor as referred to in this provision, is the principal or interest debt. This last point is not contained in the elucidation of Article 2 UUKPKPU.4

[3] Article 2 Paragraph (1) law Number 37 of 2004 (UUKPKPU)

[4] Man Sastrawidjaya, Hukum Kepailitan dan Penundaan Kewajiban Pembayaran Utang, Alumni, Bandung, 2006, Page.89-90.

2. The Principles, Objectives, and Functions of the Bankruptcy Law

Principles of Bankruptcy Law, namely:

a. The Bankruptcy Declaration must be terminated in a timely manner;

b. The management of a bankrupt company must be responsible for managing the company, unless able to prove otherwise that they are innocent;

c. It is possible for the debtor's debt to be restructured before the bankruptcy application is submitted;

d. Criminalization of debtor fraud.

Purpose of Bankruptcy Law:

a. Providing a collective forum for choosing the rights of various collectors against debtor assets that are insufficient to pay debts;

b. Guarantee the equal and balanced distribution of the debtor's assets in accordance with the principle of "pari passuh";

c. Prevent debtors from taking actions that are detrimental to creditors;

d. Protect concurrent creditors from obtaining their rights;

e. Provide opportunities for debtors and their creditors to restructure debtors' debts;

f. Providing protection to debtors who have good faith by means of debt relief

The functions of the Bankruptcy Law are:

a. Setting the level of priority and sequence of each creditor's receivables;

b. Regulates procedures for a debtor to be declared bankrupt;

c. Regulates how to determine the truth of creditors' receivables;

d. Regulate the legitimacy of creditors' receivables or bills;

e. Set the procedure for matching or verifying creditor bills;

f. Regulating the procedure for dividing the proceeds from the sale of the debtor's assets according to the priority and order of each creditor;

g. Regulates the reconciliation procedures taken by the debtor with the creditors and after the bankruptcy statement.

3. Conditions for being declared bankrupt

a. There is a state of stopping paying, namely when a debtor is unable or unwilling to pay his debts.

b. There must be more than one creditor, and one of them, the debt is collectible.

In general, for a bankruptcy statement it is not necessary to show that the debtor is unable to pay his debts, and it does not matter whether he stops paying as a result of being unable or unwilling to pay.

It is sufficient to prove the condition of the debtor who "stopped paying" in a simple (sumier) way, meaning that the court in examining a bankruptcy case does not need to be bound by the system of evidence and evidence specified in civil procedural law.

The judge in examining bankruptcy applications is active, as far as possible listens carefully to both parties (debtor and creditor) before the trial, and tries to reconcile between the two parties that may submit bankruptcy requests

Article 2 paragraph 1 of Law No. 37 of 2004, those who can file for bankruptcy are:

a. The debtor himself

b. One Creditor or more

c. Prosecutor or public prosecutor

d. Bank Indonesia if the debtor is a Bank;

e. Capital Market Supervisory Agency if the debtor is a Securities company, Stock Exchange, Clearing Guarantee Institution, Depository and Settlement Institution;

f. The Minister of Finance if the debtor is an Insurance, Reinsurance Company, Pension Fund and State Owned Enterprise.

4. Problems In Bankruptcy Law in Indonesia

The implementation of the 2004 Bankruptcy Law is not as easy as it might seem. "It is even heavier than the 1998 Bankruptcy Law. In fact, the monetary crisis has passed," The substance of the Bankruptcy Law and PKPU is contrary to the essence of bankruptcy law. The Bankruptcy Law seems to be a killing machine for the continuation of the debtor's business.

Several problems occurred, including:

1) Minimum creditor requirements as a bankruptcy applicant. Article 2 paragraph (1) of the Bankruptcy Law confirms that bankruptcy can be filed if two conditions are met: The debtor has two or more creditors and the debtor does not pay at least one debt that is due and collectible. Since the issuance of the 1998 Bankruptcy Law, requests for bankruptcy statements against debtors have been very easy. This has resulted in many debtors being declared bankrupt, even though at cassation the bankruptcy was cancelled, for example, the bankruptcy applications against Modernland, Manulife, and Prudential were granted. Modern land went bankrupt due to failure to deliver the apartment unit to the buyer, Manulife went bankrupt due to a dispute between shareholders, and Prudential went bankrupt due to a contractual dispute. The biggest

case is the bankruptcy of a BUMN, namely PT Dirgantara Indonesia because in history this is the first time a BUMN has been bankrupt. In this case there may be:

a. This article is considered to be evidence that the Bankruptcy Law is contrary to nature of the need for bankcruptcy remedies which should be for the benefit of all creditors.
b. In practice, problems can arise when other creditors who are not applicants for bankruptcy and whose bills are due or not yet due do not intend to take legal action (bankrupt the debtor). "As a result, other creditors were forced to join in registering as creditors."
c. Problems can arise when other creditors who are not applicants for bankruptcy and whose bills are due or not yet due do not intend to take legal action (bankrupt the debtor). "As a result, other creditors were forced to join in registering as creditors,
d. The debtor is also burdened with proving that a minimum of 75 percent of creditors have receivables that are past due. If there is only one creditor, said Hotman, the case can be resolved through the usual civil lawsuit or application for bail execution provided that there is an improvement in the civil case process in terms of time.

2) Suspension of Payment (PKPU) Period is very short

a. The basic idea of PKPU is to provide an opportunity for debtors to reorganize or rearrange their business. The realignment of the business takes a lot of time.
b. The time given by the Bankruptcy Law is only 45 days. The 45 days are considered difficult to use to finalize peace proposals, lobby and business reorganization.
c. If the creditor submits The Suspension of Payment (PKPU), the debtor is forced to submit a peace proposal for all creditors. Ideally, creditors will also submit a peace proposal.
d. Separatist creditors have the right to go bankrupt and take part in voting without losing their rights to collateral. There is injustice, where is the right
e. The creditor has been protected by collateral for the debtor's wealth, but the debtor remains bankrupt due to the voting of the separatist creditor.
f. The high requirements for vote counting and the cumulative voting conditions for concurrent creditors and separatist creditors that must be met as stipulated in Article 281 of the Bankruptcy Law are the main reasons why PKPU's legal efforts are so cruel. In fact, this is also the main obstacle to peace proposals put forward

by debtors who often experience defeat.

g. “In practice, it often happens that only one year after the homologation of the composition plan, it turns out that the debtor fails to pay because he has been forced from the start. So the debtor is forced to make a peace proposal that impresses the creditors even though they are already unable to pay," Hotman added.

h. Regarding honorarium or curator fees (administrators). Currently, the rules for the curator's honorarium are based on a percentage of the debtor's total assets or a percentage of the total amount owed. This rule is considered to be the cause of 'cannibalism' and 'games' by individuals who have an interest in and benefit from it.

5. Efforts to Overcome Problems in Bankruptcy Law in Indonesia

a. Revised Article 2 paragraph (1) of the Bankruptcy Law. This article does not take into account whether the debtor is able or unable to pay all debts. Revisions must clearly regulate creditor ratings and review procedures Revisions to the Bankruptcy Law and PKPU must be synchronized with related laws such as the Limited Liability Company Law, the Law on the Prohibition of Monopolistic Practices and Unfair Business Competition, and the Investment Law.

b. It is important for commercial judges to better understand the ins and outs of bankruptcy. Bankruptcy is indeed vulnerable to being used incorrectly, but it is also important for companies that do have assets but don't want to pay them. So that judges at the Commercial Court must really understand the ins and outs of bankruptcy. Don't replace it every two years, it will be difficult because you have to explain from the beginning again, "

c. PKPU should be submitted by the debtor. In fact, PKPU is mostly filed by creditors because the Bankruptcy Law and PKPU allow this the this provision is considered to be misguided. Therefore it is necessary to revise which emphasizes that PKPU cannot be submitted by creditors and can only be submitted voluntarily by debtors. However, if with all the creditors' considerations it is possible to submit a PKPU, the PKPU decision must open up opportunities for cassation for the debtor.

d. Modern capitalists are to promote corporate reorganization. Bankruptcy Law must provide enough time for the company to make company improvements.

e. Bankruptcy law should not only pay attention to creditors and debtors, but what is even more important is to pay attention to the interests of stakeholders, in this

connection the most important thing is workers.

f. Bankruptcy provisions have indeed provided privileges for the payment of wages owed to workers. But what about other labor rights? Besides that, it is also necessary to see whether bankruptcy has a broad impact on consumers or causes bad economic dislocation. In short, bankruptcy is an ultimum remedium, a last resort.

g. Article 2 paragraph 5 of the Bankruptcy Law states that if the Debtor is a State-Owned Enterprise operating in the field of public interest, then the Minister of Finance can only file a bankruptcy declaration. However, the SOEs referred to in the Law cannot be interpreted by all SOEs in Indonesia.

h. Related to Article 2 of the Bankruptcy Law which regulates parties who can apply for bankruptcy against certain agencies. Article 2 paragraph (3) states that in the event that the Debtor is a bank, the application for a declaration of bankruptcy can only be submitted by Bank Indonesia. Also associated with Article 2 paragraph (5), a new question arises, namely what if the debtor is a BUMN in the form of a bank, then who has the right to apply for bankruptcy against him? Minister of Finance or Indonesian bank?

i. In bankruptcy law in Indonesia, it does not pay attention to the financial health of the debtor. So even though the debtor's finances are solvent, they can still go bankrupt as long as they meet the requirements for unpaid debts and the presence of two or more creditors.

j. Article 10 of the Bankruptcy Law allows for the placement of collateral for part or all of the creditor's assets. The procedure for requesting and determining collateral confiscation in bankruptcy refers to the provisions of article 10

Bankruptcy Act. In practice, the bankruptcy applicant usually asks the Commercial Court for the assets of the bankruptcy respondent to be placed as collateral. But in practice anyway, the request for confiscation of collateral has never been granted by the Commercial Court. Because, first, the examination procedure at the Commercial Court takes place in a brief (simple) procedure and the time is short (within 30 days a decision must be made). Without the collateral confiscation procedure, the timeline for the trial and examination of bankruptcy cases is very "close". Second, the essence of the bankruptcy declaration itself is the general confiscation of the debtor's assets, both now and in the future. Therefore, even without asking for collateral confiscation, if the debtor is declared bankrupt, then the statement will automatically constitute a general confiscation and there is no need to ask the district court for collateral confiscation. Thus, the Commercial Court Council has never granted a bankruptcy petition accompanied by a request for collateral confiscation so far because they

think that if the debtor is declared bankrupt, then all of the debtor's assets will automatically become a general confiscation which is used to pay off his debts to his creditors.

E. Conclusion

The implementation of the 2004 Bankruptcy Law is not as easy as it might seem. "It is more challenging than the 1998 Bankruptcy Law (. In fact, the monetary crisis has passed," The substance of the Bankruptcy Law and The Suspension of Payment (PKPU) is contrary to the essence of bankruptcy law. The Bankruptcy Law seems to be a killing machine for the continuation of the debtor's business. There are a few problems, example: The minimum requirements for a creditor as a bankruptcy applicant that are contained in Article 2 paragraph 1), The Suspension of Payment (PKPU) period is very short, if the creditor submits The Suspension of Payment (PKPU), the debtor is forced to submit a peace proposal for all creditors. Ideally, creditors also participate in submitting peace proposals. Separatist creditors have the right to go bankrupt and participate in voting without losing their rights to collateral.

There is injustice, the high requirements for vote counting and the cumulative voting conditions for concurrent creditors and separatist creditors must be fulfilled as regulated in Article 281 of the Bankruptcy Law, “In practice this often only takes about one year. after homologation of the composition plan it turned out that the debtor failed to pay because indeed from the beginning he had been forced to, the honorarium or curator fee (administrator) was very high. interest and benefit from it. There are multiple interpretations of the ranking of tax bills, labor wage bills, and separatist creditor receivables.

Efforts to Overcome Existing Problems, are by: Revising *Article 2 Paragraph (1) of the Bankruptcy Law*. It is important for commercial judges to understand more about the ins and outs of bankruptcy, *Suspension of Payment* (PKPU) is supposed to be filed by a debtor, Bankruptcy Law must provide enough time for companies to make improvements to the company. Bankruptcy law should not only pay attention to creditors and debtors but most importantly pay attention to the stakeholders, in this context which are the workers. It is necessary to see whether bankruptcy has a broad impact on consumers or causes bad economic dislocation, Bankruptcy law in Indonesia must pay attention to the financial health of the debtor, the procedure for requesting and establishing site guarantees must be more strictly regulated

F. Recommendation

1. The bankruptcy Law and Suspension of Payment (PKPU) should be revised, including: Minimum creditor requirements as a bankruptcy applicant, also the

comparison of the amount of debt and existing assets must be taken into consideration.

2. Judges who handle bankruptcy must be truly experts in the field.

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Code of Civil Law

Law Number 37 of 2004 concerning Bankruptcy and PKPU