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HOMOLOGATION PEACE REVIEW AGAINST POSTPONEMENT OF DEBT PAYMENT OBLIGATIONS IN INSOLVENCY LAW

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Abstract

This study aims to analyze the homologation reconciliation review of the postponement of debt payment obligations in bankruptcy law. The research method used is normative juridical. The results showed that the Homologation Peace is a Peace Endorsement by the Commercial Court, the peace that has been received by the verification meeting must be approved by the Bankruptcy Judge. The approval is given on condition; 1) the assets of the bankruptcy are more than the amount promised in the settlement; 2) sufficient guarantee that the peace will be carried out properly; 3) peace does not occur through unreasonable means. If the peace is agreed upon by the parties, the bankruptcy will end, and subsequently the settlement will be carried out by the debtor himself. Furthermore, the curator or Balai Harta Peninggalan is obliged to provide a calculation and accountability to the bankrupt debtor regarding the assets of the bankrupt debtor, namely by returning the goods, money, valuable papers and other assets witnessed by the Supervisory Judge.

Keywords: *Homologation, Peace, Postponement, Debt Payment Obligations, Bankruptcy Law.*

A. INTRODUCTION

The development of the economy globally has an influence not only on the world of economics and investment, but also correlates with the development of laws, especially economic laws. One of the areas of economic law that has also undergone changes as an effort to accommodate the development of modern business transaction practices is insolvency law. Regulations regarding insolvency law in various countries including Indonesia tend to undergo changes. In substance and structure although the insolvency-related policies in each EU country show some differences, most of these policies have a heavy point on corporate *rescue* procedures, as an alternative to liquidation procedures. The procedure in insolvency used by most of the countries of the European Union refers to *Chapter 11 of the United States Bankruptcy Code*.[1]

In responding to the challenges of the world economy, Indonesia is taking corrective steps related to insolvency law. The improvement of laws and regulations related to insolvency began in 1998 with the birth of a Government Regulation in Lieu of Law Number 1 of 1998 concerning Amendments to the Insolvency Law. This regulation was born when Indonesia was hit by a monetary crisis in 1998 which resulted in a number of national and multinational companies in Indonesia going bankrupt. Then in 2004 as a refinement of the substance of the previous insolvency regulation and to answer the needs

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and developments of community law, Law Number 37 of 2004 concerning Insolvency and Postponement of Debt Payment Obligations was established. This law in the explanation is generally stated to have a wider scope both in terms of norms, material scope, and the process of settling debts. This wider scope is needed, because there are developments and legal needs in society while the provisions that have been in force are not adequate as a legal means to resolve the problem of debts in a fair, fast, open, and effective manner. [2]

Settlement of insolvency cases is an important part that supports the ease of doing business in Indonesia. This is a reference for investors to ascertain whether debt can be repaid, as well as to ascertain whether companies that have financial difficulties have a mechanism to restructure their debt. In addition, the settlement of insolvency cases can illustrate whether the liquidation settlement mechanism can be resolved transparently with the best possible results.

One of the legal aspects that have a direct influence on competitiveness, investment, trade and other economic spheres is regulation or legislation. Currently, Indonesia is still faced with problems related to regulations, including:

1. Too much *regulation (Hyper-regulation);*
2. Conflict with each other;
3. Overlapping*;*
4. Multi-interpretation;
5. Disobedience (*inconsistency);*
6. Ineffective;
7. Creating unnecessary loads;
8. Creating a *High-Cost Economy*

In a limited meeting on January 17, 2017, the government set out three important points in the legal reform policy package volume II, namely; first, regulatory structuring; second, expanding the reach of legal aid to the community, and thirdly building a sense of security in the environment.

Regulatory structuring must be carried out through evaluation of various regulations to be in line with the spirit of Pancasila, the mandate of the constitution and the national interest. By conducting an assessment of laws and regulations, it will not only improve existing *legal* materials, but also improve the legal system which includes legal materials, institutions, law enforcement, legal services, and also public legal awareness.

B. DISCUSSION

1. Review of Insolvency in Debt Payment Delays

Etymologically the term insolvency comes from the word bankrupt. The key word of insolvency is debt, which is due and collectible and obligatory to pay. So insolvency and debt are like two sides of a currency that cannot be separated from each other. Therefore, the definition of insolvency and debt needs to be contained in one insolvency law as a formal reference that is binding on the general public. The term bankruptcy comes from the Dutch language, failliet which has a double meaning, namely as a noun and as an adjective. The term failliet itself comes from the French word Failite which means strike or payment congestion. Whereas the person who strikes and stops paying in French is called Le Faili. The verb Failliet means to fail. While in English it is known by the word to fail, with the same meaning. For Latin, the term bankruptcy is called Failure.

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According to Subekti and R Tjitrosoedibio, Bankruptcy is a state in which a debtor has stopped paying his debts. After a person who is in charge of his creditors or at his own request by the court is declared bankrupt, his property is controlled by the Balai HartaPeninggalan as the curatrice (custodian) in the affairs of the insolvency to be used for all creditors.[3]

Furthermore according to Henry Campbell Black states that; *"Bangkrupt is the state or condition of a person (individual, partnership, corporation, municipality) who is unable to pay its debt as they are, or became due".* [4]According to Henry Campbell Black the notion of bankruptcy/bankruptcy is associated with inability to pay debts. So it is not because of unwillingness to pay from the debtor for his debts that have matured. Such incapacity must be accompanied by concrete action i.e. filing an application for bankruptcy with the commercial court, either on the initiative of the debtor or at his own request.

Similarly, in the traffic of legal relations of agreements, where one party is called a creditor (schuldeiser) and the other party is called a debtor (*schuldenaar*). Each party has rights and obligations born from the legal relationship, namely achievements and counter-achievements, giving, doing and not doing something. In that case, the definition of achievement in question is an object or *voorwerp* in a treaty. When viewed in the Civil Code, the achievements to be made by each party have several conditions, namely:

1. Achievements must be certain or can be determined (Article 1333 of the Civil Code to Article 1465 of the Civil Code).
2. Achievements can be either a single deed or a series of deeds (constantly).

In legal practice, often a debtor (debtor) neglects to fulfill his obligations or achievements, not because it is caused by compelling circumstances (*overmacht*). Such a situation is called a breach of promise (*default*). In civil law, three forms of default are known, namely:

1. The debtor does not meet the feat at all.
2. The debtor is late in fulfilling the achievements.
3. The debtor performs not as it should.[5]

When carrying out activities in the business sector, lending and borrowing activities are activities that must be carried out by a business entity. Lending and borrowing in a business entity serves for additional capital or funds for the smooth operation of the company. The existing trend shows that a company really needs capital from the existence of these loans and more and more companies are not using capital or additional funds from third parties or capital from outside the company.

Companies can have serious difficulties in fulfilling debt repayment obligations so that creditors are economically disadvantaged. Under these conditions, insolvency law is necessary to regulate the settlement of debt receivable disputes between debtors and their creditors. When entering the business world, if the debtor is unable or unwilling to pay his debts to creditors due to a difficult economic situation or forced circumstances, then the debtor can apply for a postponement of debt repayment obligations to resolve the issue. Article 1131 of the Civil Code stipulates as follows:[6]

"All the material of the debtor, whether movable or immovable, whether existing or new will exist in the future, is dependent on all individual engagements".

Furthermore, Article 1132 of the Civil Code specifies as follows:

"The treasury becomes a common guarantee to all those who devote to it, the income of the sale of the property is divided according to the balance, that is, according to the size of the respective receivables, unless among the debtors there are valid reasons for precedence".

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An act of insolvency is a general confiscation of all the assets of the insolvent debtor whose management and settlement is carried out by the curator under the supervision of the supervising judge. The bankruptcy property will be distributed according to the portion of the creditor's claim. Such a principle of insolvency is a realization of the provisions of Articles 1131 and 1132 of the Civil Code, namely that the debtor's treasury becomes a joint guarantee for all Creditors divided according to the principle of balance or "*Pari Pasu Prorata Parte*".[7]

Based on the provisions in the aforementioned articles, it is clear, that if the debtor is negligent in fulfilling his obligations or his achievements the creditor is given the right to conduct an auction of the debtor's property. The proceeds of the sale (auction) must be divided honestly and balanced among creditors according to the balance of the amount of their respective receivables. In general, insolvency is related to debts owed by debtors or creditors' receivables. A creditor may have more than one receivable or bill, and different receivables or bills are required differently in insolvency proceedings.[8]

According to the general dictionary Indonesian the notion of debt is money borrowed from another person; the obligation to repay what was already received. Article 1756 of the Civil Code regulates the definition of debt that occurs due to borrowing money, stating "the debt that occurs borrowing money consists only of the amount of money mentioned in the agreement". Within the limits of the definition of debt according to the Civil Code or the KPKPU Law itself, sometimes there are still disagreements regarding the interpretation of debt.[9]

Based on the matters stated above, it can be seen that the objectives of the *bankruptcy law* are as follows:

1. Guarantee equal distribution of the debtor's property among his creditors;
2. Prevent the debtor from committing acts that may harm the interests of his creditors;
3. Provide protection to debtors in good faith from their creditors by obtaining debt relief.

According to Professor Radin, the purpose of all bankruptcy laws is to provide a collective forum to sort out the rights of various collectors to the assets of a debtor that are not of sufficient value. Meanwhile, according to Professor Warren, the purpose of insolvency law is: [10, 11] "In bankruptcy, with an inadequate pie to divide and the looming discharge of unpaid debts, the disputes center on who is entitled to shares of the debtor's assets and how these shares are to be divided. Distribution among creditors is no incidental to other concerns; it is the center of the bankruptcy scheme"

With regard to the opinions of Professor Radin and Professor Warren, it can be argued that the core of bankruptcy law both past and present is a debt collection system *even though bankruptcy* is not the only *debt collection system.*

In the general explanation of Law No. 37 of 2004, it is stated that several factors require regulation regarding insolvency and postponement of debt payment obligations, namely:

1. To avoid seizure of the debtor's property if at the same time there are several creditors who collect their receivables from the debtor.
2. To avoid the existence of creditors holding treasury guarantee rights who demand their rights by selling goods / assets belonging to debtors without paying attention to the interests of debtors or other creditors /
3. To avoid fraud committed by one of the creditors or debtors themselves. For example, a debtor seeks to benefit one or several certain creditors so that other creditors are harmed; or the existence of fraudulent acts of the debtor to flee all his property with a view to discharging his liability towards the creditors.

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Insolvency actually occurs because of a debt receivable between the debtor and the creditor, the problem arises if the debtor stops paying the debt at maturity, either because he does not want to pay or because he cannot afford to pay. According to Man Suparman Sastrawidjaya, in the event of such a situation, there are several efforts to settle the receivable debt, namely: [12]

1) Peace (out of court);
2) Lawsuit me!alui court;
3) Peace within the courts;
4) Billed individually;
5) Payment delays;
6) Peace delay in payment;
7) Insolvency;
8) Peace in insolvency.

The Insolvency Law and PKPU provide two ways to prevent the Debtor from carrying out liquidation of his assets in the event that the Debtor has or will be in a state of insolvency. First, by applying for a postponement of debt payment obligations made before the Debtor is filed for bankruptcy or at the time the bankruptcy declaration is being examined by the Commercial Court. Secondly, by entering into peace between the Debtor and its Creditors after the Debtor is declared bankrupt by the Court.

2. Homologation Peace Against Postponement of Debt Payment Obligations

The Concept of Peace (*accord* or *homologation*) in Insolvency Based on the Insolvency Law & PKPU. Termination of the debtor's insolvency may occur if the bankruptcy statement which has previously been decided by the Commercial Court, is overturned by cassation or judicial review. And according to the provisions of Article 18 of Law No. 37/2004 if the bankruptcy budel situation is not enough to cover the costs of insolvency, then at the request of the Supervisory Judge, the Commercial Court can terminate the insolvency. The debtor may also submit a peace plan as an attempt to terminate the insolvency, to all his creditors. Peace or Accord in insolvency is defined as a peace agreement between the insolvent debtor and his creditors, in which a provision is held, that the insolvent by paying a certain percentage (of his debts), he will be released to pay the rest.[13]

The Procedure for Peace in Insolvency Peace in insolvency proceedings is essentially the same as peace in a general sense, the essence of which is that there is a "word of agreement" between the parties to the affair. However, although there are also differences between peace in insolvency proceedings and those in general that do not go through insolvency proceedings, the differences are as follows: [14]

a. Binding on all parties;
b. More formal;
c. Needs endorsement (homologation);
d. against the denial of homologation may be appealed;
e. Does not apply to separatist creditors and creditors taking precedence;
f. The goal is the division of assets;
g. The role of the curator is also large;
h. The verdict has executory power

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The peace process, both in bankruptcy and in the PKPU formula, is bound by the provisions of Law No. 37/2004, this is different from the peace process in ordinary procedural law processes that are not bound by the formula. Peace in ordinary civil procedural law can be carried out by the parties themselves without court interference, while in cases of insolvency the peace is carried out with the supervision of a supervisory judge.[15]

Classification of Peace in Law No. 37/2004 Law No. 37/2004 recognizes two kinds of peace (accord), namely: [16]

1. Peace offered by the debtor in the framework of PKPU before the debtor is declared bankrupt by the Commercial Court
2. Peace offered after the debtor is declared Insolvent by the Commercial Court.

These two forms of peace are also different characteristics from each other, according to M. Hadi Shubhan in his book The Law of Insolvency of peace in insolvency is more towards the process of settling debts of debtors through the settlement of bankruptcy assets while peace in PKPU is more emphasized on the plan of offering payments or restructuring debts. This is regulated in Law No. 37/2004, Article 265-294 regulates Peace in PKPU, while Article 144-177 regulates Peace after the fall of the Bankruptcy Decision. The peace plan in the PKPU can be submitted at the following times: [17, 18]

1. Along with the filing of the PKPU application (Read Article 265);
2. After the PKPU application is submitted, the plan must be submitted before the date of the trial day as referred to in Article 266 paragraph (1);
3. After the date of the day of the session as referred to in Article 266 paragraph (1) of Law No. 37/2004 while still paying attention to the provisions as referred to in Article 217 of Law N0. 37/2004, namely during the duration of the PKPU or for a period of not exceeding 270 days from the time the temporary PKPU is established.

The peace plan in PKPU contains an agreement between debtors and creditors regarding debt restructuring. Debt restructuring has different forms, for example in banking practice, debt restructuring can take one or more of the following forms: [19]

a. Rescheduling; including the granting of a new grace period or the granting of a moratorium to debtors;
b. Require-requirement;
c. Reduction in the amount of debt (haircut);
d. Reduction or exemption of the amount of interest in arrears, fines and other costs;
e. Interest rate cuts;
f. The granting of new debt;
g. Conversion of debt into corporate capital (debt for equity conversion or also known as debt equity swap);
h. The sale of unproductive or indirect assets is necessary for the business activities of the debtor company to pay off debts;
i. Other forms that do not conflict with applicable laws and regulations.

In Peace after the debtor is declared Bankrupt by the Commercial Court, as stipulated in Article 144 of Law No. 37/2004, determines that the Bankrupt debtor has the right to file a Peace with all creditors

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jointly and according to Article 145 of Law No. 37/2004 the Peace plan must be submitted by the Debtor within a period of no later than 8 days from the debt matching meeting (verification). If in the receivables matching meeting no peace application is filed, then the Debtor's property is declared to be in a state of insolvency. The peace process in an insolvency is carried out according to the stage provided for in the Insolvency Law. The stages of such peace are as follows: [20]

1) The stage of submitting a peace proposal.
2) The stage of announcing the peace proposal.
3) The stage of the peace decision-making meeting.
4) Homologation trial stage.
5) The stage of appeal against the homologation trial.

The peace offer must be submitted by the insolvent debtor to the Curator or the Estate Board no later than 8 days before the verification meeting, and if there is an interim Committee of Creditors, it shall also be sent to him. In the verification meeting, the issue of bills to be passed will be discussed and discuss peace. Also at the meeting, the insolvent debtor is given time to give an explanation of the peace he offers or maintain or change the peace he offers. It is often the case that creditors have different views/opinions on the peace offer. Some creditors accepted the plan and some rejected it. If this happens, a vote will be held to determine whether or not the peace is accepted.[21, 22] In Article 151 of Law No. 37/2004, it is stated that a new peace plan can be accepted if it is approved by more than half of the number of concurrent creditors present at the meeting and whose rights are recognized or temporarily recognized representing at least 2/3 of the total amount of all concurrent receivables recognized or temporarily recognized from concurrent creditors or their proxies present at the meeting.[23] If peace has been accepted on the basis of the above vote, the peace will be binding on all creditors, including creditors who do not agree to peace, so that such peace is called coercive peace (*dwang accord*). The peace offered by the insolvent debtor contains several possibilities or alternatives that will be chosen by the creditors, namely: [24, 25]

1) Perhaps the insolvent debtor offers to his creditors, that he will pay (be able to pay) a certain amount of his debt (not in the total amount);
2) Perhaps the insolvent debtor will offer liquidatieaccord, that is, the insolvent debtor provides his property for the benefit of his creditors to be sold under the supervision of a supervisor (settler), and the proceeds of the sale are divided for the creditors. If it is not enough, then the insolvent debtor is released to pay the remaining outstanding amount;
3) Perhaps the bankrupt debtor offered to ask for a delay in payment and was allowed to pay off his debt for some time.

If the peace has been agreed and accepted by the parties, the court will decide on the ratification of the peace, as stipulated in Article 146 of Law no. 37/2004. The minutes of the Peace Meeting contain: [26]

1. The content of peace;
2. The names of the creditors who are entitled to vote in the meeting;
3. Votes cast by each;
4. The results of the vote and others discussed in the meeting.

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Before the meeting closes, the Supervising Judge will set a hearing day on which the Court will decide on the ratification of the peace. Especially in the case as stipulated in Article 156 of Law No. 37/2004, the determination of the day of hearing will be made by the Court in its determination letter. Furthermore, the Curator must notify the determination by letter to the creditor.[27] Ratification of the Peace by the Commercial Court, the peace already accepted by the verification meeting must be approved by the Insolvency Termination Judge. Such consent is called homologation. Homologation can be given when there are the following: [28]

1. If the assets of the bankruptcy property are more than the amount of payment promised in peace;
2. If enough assurance that peace will be properly executed;
3. If the peace does not occur through an unreasonable path, for example by promising special benefits to one or several creditors or by other deceptive means (Article 159 paragraph (2) of Law No. 37/2004).

If the peace is agreed by the parties, then the insolvency will end, and henceforth the settlement will be carried out by the debtor himself. Furthermore, the curator or Balai Harta Warisan is obliged to give calculations and liability to the insolvent debtor regarding the property of the bankrupt debtor, namely by returning the goods, money, and securities and other property witnessed by the Supervisory Judge.The result of the peace law for insolvency then the peace that has been agreed upon by the parties and has obtained ratification from the Commercial Court will have certain legal consequences. The decision of the Commercial court shall have permanent legal force if: [29]

1. Against the judgment of the Commercial Court (first instance), no appeal was filed, or.
2. After the cassation decision, if the decision of the Commercial Court is filed for cassation.[30]

If peace between the debtor and his creditors is achieved, it will have the following legal consequences: [31]

1. Once peace occurs, then the insolvency ends.
2. The decision on the acceptance of peace is binding on all concurrent creditors.
3. Peace does not apply to separatist creditors and privileged creditors.
4. Peace should not be proposed twice.
5. Peace is a pedestal for Garantor.
6. The rights of creditors remain in force against Garantor and co-debtors.
7. The rights of creditors remain in force, against the objects of third parties.
8. The suspension of execution of the debt guarantee expires.
9. *Actio pauliana* ends.
10. The debtor can be rehabilitated

In the annulment of the peace which has been ratified by the Commercial Court, it may be sued by each creditor, if it is proved that the debtor neglected to fulfill the contents of the peace. In this case the debtor must prove that the peace has been fulfilled.[32, 33] Demands for annulment of peace must be filed and determined in the same manner as an application for bankruptcy, as referred to in Article 7, Article 8, Article 9, Article 12, and Article 13. In the decision to annul the peace, according to the provisions of Article 172 paragraph (1) of Law No. 37/2004, it contains an order to reopen bankruptcy,

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with the appointment of a supervisory judge, curator, and member of the creditor committee (if there was previously a committee of creditors). The supervising judges, curators and members of the creditors' committee referred to in subsection (1) shall wherever possible be appointed from those formerly in the insolvency having assumed office. With the opening of the insolvency camp, the curator must notify and announce the decision in the manner as referred to in Article 15 paragraph (4) of Law No. 37/2004.[34, 35, 36]

C. CONCLUSION

If thedebtor is unable or unwilling to pay his debts to creditors due to a difficult economic situation or forced circumstances, the debtor may apply for a postponement of the debt repayment obligation to resolve the issue. It is also possible for the debtor or creditor to file an application for a declaration of bankruptcy in the hope that the negligent debtor will be declared bankrupt by the judge through his judgment. Ratification of the Peace by the Commercial Court, the peace already accepted by the verification meeting must be approved by the Insolvency Termination Judge. The agreement is referred to as homologation based on the following:

1) If the assets of the bankruptcy property are more than the amount of payment promised in peace;
2) If there is enough assurance that peace will be properly implemented;
3) When the peace does not take place by going through an unnatural path, for example by promising privileged benefits to one or several creditors or by other deceptive avenues

If the peace is agreed by the parties, then the insolvency will end, and henceforth the settlement will be carried out by the debtor himself. Furthermore, the curator or Balai Harta Warisan is obliged to give calculations and liability to the bankrupt debtor regarding the property of the bankrupt debtor, namely by returning the goods, money, and securities and other property witnessed by the Supervisory Judge. As a result of the peace law for insolvency, the peace that has been agreed upon by the parties and has obtained ratification from the Commercial Court will have certain legal consequences. The decision of the Commercial court has permanent legal force if:

1) Against the decision of the Commercial Court (first instance), no appeal is filed, or
2) After the cassation judgment, if the decision of the Commercial Court is filed on appeal.

If peace between the debtor and his creditors is achieved it will give rise to the following legal consequences:

1) if there is peace, then the insolvency ends,
2) The decision on the acceptance of the peace is binding on all concurrent creditors,
3) The peace does not apply to separatist creditors and privileged creditors,
4) Peace should not be filed twice.
5) Peace is a pedestal for Garantor.
6) The rights of creditors remain in force against Garantor and co-debtors,
7) The rights of creditors remain in force, against the objects of third parties.
8) Suspension of execution of debt guarantee expires,
9) *Actio pauliana* expires,
10) The debtor can be rehabilitated

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In the annulment of the peace which has been ratified by the Commercial Court, it may be sued by each creditor, if it is proved that the debtor neglected to fulfill the contents of the peace. In this case the debtor must prove that the peace has been fulfilled. This means that the burden of proving that peace has been carried out rests with the debtor concerned. The annulment of the peace does not always have to be granted immediately, but Article 170 paragraph (3) No. 37/2004 provides that the court has the authority to give leeway to the debtor to fulfill his obligations no later than 30 (thirty) days after the decision of the concession is pronounced. The concession as stipulated in Article 170 paragraph (3) of Law No. 37/2004, in the explanation of the article is only given once. According to the author, this is intended so that the insolvency and peace process takes place quickly and the interests of each party can be carried out without harming either party.

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