

Ratio Legis of Bankruptcy and Suspension of Debt Payment Obligations to Fulfil Creditors' Rights

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ABSTRACT: Law No. 37 of 2004 concerning Bankruptcy and PKPU was established to address the debtor's obligations amidst financial incapacity. However, Law No. 37 of 2004 is invoked as the underlying basis by corporations seeking to absolve themselves from debt obligations. The objective is to understand corporate rescue, the principles of commercial exit from financial distress, and their connection to the fulfilment of creditor rights in the PKPU or Bankruptcy processes under Law No. 37 of 2004. The research methodology is empirical juridical, with the primary data as the main source, supplemented by secondary data through observations and interviews, with qualitative analysis and inductive conclusions. The research findings indicate that the simplified evidentiary outlined in Law No. 37 of 2004 is inappropriately invoked as the legal basis for Debtors is financially solvable and viable. Consequently, this leads to creditors losing. Moreover, Law No. 37 of 2004 is considered irrelevant; the emphasis should shift towards the concept of corporate rescue as a principle for business continuity. This approach aligns with practices in developed countries within the EU, as outlined in Chapter 11 of the United States Bankruptcy Code, to be used as a parameter to revise Law No. 37 of 2004.

KEYWORDS: Bankruptcy; Debt Payment Obligations; Ratio Legis.



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I. INTRODUCTION

The rules regarding bankruptcy and postponement of payment have existed since the Dutch East Indies era which is regulated in *Verordening op het*

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Faillissement en de Surseance van Betaling de Europeanen in Nederlands Indie/ Faillissement Verordening (hereinafter referred to as "FV"), *Staatsblad* 1905 Number 217 in conjunction with *Staatsblaad* 1906 Number 348, this regulation was declared to come into force on November 1, 1906.¹ When examined in depth, the *Faillissement Verordening*, there are several provisions that are not in accordance with the legal system of property in the civil law regime. Article 1 paragraph 1 of the FV states that any debtor who is unable to pay his debts who is in a state of ceasing to pay back such debts, either at his own request or at the request of a creditor or several of his creditors, may be held by a judge declaring that the debtor concerned is in a state of bankruptcy. In its development, the *Faillissement Verordening* was amended to adjust the conditions and improve the provisions regarding bankruptcy.² On April 22nd, 1998, the Government promulgated Government Regulation in Lieu of Law Number 1 of 1998, concerning Amendments to the Bankruptcy Law (State Gazette 1998 Number 87 Supplement to State Gazette Number 3761). The Perpu was then approved by the House of Representatives to become a law, namely Law Number 4 of 1998 concerning the Stipulation of Government Regulation Number 1 of 1998 concerning Amendments to the Bankruptcy Law into Law.

Law No. 4 of 1998 explicitly adheres to the principle of parity creditorium and the principle of *pari passu prorata parte*.³ However, after more than five years of Law No. 4 of 1998 being in effect, there is still a need for changes to several provisions in it. To overcome the many weaknesses and shortcomings of Law No. 4 of 1998, Law No. 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations (hereinafter referred as "Law No. 37 of 2004") was enacted. Legal products, both statutory regulations

¹ Rizka Rahmawati, "Comparison of Laws for Settling Debt Remaining Bankruptcy Between Indonesian and Dutch Countries" (2019) 4:1 Jurnal Notariil 18–26.

² Robert L Weku, "Perlindungan Hukum Bagi Kreditur Terhadap Kepailitan Debitur (Studi Kasus Terhadap Putusan Pengadilan Negeri Makassar No. 05/Pdt.Sus-PKPU/2016/PN. Niaga Mks)" (2018) 6:1 Jurnal Lex et Societas 81-87.

³ Article 1 paragraph 1 of Law No. 4 of 1998 states that a debtor who has two or more creditors and does not pay at least one debt that has fallen 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.

and court decisions in their implementation, must also provide legal protection to the parties concerned, which are based on justice and truth. The Law No. 37 of 2004 in resolving debtor's debt problems gives meaning as a solution to debtor debt settlement, not being used to bankrupt a business. On one hand, the creditor's goal of obtaining claims for its debts can be carried out immediately, while on the other hand the debtor can still be guaranteed to continue its business.⁴

By seeing the rapid development of the economy and the emergence of circumstances that disrupt economic stability, such as the Covid-19 pandemic some time ago. Small and large-scale companies have also been affected by the Covid-19 pandemic. The crisis caused by the pandemic is not only limited to monetary and financial but also health and social issues, resulting in business activities coming to a halt. Companies are experiencing financial difficulties and postponing obligations even though the government has issued policies in the form of credit restructuring and tax incentives, but it is not enough to be able to support to keep the wheels of the company moving. This creates great difficulties for the business world in settling its obligations.

From this condition, in Law No. 37 of 2004 there is a mechanism that can be used by creditors and debtors in the event that the debtor or creditor considers that the debtor can no longer continue to pay his debts that are due and collectible, with the intention of achieving a peace plan regarding the payment of debts from the debtor, either full or partial payment. This mechanism is called Suspension of Payment Obligations (hereinafter referred as "PKPU")/ Suspension of Payment.⁵ Sutan Remy Sjahmedi defines PKPU as an attempt by the debtor to avoid bankruptcy or an attempt to avoid liquidation of assets when the debtor has been or will be

⁴ Ria Sintha Devi et al, "The Bankruptcy Legal Politics in Indonesia based on Justice Value" (2022) 9:1 Jurnal Akta 67–78.

⁵ The rules regarding the postponement of debt payment obligations are contained starting from Chapter III (Three) of Law No. 37 Year 2004.

in an insolvent state.⁶ PKPU and Bankruptcy are 2 (two) separate things in Law No. 37 of 2004.

The definition of bankruptcy refers to Article 1 number 1 of Law No. 37 of 2004, bankruptcy is a general confiscation of all assets of a bankrupt debtor whose management and management is carried out by a curator under the supervision of a Supervisory Judge as regulated in the Law. In bankruptcy, not only the principle of *paritas creditorium* and the principle of *pari passu prorata parte*, there are also principles of debt collection, and debt forgiveness.⁷ The principle of debt collection in modern bankruptcy law is manifested in the form of asset liquidation, in the form of writing off debtors' debts if their assets are insufficient, and there is no consideration of the debtor's financial performance or the amount of assets that exceed the debts of the debtor. The principle of debt forgiveness is manifested as the elimination of debts and the possibility of starting a new business without being burdened by old debts.⁸ The PKPU process, which is based on the results of the debtor's peace plan for debt settlement, will have legal consequences if the creditors reject the peace plan.⁹ The elucidation of Article 292 of Law No. 37 Of 2004 states that a bankruptcy declaration decision on the rejection of a peace plan results in the debtor in PKPU not being able to submit a peace plan again and therefore the debtor's bankruptcy estate is immediately in insolvency.¹⁰ The material requirements for bankruptcy in Article 2 paragraph (1) of Law No. 37 of 2004 can create

⁶ Sutan Remy Sjahdeini, *Sejarah, Asas, dan Teori Hukum Kepailitan (Memahami undang-undang No. 37 Tahun 2004 tentang Kepailitan dan Penundaan Kewajiban Pembayaran)* (Jakarta: Kencana, 2016), at 411.

⁷ Pebry Dirgantara, "Debt Forgiveness Principle in Business Legal Representatives" (2019) 4:1 Jurnal Notariil 1–7.

⁸ Emmy Yuhassarie, *Pemikiran Kembali Hukum Kepailitan Indonesia* (Jakarta: Pusat Pengkajian Hukum, 2005), at 19.

⁹ Article 285 in conjunction Article 286 in conjunction Article 289 in conjunction Article 291 in conjunction Article 292 of Law No. 37 Year 2004.

¹⁰ Insolvency has legal consequences for the bankrupt debtor. The bankrupt debtor will lose all civil rights to control and manage the assets that have been included in the bankruptcy estate. The transfer of control of bankruptcy assets to the Curator appointed by the court, will later be carried out management and order, then management is carried out by matching the list of receivables, and order by executing all bankruptcy assets. The proceeds will be distributed to the entitled creditors proportionally.

new problems regarding the creation of injustice in bankruptcy cases with solvent¹¹ debtors. The solvency of the debtor should be analyzed and considered by the judge before deciding the bankruptcy petition. Consideration of debtor solvency¹² is needed to avoid bad faith from debtors who deliberately abuse the bankruptcy instruments in Law No. 37 of 2004.

Debtors who are solvent, with good business prospects and still have the ability to pay debts, will be very detrimental to creditors, not limited to harming workers/ laborers, if in the end the debtor is declared bankrupt. In PKPU and Bankruptcy, creditors also have their respective positions. The position of creditors aims to determine the nature of the bill and the order of creditors who are prioritized in the payment of debts by the debtor. In the PKPU process, the position of creditors also has an important role in terms of voting on the peace plan. Reflecting on these rules, debtors who are sentenced to PKPU or bankruptcy also have legal consequences for creditors' receivables. In essence, the intent and purpose of the legislator to revise Law No. 4 of 1998 did not change the principles of bankruptcy in Law No. 37 of 2004 to be more comprehensive, but only as a replication of Law No. 4 of 1998. "A new container with the same content", Law No. 37 Of 2004 raises further juridical implications so that the concept of bankruptcy and postponement of debt payment obligations is still very far from the 3 (three) principles of law, namely legal certainty, legal benefits, and legal justice. Especially regarding the bankruptcy of companies that are still solvent and prospective, of course, it is contrary to the principle of commercial exit from financial distress. Thus, a more in-depth and comprehensive research and study of the ratio legis of Law No. 37 of 2004 is needed.

¹¹ According to Indonesia Dictionary, solvent is defined as "able to pay debts". "Arti kata solven - Kamus Besar Bahasa Indonesia (KBBI) Online", online: <<https://kbbi.web.id/solven>>.

¹² According to Indonesia Dictionary, solvency is defined as "the company's ability to pay its debts because the total assets exceed these debts" "Arti kata solvabilitas - Kamus Besar Bahasa Indonesia (KBBI) Online", online: <<https://kbbi.web.id/solvabilitas>>.

II. METHODS

The research method used in this research is the normative legal research method. Legal research is a process of finding legal rules, legal principles, and legal doctrines in order to answer the legal issues at hand. This research is intended to conduct a theoretical-normative study of the principles and norms/regulation of bankruptcy law in Indonesia, as well as further examine how the PKPU and bankruptcy delay mechanism in several countries that adopt Chapter 11 of the U.S. Bankruptcy Code. The main variable in the form of laws and regulations will be the object of this research; the reasoning used in this research is induction-deduction reasoning based on normative and evaluative aspects.¹³ Induction reasoning as a minor premise will produce conclusions on the principles and rules of bankruptcy law in Indonesia, accompanied by a case approach. Deduction reasoning is a major premise used to develop deduction thinking so as to produce conclusions that can be used for further induction processes.

The stages and procedures followed in this normative research method are the search or inventory of primary legal materials and secondary legal materials. Primary legal materials are obtained from the types of rules and regulations themselves. Secondary legal materials are obtained from literature in the field of law and the views of legal scientists. In addition to using primary and secondary legal materials, this research also uses non-legal materials in the field of corporate economics to analyze the phenomenon of bankruptcy or economic instability of a company. The processing of legal materials begins with the identification of legal materials, followed by the classification or sorting of legal materials systematically and logically. After the legal materials are processed, analysis will be carried out to find a pragmatic truth and / or coherence.

There are 3 (three) kinds of approaches carried out in this research, namely the statute approach, comparative approach, and case approach.¹⁴ The statutory approach is a *conditio sine qua non* for normative legal research. The benefit of using the statutory approach is to find the ratio legis and

¹³ Bernard Arief Sidharta, "Refleksi tentang Struktur Ilmu Hukum: Sebuah Penelitian tentang Fundasi Kefilsafatan dan Sifat Keilmuan Ilmu Hukum Sebagai Landasan Pengembangan Ilmu Hukum Nasional Indonesia" (Bandung: Mandar Maju, 2009), at 167.

¹⁴ Enid Campbell & Donald Macdougall, *Legal Research Materials and Methods* (Sydney: The Law Book Company Ltd, 1967), at 274.

ontological basis for the birth of laws and regulations. By studying the ratio legis and ontological basis of legislation, it will be able to understand the philosophy of the legislation. The comparative approach used in this research is a minor comparative approach, by knowing the PKPU and bankruptcy laws in several countries. The case approach provides benefits in order to find the *ratio decendi* or reasoning.¹⁵

III. PRINCIPLES OF CORPORATE RESCUE AND PRINCIPLES OF COMMERCIAL EXIT FROM FINANCIAL DISTRESS IN LAW NUMBER 37 OF 2004

Debtors who are unable or expect to be unable to continue paying their debts that are due and collectible, can request a postponement of debt payment obligations, with the intention of proposing a peace plan that includes an offer of a division or all of the debt to creditors.¹⁶ Basically, the debtor itself can project its business if it experiences financial difficulties. In corporate finance theory, which is commonly known in financial management, distinguishes corporate financial difficulties:¹⁷

1. Economic Failure, which means that the company's revenue cannot cover total costs, including capital costs. Businesses that experience economic failure can continue their operations as long as creditors are willing to provide additional capital and owners can receive a rate of return below the market interest rate.
2. Business Failure, which means that a business can be classified as failing even if it does not go through normal bankruptcy, and a business can cease/close its business but not be considered as failing;
3. Technical Insolvency, which means that a company can be considered insolvent if it does not meet its maturing obligations. Technical Insolvency may indicate a temporary lack of liquidity

¹⁵ Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana, 2010), at 133.

¹⁶ Article 222 of Law No. 37 Year 2004.

¹⁷ Nyaman Nyaman & Nur Samsi, "The Financial Distress Strategy to Predict The Bankruptcy of SOEs Manufacturing Clusters During The Covid-19 Pandemic for The Fiscal Year 2020-2021" (2022) 1 ICOEMA 977-991.

where at some point in time the company can raise money to meet its obligations and stay alive.

PKPU and bankruptcy are important to provide protection in the settlement of debt-debt relationships on a pro rata basis considering that the capital owned by debtors generally comes from various sources of financing / loans, both banking, investment, bonds, and other agreements that give rise to various obligations that can be valued in the amount of money. By considering the multiplier effect that can arise from debt-debt relationships, it is necessary to have a legal tool that can provide debt settlement that prioritizes business continuity (going concern) and provides reasonable protection for debtors and creditors in the PKPU or bankruptcy process.

A. Principle of Corporate Rescue

PKPU can be a forum for the implementation of the principle of business continuity if it provides an opportunity to continue business. However, PKPU in Law No. 37 Of 2004 reflects as a means that provides an opportunity for debtors not to be bankrupted. The implementation of the PKPU process should be based on the principle of corporate rescue or the principle of business continuity. According to Tri Harnowo, the corporate rescue principle is needed in the business world to select inefficient businesses. For this reason, it will leave efficient companies that have an impact on the country's economy. An efficient company is a company that can manage its assets optimally, produce goods and/ or services at competitive prices without ruling out quality.¹⁸

The implementation of the principle of corporate rescue is by debt restructuring or business restructuring. The purpose of debt restructuring is to improve the debtor's financial position because the debtor is no longer able to fulfill its obligations to creditors in accordance with the agreed agreement. In simple terms, PKPU can also be interpreted as a legal moratorium that permitted by regulations to prevent and increasingly severe financial crisis. Several bankruptcy cases in Indonesia have ended peacefully through PKPU and there are also still ended in bankruptcy

¹⁸ M Hadi Subhan, *Hukum Kepailitan: Prinsip, Norma, dan Praktik di Peradilan* (Jakarta: Sinar Grafika, 2009).

decision by the commercial court.¹⁹ Basically, granting PKPU to the debtor is intended so that the debtor is in control in a state of insolvency, have the opportunity to propose a peace plan. Therefore, PKPU is an opportunity for debtors to pay off or carry out its obligations for debts so the debtors will not be declared bankrupt. Constitution expressly states that as long as the PKPU is in progress, the debtor cannot petition filed for bankruptcy.²⁰

Peace isn't defined by Law No. 37 of 2004, however general understanding can refer to the view of Article 222 of Law No. 37 of 2004, in principle the plan included an offer of partial payments or all debts to creditors. According to Sutan Remy Sjahdeini, such offers are categorized form of debt restructuring. Peace in the PKPU process is a type of agreement. Peace is also regulated in Article 1851 of The Civil Code that peace can end problems that already exist of problems that might exist.²¹

Law No. 37 of 2004 does not regulate debt restructuring or business restructuring, but in PKPU, at every meeting of creditors, supervisory judges and administrators/ curators always direct debtors to submit peace proposals containing debt or company restructuring. The parties are free to determine the contents of the peace plan. This peace plan is known as the freedom of contract, everyone is free to enter into an agreement containing the terms of any kind of agreement, as long as the agreement was made legally and in good faith, and didn't violate public order and decency. This freedom is a manifestation of free will, the emanation of rights and human rights.²²

Efforts to submit peace proposals often fail or are unsuccessful, so that debtors who should still be able to continue their business are stopped and

¹⁹ Gautama Sudargo, *Komentar Atas Peraturan Kepailitan Baru Untuk Indonesia*, 2d ed (Bandung: Citra Aditya Bakti, 2008).

²⁰ Kartika; Sitoresmi Irwanti Anggit Sinar, "Permohonan Penundaan Kewajiban Pembayaran Utang dan Akibat Hukum terhadap PT. Asmin Koalindo Tuhup berdasarkan Undang-Undang Nomor 37 Tahun 2004" (2019) 14:2 *Pandecta Research Law Journal* 119–127.

²¹ Putri Maha Dewi, Ismawati Septiningsih & Itok Dwi Kurniawan, "Perjanjian Perdamaian Untuk Menciptakan Konsep Corporeae Resque Dalam Restrukturisasi Semi Publik Insolvency Law Di Era Bisnis Modern" (2023) 11:2 *Jurnal Private Law* 228–237.

²² Gemala Dewi, *Aspek-aspek Hukum Dalam Perbankan dan Perasuransian Syariah* (Jakarta: Kencana, 2004).

many concurrent creditors are harmed. Factors that cause such failure include the following:²³

1. Judges and curators (in bankruptcy)/ administrators (in PKPU) only formally recommend in a creditors' meeting that the debtor offer a settlement containing financial and/or corporate restructuring, and then leave the debtor to work on their own without direction.
2. Creditors are often unsure whether the debtor is able to fulfill what is offered, because often in the PKPU or bankruptcy process there is no examination of the debtor's finances and business feasibility by public accountants or company management experts, so that creditors cannot know how the debtor's finances and business are in real terms.
3. Debtors are also unable to convince concurrent and secured creditors whose bills are not yet due and collectible. These creditors are often influenced by creditors who have the intention of immediately liquidating the debtor's assets.
4. If the applicant's creditor is a separatist creditor, then what the separatist creditor wants is how as soon as possible the separatist creditor gets payment and repayment of its receivables that are due and collectible, thus the muzzle is liquidation of the debtor's assets, especially the debtor's assets that are collateral for the separatist creditor's bill.
5. The period of the peace process in PKPU is limited by Law No. 37 of 2004, namely:
 - a. First, it is called temporary PKPU for 45 (forty-five) days from the pronouncement of the decision determining that the debtor is in a state of temporary PKPU.²⁴
 - b. Second, for 270 (two hundred seventy) days since the temporary PKPU decision is pronounced, provided that it must be approved by concurrent creditors and statutory

²³ Marulak Pardede, "Aspek Hukum Kepailitan Dalam Perspektif Bisnis Perbankan" (2004) *Jurnal Perguruan Tinggi Ilmu Kepolisian* 141–171.

²⁴ Article 225 paragraph (4) of Law No. 37 Year 2004.

creditors, each of which must meet the quorum specified in Law No. 37 of 2004.²⁵

The 45 (forty-five) days period has been used for the preparation period for newspaper announcements, the first creditors' meeting and the receivables matching creditors' meeting. The remaining time period cannot be used every day for that. If at the 45 (forty-five) day stage the debtor has not been able to convince the creditors, then the extension of the period will not be agreed upon by the creditors.

PKPU allows debtors to continue running their business as a going concern by providing opportunities for debtors to obtain reasonable time allowance from creditors to be able to pay off their debts, either with or without renewing the terms of the credit agreement. Therefore, through the provision of payment delays which are implemented in the form of continuity efforts given to the debtor, the debtor can carry out debt restructuring. The debt restructuring method used to achieve a peace agreement is rescheduling combined with other models as mentioned above. But creditors will look at the solvency analysis of the go-public company. If the solvency analysis is positive, then the company is in the going concern category, and creditors will be confident to agree to the peace agreement that is submitted, and vice versa. Achievement of corporate rescue in maximizing processes that lead to the interests of creditors creates a modal that adopts the concept of legal change, which must be able to facilitate its existence as a preventive form of liquidation in the bankruptcy process.

B. Principle of Commercial Exit From Financial Distress

In principle, there are many legal aspects that take into account the interests of debtors to minimize losses to the debtor's assets, such as the existence of a stay, PKPU provisions, rehabilitation provisions, and so on. Companies are the main actors in the economy. If there are problems related to the company and its business continuity, it will be enough to shake the country's economy, including the ability to pay company debts, the ability to generate profits, and the ability to maintain the existence of the company itself. In macroeconomics, the bankruptcy of a company will

²⁵ Article 228 paragraph (6) of Law No. 37 Year 2004.

affect the economic arena of a country, including affecting the productivity of goods and services, the level of state tax revenue, increasing unemployment, affecting consumers at the lowest consumer level so that real sector activities are also affected.²⁶

Basically, bankruptcy is not an effort to make it easier for a business, whether owned by an individual or a corporation, to become bankrupt, but bankruptcy is an effort to overcome the bankruptcy of the business. Ricardo Simanjuntak states that bankruptcy, especially corporate insolvency, is an exit from financial distress. The principle of exit from financial distress is a way out of problems that can no longer be resolved financially. So, there is a fact that there is a technical obligation that makes the company unable to pay, so rather than being emotionally or business related to the parties, the only way is to request that bankruptcy be filed.²⁷ The principle of commercial exit from financial distress from bankruptcy means that bankruptcy is a solution to the debts of debtors who are experiencing bankruptcy and not the other way around, that bankruptcy is considered or used as a legal institution to bankrupt a business.²⁸ This means that the facilities provided to debtors are facilities in the context of debt settlement due to financial difficulties.²⁹

If the debtor realizes that he/she is insolvent, the debtor can file a voluntary petition for self-bankruptcy³⁰ or the determination of the debtor's status as insolvent can also be filed by creditors as long as it can be proven that the debtor meets all the requirements to be declared bankrupt. In bankruptcy, in order to pay the creditors in accordance with their respective portions,

²⁶ Rai Mantili & Putu Eka Trisna Dewi, "Penundaan Kewajiban Pembayaran Utang (PKPU) Terkait Penyelesaian Utang Piutang Dalam Kepailitan" (2021) 6:1 Jurnal Aktual Justice 1–19.

²⁷ Adriel Michael Tirayo & Yoefanca Halim, "Problematik Definisi Harta Pailit dalam Kepailitan dan PKPU untuk Mencapai Kepastian Hukum" (2022) 10:2 Verstek 306–316.

²⁸ Sonnyendah Retnaningsih & Isis Ikwansyah, "Legal Status of Individual Bankrupt Debtors After Termination of Bankruptcy and Rehabilitation Under Indonesia Bankruptcy Law" (2017) 7:1 ILREV 79–94.

²⁹ Interviewed with The Curator, Yohan Made Ardo Sipayung, S.H., on January 4th, 2024.

³⁰ Article 4 paragraph (1) of Law No. 37 Year 2004, "In the event that a petition for a declaration of bankruptcy is filed by a Debtor who is still bound in a legal marriage, the petition may only be filed with the consent of the husband or wife."

the court will appoint and appoint a Curator.³¹ The Curator must be able to manage and administer the bankruptcy estate so that the value of the bankruptcy estate can be maximized to meet all obligations of the bankrupt debtor to its creditors.³² In maximizing the value of bankruptcy assets, there are 2 (two) possibilities that can be pursued by the curator to make bankruptcy assets remain in a going concern condition, namely the sale of bankruptcy assets or continuing the debtor's business.³³

The act of continuing the debtor's business by the curator if there is a possibility to increase the value of the bankruptcy estate. This provision is stipulated in Article 104 of Law No. 37 of 2004, "Based on the approval of the provisional creditors' committee or with the permission of the Supervisory Judge³⁴, the curator may continue the business of the debtor declared bankrupt even though cassation or judicial review is filed against the bankruptcy declaration." The bankruptcy law stipulates that as soon as the full amount of their receivables has been paid to the creditors who have been matched or as soon as the closing distribution list has obtained permanent force, the bankruptcy is terminated.³⁵

Based on the description above, the act of continuing the debtor's business in the PKPU process only focuses on efforts to repay debts, not to restructure the debtor's business. The PKPU process only focuses on the peace proposal submitted by the debtor, so it is not uncommon for the peace proposal not to be accepted by creditors, and will eventually lead to bankruptcy.³⁶ The principle of corporate rescue has not yet been applied by judges at the Commercial Court and PKPU administrators, because to be able to apply it, judges need clear and clear instructions regarding PKPU by prioritizing the principle of corporate rescue. Creditors, especially secured

³¹ Didi Sukardi, "The Legal Responsibility of Debtor to Payment Curators in Bankruptcy Situation" (2021) 8:2 JPH 142.

³² All objects must be sold in public in accordance with the procedures prescribed in laws and regulations. In the event that a public sale cannot be achieved, an underhand sale may be conducted with the permission of the Supervisory Judge. See Article 185 paragraphs (1) and (2) of Law No. 37 of 2004.

³³ Serlika Aprita & Yonani, "The Role of Curator in Increasing The Asset Recovery Value Through The Bankruptcy Process" (2022) 11:2 Legal Brief 1246–1260.

³⁴ Article 104 paragraph (2) of Law No. 37 Year 2004.

³⁵ Article 202 paragraph (1) of Law No. 37 Year 2004.

³⁶ Susanti Adi Nugroho, *Hukum Kepailitan Di Indonesia : Dalam Teori dan Praktik Serta Penerapan Hukumnya* (Jakarta: Prenadamedia Group, 2018).

and concurrent creditors with the most voting rights, focus on how to maximize the payment of their bills. This situation is not only detrimental to the debtor but also to the concurrent creditors with the least voting rights who are considered last.³⁷

It is understood that the principle of corporate rescue and the principle of commercial exit from financial distress are implied by the recommendation to debtors to submit a peace proposal. However, when and how the debtor will pay off its debts to creditors is not further regulated in Law No. 37 of 2004. The entire regulation in Law No. 37 of 2004 still focuses on the administration of bankruptcy assets.

IV. POSITION AND FULFILLMENT OF CREDITORS' RIGHTS IN DEBT SUSPENSION AND BANKRUPTCY

If a person has more than one obligation that must be fulfilled against more than one person who is entitled to the fulfillment of the obligation, the obligation must be fulfilled from the assets of the obligated party (debtor) in:³⁸

1. *Pari passu*, i.e. jointly obtaining repayment, without any precedence;
2. *Pro rata*, i.e. proportionally calculated based on the amount of their respective receivables compared to their receivables as a whole, against the entire assets of the debtor.

The meaning of the *pari passu prorata parte principle* is that all of the debtor's assets, by law, are joint security for the creditors and the proceeds must be distributed proportionally between them, unless the creditors are statutorily required to take precedence in the payment of their bills.³⁹ This principle is one of the principles used as a basis for why the legal

³⁷ Heri Hartanto, "Perlindungan Hak Konsumen terhadap Pelaku Usaha yang Dinyatakan Pailit" (2017) 2:2 ADHAPER Jurnal Hukum Acara Perdata 315–328.

³⁸ IDAD Juniarta & Ida Ayu Sukihana, "Kewenangan Pengadilan Niaga Indonesia Dalam Eksekusi Aset Debitor Pailit Yang Berada Di Luar Negeri" (2019) 7:8 Kertha Semaya Jurnal Ilmu Hukum 1–13.

³⁹ Rudhy A Lontoh, Denny Kailimang & Benny Ponto, *Penyelesaian Utang-Piutang: Melalui Pailit atau Penundaan Kewajiban Pembayaran Utang* (Bandung: Alumni, 1991).

instrument of bankruptcy is needed, and also as one of the principles in the process of dividing the bankruptcy property. There are 3 (three) creditors known in the Civil Code, namely:

1. Concurrent Creditors are listed in Article 1132 of the Civil Code⁴⁰ which states that the goods are jointly guaranteed for all creditors against them; the proceeds from the sale of the goods are divided according to the ratio of their respective receivables unless among the creditors there are valid reasons for precedence. Based on article 1132 of the Civil Code, it shows that concurrent creditors are creditors with *pari passu* rights and *pro rata* rights. The creditors jointly obtain repayment (without any precedence) which is calculated based on the amount of their respective receivables compared to their receivables as a whole;⁴¹
2. Preferred Creditors are creditors who by law, solely because of the nature of their receivables, get repayment first. Preferred creditors are creditors who have privileges granted by law based on the nature of their debt. The privilege is regulated in Article 1134 of the Civil Code;⁴²
3. Separate Creditors. Creditors holding property security rights who can act alone. This group of creditors is not affected by the bankruptcy declaration, meaning that their execution rights are still carried out as if there was no bankruptcy.⁴³ Article 1134 paragraph (2) also regulates the classification of separatist creditors, namely creditors holding material security, namely pledges and mortgages. Currently, property guarantees regulated

⁴⁰ Article 1132 of the Civil Code

⁴¹ Abigail Kristianti Octaviana, "Kajian Yuridis Perlindungan Hak Konsumen Terhadap Perusahaan Pailit (Studi Kasus Ganti-Rugi Tiket Pesawat Maskapai Batavia Air)" (2014) 2:3 Jurnal Hukum Prodi Ilmu Hukum Fakultas Hukum Untan (Jurnal Mahasiswa S1 Fakultas Hukum) Universitas Tanjungpura.

⁴² Privilege is a right granted by law to a creditor that causes him to be higher than others, based solely on the nature of the receivable. Liens and mortgages are superior to privileges, except where the law expressly provides otherwise.

⁴³ Dedy Tri Hartono, "Perlindungan Hukum Kreditor Berdasarkan Undang-Undang Kepailitan" (2016) 4:1 Legal Opinion.

in Indonesia include pawn, fiduciary, mortgage, and ship mortgages.⁴⁴

Preferred creditors are also regulated in other laws, such as Law Number 28 Of 2007 on the Third Amendment to Law Number 6 of 1983 on General Provisions and Tax Procedures. In the provisions of Article 21 paragraph (1) of the Law *a quo*, it stipulates that the state has a prior right to tax debts on goods owned by taxpayers. From these provisions, tax bills are privileges that take precedence over the receivables of separatist creditors. Next, Law Number 13 of 2003 concerning Manpower, in Article 95 paragraph (4) of the Law *a quo*, regulates that companies declared bankrupt or liquidated based on applicable laws and regulations, wages and other rights of workers or laborers are debts that take precedence in payment.⁴⁵ Other rights can also include the rights of workers who are terminated (hereinafter referred to as "PHK") due to a business being declared bankrupt. The regulation of layoffs due to bankruptcy is contained in Article 154A paragraph (1) letter f of Law Number 6 of 2023 concerning the Stipulation of Government Regulation in Lieu of Law Number 2 of 2022 concerning Job Creation into Law (hereinafter referred to as "Law No. 11 of 2020").

In the event of layoffs on the grounds that the company is bankrupt, as referred to Article 47 of Government Regulation Number 35 of 2021 concerning Certain Time Work Agreements, Outsourcing, Working Time and Rest Time, and Termination of Employment, it is stated that workers are entitled to:

1. Severance pay, equal to 0.5 times the applicable severance pay provisions;
2. Long service pay / UPMK amounting to 1 time the applicable UPMK provisions; and
3. Right replacement payment/ UPH.

⁴⁴ Luthvi Febryka Nola, "Kedudukan Konsumen Dalam Kepailitan (The Position Of Consumer In Bankruptcy)" (2017) 8:2 Negara Hukum 255–270.

⁴⁵ Dedy Kurniadi & Co Lawyers, "Kreditor Dengan Hak Didahulukan Dalam Peraturan Perundang-Undangan di Indonesia", (2020), online: *Dedy Kurniadi & Co Lawyers* <<https://dedykurniadi.com/kreditor-dengan-hak-didahulukan-dalam-peraturan-perundang-undangan-di-indonesia.html>>.

The priority of payment of workers'/ laborers' rights when the company is bankrupt pays attention to the provisions in Article 95 paragraph (1) of Law No. 6 of 2023, as follows:

Article 95

- (1) *In the event that a company is declared bankrupt or liquidated based on the provisions of laws and regulations, wages and other rights that have not been received by workers/laborers are debts whose payment takes precedence.*
- (2) *The wages of workers/laborers as referred to in paragraph (1) shall take precedence in payment before payment to all creditors.*
- (3) *Other rights of workers/laborers as referred to in paragraph (1) shall take precedence in payment over all creditors except creditors holding property security rights.*

The above rule is also reinforced in the Constitutional Court Decision Number 67/PUU-XI/2013 on the Settlement of Wage Payments for Workers, "Payment of wages owed by workers/laborers takes precedence over all types of creditors, including claims of separatist creditors, claims of state rights, auction offices, and public bodies established by the government, while payment of other workers/laborers' rights are precedence over all bills including bills of state rights, auction offices, and public agencies established by the government, except bills from secured creditors."⁴⁶

In the PKPU process, the types of creditors are also determined based on the nature of the bill as explained in the description above. Because PKPU focuses on the acceptance or rejection of a debtor's peace plan, creditors in the PKPU process have the right to vote to accept or reject the debtor's peace plan.⁴⁷ Based on the provisions of Article 87 of Law Number 37 Of

⁴⁶ Mahkamah Konstitusi Republik Indonesia, "Ikhtisar Putusan Perkara Nomor 67/PUU-XI/2013 Tentang Penyelesaian Pembayaran Upah Buruh", (2013), online: *Mkri.id* <https://www.mkri.id/public/content/persidangan/sinopsis/sinopsis_perkara_86_IPI%2067-PUU-XI-2013.pdf>.

⁴⁷ Mr Sularto, "Perlindungan Hukum Kreditur Separatis Dalam Kepailitan" (2012) 24:2 *Mimbar Hukum* 241–353.

2004 on Bankruptcy and Suspension of Debt Payment Obligations, the calculation of the number of creditors' voting rights is further regulated by Government Regulation.

Article 87

- (1) *Except as provided in this law, all meetings of creditor's decisions are determined based on affirmative votes of more than ½ of the number of the votes cast by creditors and/ or proxies creditors present at the relevant meeting.*
- (2) *In the event that creditors attend the creditor's meeting and do not give their rights to vote, its vote is counted as a dissenting opinion.*

In principle, each Creditor is entitled to 1 (one) vote in the Creditors' meeting provided that the number of Creditor votes is calculated based on the amount of receivables, i.e. for receivables up to Rp 10,000,000.00 (ten million rupiah), the Creditor is entitled to 1 (one) vote. The calculation of additional votes for receivables of more than Rp 10,000,000.00 (ten million rupiah) is then determined based on each multiple of Rp 10,000,000.00 (ten million rupiah). The remaining receivables that do not reach Rp 10,000,000.00 (ten million rupiah) are entitled to 1 (one) additional vote, if the remaining receivables amount to Rp 5,000,000.00 (five million rupiah) or more.⁴⁸ An example of voting rights can be seen in one of the PKPU cases at the Central Jakarta District Court, based on the analysis carried out on the voting results table, there are creditors with the amount of debt reaching up to Rp 16.000.000.000.00 (sixteen billion rupiah), then will get the number of votes up to 1.600, and the creditors with the amount of debt reaching up to Rp56.000.000.00 (fifty six million rupiah), will get the number of votes only 6.

It concludes that if the other creditors agree with the peace agreement, but their votes didn't classify as majority vote, but on the other hand creditors with majority votes want the debtors to be bankrupt. All creditors should face the bankruptcy process. In this case, we can see that bankruptcy

⁴⁸ General Provisions of the Explanation of Government Regulation of the Republic of Indonesia Number 10 of 2005 concerning the Calculation of the Number of Creditors' Voting Rights.

reduces public confidence in a debtor's ability to manage a company. If the bankruptcy estate is insufficient to pay the debts of the creditors, then there is no other way but to close and end the business of the debtor, even the existence of a legal entity is lost without any exceptions while the remaining debts of the debtor only become nominal debts on paper and have become a business risk of the debtor and creditor relationship.⁴⁹ We analyze of the bankruptcy cases at the Central Jakarta District Court, which showed that total of recognized bills reached three hundred and seventy-seven billion rupiah. Hereinafter, to find out the percentage of the rights of each concurrent creditor is by dividing the amount of creditors' receivables by the total receivables of concurrent creditors multiplied by 100% (one hundred percent). Then the percentage is then multiplied by the remaining distribution.⁵⁰ In the process of administering bankruptcy assets, after deducting costs in the form of the interests of managing and administering bankruptcy cases by the Curator, the remaining costs will be distributed to creditors by taking into account the position of each creditor. The distribution to concurrent creditors will be carried out in accordance with the principle of *pari passu prorata parte*, the more the number of bills, the amount of settlement of receivables that will be obtained by these creditors is also greater than other concurrent creditors.⁵¹ Concurrent creditors must be prepared for the consequences of not maximizing the payment of their bills.

V. THE CONCEPT OF SUSPENSION OF DEBT PAYMENT OBLIGATION AND BANKRUPTCY IN SOME COUNTRIES ADOPTING CHAPTER 11 OF THE UNITED STATES BANKRUPTCY CODE

In substance and structure, although bankruptcy policies in each European Union country show some differences, most of these policies focus on corporate rescue procedures as an alternative to liquidation procedures. The

⁴⁹ Based on The Curator's Description, Anonim, on January 18th, 2024.

⁵⁰ Siti Anisah, *Perlindungan kepentingan kreditor dan debitor dalam hukum kepailitan di Indonesia: studi putusan-putusan pengadilan* (Yogyakarta: Total Media, 2008) at 43.

⁵¹ Kartini Muljadi & Gunawan Wijaya, *Pedoman Menangani Perkara Kepailitan* (Jakarta: Raja Grafindo Persada, 2003) at 11.

bankruptcy procedure used by most EU countries refers to Chapter 11 of the United States Bankruptcy Code. Crucial feature of the United States Bankruptcy system is the United States Trustee Program. The United States Trustee Program is one of the departments under the United States Department of Justice. The United States Trustee Program holds an essential function, which is to preserve the integrity and efficiency of the US bankruptcy system in order to serve the interests of all stakeholders in the system.⁵²

The United States Trustee Program employs 4 (four) primary methods to identify whether a bankruptcy fraud or abuse has occurred or not, namely:⁵³

1. The information from the private trustees regarding the case review.
2. The information which the field officers present regarding the statements, schedules and petition of a bankruptcy case.
3. The information from the debtor's insiders, including former spouses, former business partners, or any other party who might be offended by the fraudulent acts from during the bankruptcy proceedings.
4. The report from the audit which performed on the debtor along with the development of society towards bankruptcy resolution, the World Bank established resolving insolvency as one of the indicators of ease of doing business, highlighting some of them related to the relatively low cost and recovery assets.⁵⁴

By 1938, modern American Bankruptcy Law had obtained its central features. Chapter 11 and the legal and financial expertise around it helped the US economy rebound quickly after the global crisis. Over time, the chapter 11 system has become faster and many cases now take less than a year. European Union saw the success of US in dealing with bankruptcy problems. In which US Bankruptcy Code are vary widely across states by a

⁵² Robert, Rosa Agustina & Bismar Nasution, "Punishing The Bankruptcy Fraudsters: What Can Indonesia Learn from United States of America?" (2021) 20:1 JDHk 174–190.

⁵³ *Ibid.*

⁵⁴ Arbijoto, "Tinjauan Kritis Terhadap Hukum Kepailitan" (2009) 2:3 j.hukPrior 130–140.

Congress in 1978 to establish a uniform law on the subject of bankruptcies.⁵⁵ The concept applied and prioritized in European Union countries is the principle of corporate rescue in both the PKPU and Bankruptcy processes. Chapter 7 of the United States Bankruptcy Code regulates agreements between creditors and debtors, called "reaffirmation agreements" where individual debtors make agreements with creditors not to discharge their debts, and continue to make payments after obtaining approval from the court. This chapter regulates the general contents of the debtor's peace plan:⁵⁶

1. Confirmation of creditor groups based on their class;
2. The existence of sufficient guarantees to implement the contents of the peace plan regarding the debt repayment scheme, in the form of the amount of the debtor's assets, the sale of the debtor's assets, and details of the cash flow of the debtor;

The standards in the preparation of a peace plan in the United States are as follows:⁵⁷

1. The parties supporting the peace plan must comply with the rules in the Bankruptcy Code, including complying with the restrictions on disclosure and application for acceptance of the peace plan;
2. The peace plan must be approved in good faith;
3. The peace plan must be approved based on the feasibility of payment.

Similar provisions are adopted by the UK, where in the UK PKPU process, an agreement will be made with a mechanism called "Members' Voluntary Winding Up". Members' Voluntary Winding Up is an insolvency

⁵⁵ Congressional Research Service, "S.2266 - A bill to establish a uniform law on the subject of bankruptcies", (7 September 1978), online: *Congress.gov* <<https://www.congress.gov/bill/95th-congress/senate-bill/2266>>.

⁵⁶ Hanna M Simanjuntak, Bernard Nainggolan & Wiwik Sri Widiarty, "Analisis Perubahan Undang-Undang Investasi Melalui Omnibus Law 2020 dan Dampaknya Terhadap Perijinan Investasi" (2021) 2:11 JSA 2072–2082.

⁵⁷ Lambok Marisi Jakobus Sidabutar, "Hukum Kepailitan dalam Eksekusi Harta Benda Korporasi sebagai Pembayaran Uang Pengganti" (2019) 5:2 Integritas 75–86.

mechanism in which the debtor himself believes that he will be able to pay his debts to creditors for a maximum of 12 (twelve) months, which is then followed up with a statement. During this time, the debtor cannot be harassed by his creditors.⁵⁸ Likewise, in Australia, the concept of PKPU is similar to that in the UK. Australian law requires an explanatory statement which is a summary or explanation of the peace proposal. The PKPU rules in Australia regulate the contents of the peace plan or deed of company arrangement in the voluntary administration scheme. The contents are the name of the deed administrator, the assets to be used to pay creditors, the debts accommodated by the agreement and the expansion of the debts to be discharged, orders regarding the availability of funds to pay creditors, the nature of the period of suspension of the debtor's business, the conditions of the agreement in order to enter and continue the management of the business for the debtor's ability to pay off debts.⁵⁹

Bankruptcy in EU countries is the *ultimum remidum* in debt settlement. Bankruptcy in EU countries, which are guided by Chapter 11 of the United States Bankruptcy Code, imposes a bankruptcy declaration on the debtor with caution. The Bankruptcy Code requires that all existing claims or interests must receive equal treatment, unless an individual claimant agrees to receive unequal treatment.⁶⁰

⁵⁸ Munif Rochmawanto, "Upaya Hukum Dalam Perkara Kepailitan" (2015) 3:2 independent 25–35.

⁵⁹ Sjahdeini, *supra* note 6 at 59.

⁶⁰ Man Supraman Sastrawidjaja, *Hukum Kepailitan dan Penundaan Kewajiban Pembayaran* (Bandung: Alumni, 2006) at 74.

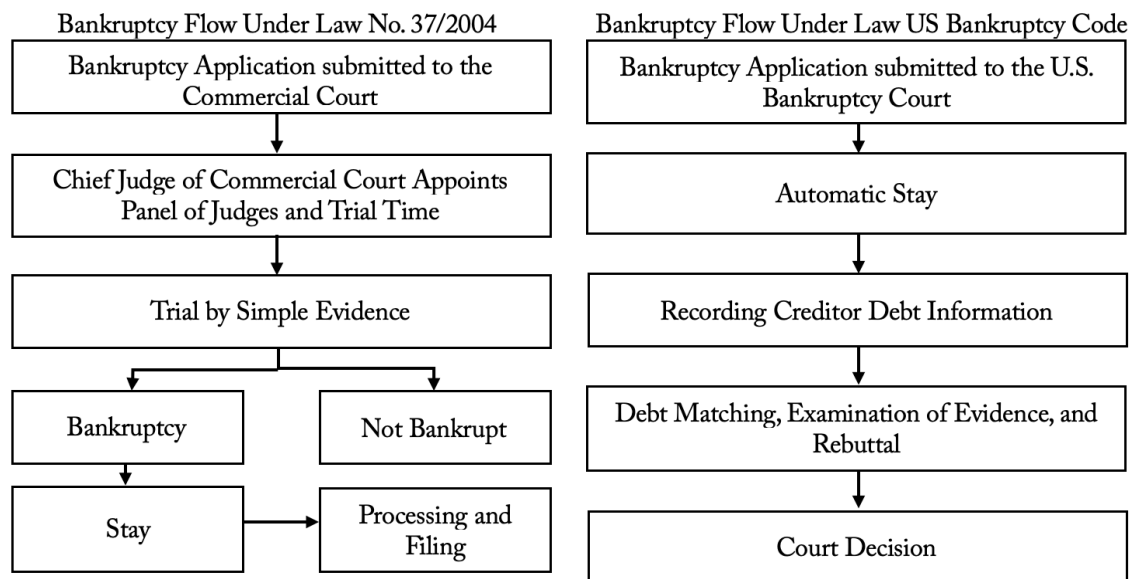


Figure 3. Bankruptcy Flow Under Indonesian and United States Laws.

There is a form of suspension in the bankruptcy process in the United States, which is called the "automatic stay". An automatic stay is a regulation that provides automatic protection to the debtor to limit or temporarily stop collection actions taken by creditors.⁶¹ In practice, the automatic stay applies to anyone and does not require a special request or decision from the court. During the automatic stay, the judge will conduct an insolvency test, with the following stages:⁶²

1. Balance-sheet test. The balance sheet test requires the court to analyze a comparison of the fair value of all the debtor's assets with the stated value of its liabilities at the relevant dates.⁶³
2. Cash flow test. The cash flow test requires the court to determine whether the debtor is paying its debts that are generally due. The court must consider the amount of the debt and the due date of the debt and any other special circumstances alleged to be an explanation for the cessation of payments through proof of

⁶¹ John H Gibbons, "Should It Stay or Should It Go: The Clash of Canons over Termination of the Automatic Stay for Repeat Filers" (2022) 75:2 *Vanderbilt Law Review* 615–655.

⁶² M Hadi Shubhan, "Insolvency Test: Melindungi Perusahaan Solven Yang Beritikad Baik Dari Penyalahgunaan Kepailitan" (2014) 33:1 *Jurnal Hukum Bisnis* 11–20.

⁶³ Mochtar Kusumaatmadja, *Konsep-Konsep Hukum Dalam Pembangunan* (Bandung: Alumni, 2006) at 18.

existence or inferences or beliefs developed through testimony from employees of the debtor and several creditors.

3. Transactional test. The transactional test requires the court to review the company's cash inflows and outflows if they are unbalanced, with outflows outweighing inflows, resulting in the company not having sufficient cash to pay its debts and other overdue payment obligations.

The successful handling of both PKPU and Bankruptcy in the United States, which has become a reference for other European Union countries, is the background why the United States is considered established and worthy of being a reference for resolving bankruptcy cases in countries in Europe, especially for Indonesia. According to World Bank data, at the end of 2021, the United States' seriousness towards economic growth after the Covid-19 Pandemic resulted in a 5.9% GDP growth rate in the country. This value represents 11.2% of economic movement around the world. On the other hand, the settlement of bankruptcy cases in the United States is also one of the things that is handled quite a lot. According to United State Court data, there were 15,724 business debt bankruptcy cases as of June 2023 run by the Court.⁶⁴

VI. CONCLUSION

Based on the description in the previous sections, it can be concluded that the legal provisions regarding bankruptcy and insolvency in Indonesia's law are regulated in the outdated regulation compared to US and EU. Through debt restructuring by applied the ideal principle of corporate rescue and the principle of commercial exit for Law No. 37 of 2004, the company will be able to pay off debts because the company has a source of income and revenue that can be used to pay debts as the concept applied by countries that adopt Chapter 11 of the United States Bankruptcy Code. Therefore, there are several flaws in the Indonesian law compared to the United States

⁶⁴ United States Courts, "Bankruptcy Filings Rise 10 Percent", (2023), online: *Uscourt.gov* <<https://www.uscourts.gov/news/2023/07/31/bankruptcy-filings-rise-10-percent>>.

law regarding bankruptcy and insolvency, which could be described as followings.

Elimination of provisions regarding PKPU provisions submitted by Creditors (Article 222 paragraph (3) in conjunction Article 225 paragraph (3)). The existence of Creditors as PKPU applicants is not in accordance with existing developments. This provision is not in accordance with international bankruptcy standards, where creditors can submit a PKPU application while the debtor is the one who really knows the ability to pay his debts. Insolvency test to measure the debtor's ability through insolvency test. This test will measure the extent to which a company is able to survive in the midst of severe financial conditions. If it is still able to survive, the company will apply for debt restructuring. Meanwhile, if not, it can then be sentenced to bankruptcy by the court.

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