International Journal of Multicultural and Multireligious Understanding

http://ijmmu.com
editor@ijmmu.com
ISSN 2364-5369
Volume 8, Issue 8
August, 2021
Pages: 458-474

Legal Protection for Debitors Through Bankruptcy Concept

Zeto Bachri[1]; Suhariningsih[2]; Sukarmi[2]; Iwan Permadi[2]

[1] Student at Faculty of Law, Brawijaya University, Malang, East Java, Indonesia

[2] Lecturer at Faculty of Law, Brawijaya University, Malang, East Java, Indonesia

http://dx.doi.org/10.18415/ijmmu.v8i8.2953

Abstract

The purpose of this study is to explain the legal protection for debitors through bankruptcy concept based on Law no. 37 of 2004 Concerning Bankruptcy and Suspension of Debt Payment Obligations (UUK-PKPU). This research is a normative legal research with a statute approach, the case approach, historical approach, comparative approach, and the conseptual approach. The legal materials used are primary, secondary, and tertiary. The analysis technique uses legal logic, legal interpretation teleologically, hermeneutics, grammatically, and systematically. The results of the study indicate that in UUK-PKPU only debtors who are insolvent can be declared bankrupt or apply for a PKPU. Bankruptcy applications can be submitted by the debtor himself or by the creditor. According to the legal principle, the applicant who submits the argument must prove the argument, then the applicant who proves the insolvency is the applicant. Essentially, bankruptcy in its application must be carried out fairly in the sense of paying attention to the interests of debtors and creditors in a balanced way. The idea of balance encourages an acknowledgment of the equality of the position of the individual with the community in common life.

Keywords: *Legal Protection; Debitors; Bankruptcy Concept; UUK-PKPU*

1. Introduction

In bankruptcy, there is an institution for Requesting for Obligation for Payment of Debt which in article 225 paragraph (2) and paragraph (3) of the Bankruptcy Law Court within 3 (three) days if the application is filed by the debtor and 20 (twenty) days is submitted by the debtor must grant the request Temporary suspension of debt payment obligations. In relation to the requirement for the amount of debt as referred to in Article 222 paragraphs (1) and (2) where there is no minimum limit on the amount of debt, the PKPU can be used as an excuse to bankrupt another party in the event that there is a claim even though the amount of the claim is small and can be paid by the Respondent. The Respondent does not want to pay because there are still civil problems between the Petitioner and the Respondent. Article 228 paragraph (5)

states: in the event that the Suspension of Obligation for Payment of Debt cannot be determined by the Court as referred to in paragraph (4), within the period as referred to in Article 225 paragraph (4), the Debtor is declared bankrupt.

Debt in bankruptcy is a basic requirement that must be met, not only in the context of filing an application for bankruptcy but also in submitting an application for obligation to pay debts (Rumadan, 2017). The terms of debt in bankruptcy do not have a minimum limit so as to encourage cases that should be filed in simple cases to be resolved in bankruptcy applications. The impact of bankruptcy petition in business affects the credibility of the Bankrupt Respondent.

The regulation of dispute resolution through bankruptcy has not been able to fulfill the purpose and objective of the establishment of the Law, namely to solve major difficulties in the business world in settling debts and continuing its activities. There was a conflict of norms between article 2 and article 222 of the Bankruptcy Law. The law functions to resolve disputes both preventively and repressively. The law should provide certainty and not make itself a means for the parties to resolve disputes that will actually result in injustice. In the absence of restrictions on the amount of debt in bankruptcy (Article 2 of Law No. 34 of 2004) and Applications for Suspension of Debt Payment Obligations (PKPU) (Article 222 of Law No. 34 of 2004) both submitted by the Debtor and Creditor must be granted by the Court can obscure the purpose of the establishment of the Law on Bankruptcy and PKPU, because judges are required to grant PKPU requests submitted by both Creditors and Debtors without providing an assessment of whether the problem submitted is a bankruptcy issue or can be filed in the realm of ordinary civil lawsuits.

The purpose of the establishment of the bankruptcy law is to overcome the difficulties of the business world in dealing with debt and receivables in continuing their activities. However, in practice the PKPU and Bankruptcy institutions are used as a means of resolving ordinary civil disputes, this is because Article 225 paragraph (3) and (5) in conjunction with Article 222 paragraph (1) and (2). To find out the background and purpose of the establishment of bankruptcy law, the author tries to explain the legal protection for debitors through bankruptcy concept based on Law no. 37 of 2004 Concerning Bankruptcy And Suspension Of Debt Payment Obligations (UUK-PKPU).

2. *Research Method*

The type of research used in this study is normative legal research, which is a research in the form of an inventory of the applicable legislation, to seek the principles of the legislation, so this research seeks to make legal findings that are in accordance with a particular case (Nasution, 2008). The research approaches in this study include the statute approach, the case approach, historical approach, comparative approach, and the conseptual approach. The legal materials used are Primary Legal Materials which include related laws and regulations, including the UUK-PKPU concerning Bankruptcy and the Obligation to Pay Debts. Secondary legal materials include books that discuss bankruptcy issues, seminar papers, newspaper clippings, scientific journals, collections of judges' decisions and other legal materials. Tertiary legal materials include law dictionaries and encyclopedias.

Legal research at the legal material collection stage begins with a literature study (library research) which is collecting, studying and reviewing legal materials that have relevance to. The analysis of the legal material is carried out prescriptive analytically, which aims to produce a prescriptive on what should be the essence of legal research as a legal scientist. The analysis of the legal material is carried out prescriptive analytically, which aims to produce a prescriptive on what should be the essence of legal research as a legal scientist who is a legal scientist (Setiono, 2004). The analysis technique uses legal logic, legal interpretation teleologically, hermeneutics, grammatically, and systematically. The legal hermeneutic method is used to analyze, look for the truth which is essentially based on the principles (Aprilia et al., 2018) of Law Number 37 concerning Bankruptcy and Suspension of Debt Payment Obligations, especially based on the concept of ratio legis from Article 225 paragraph (3) and paragraph (5) UUK-PKPU.

3. Results and Discussion

3.1 Insolvency Test as an Alternative to Determining Insolvency Conditions

The legal appeals for Law No. 4 of 1998 firmly stated that the definition of debt must be interpreted as principal and interest debt, while the legal relationship that occurred The evidence submitted by the bankruptcy applicant is evidence regarding the existence of a legal relationship between buying and selling binding. The evidence submitted by the bankruptcy applicant is evidence regarding the existence of a legal relationship in the form of an agreement between producers and consumers so that it is mistakenly interpreted as a relationship between debtors and creditors. Disamping itu Undang-undang Nomor 4 Tahun 1998 sama sekali tidak memberikan definisi in addition, Law No. 4 of 1998 didn't give the definition of Debt, but according Council, Debt is a right that can be assessed with a certain ammount of money, arising out of the agreement, is not only the debitor's obligation to pay but also the creditor's right to receive payment. Thus, even though the agreement entered into between the Defendant of Cassation and the Petitioner of Cassation is in the form of a sale and purchase agreement between the consumer and the producer, in the sale and purchase agreement applies the legal principle of the agreement in general. The agreement arises because of the legal actions or actions of the parties who made the agreement. On the one hand, obtain rights, and on the other hand have the obligation to fulfill achievements. The party who is entitled to an achievement is domiciled as a creditor (schuldeiser) while the other party who is obliged to fulfill the achievement is a debtor (schuldenar). Thus, the position of the Respondent as a consumer in this case can be called a creditor, while the position of the petitioner as a producer can be called a debtor.

A debtor can only be declared bankrupt by the Court if the debtor is already insolvent. But not the other way around, namely a debtor who has been insolvent does not become bankrupt but must first apply for bankruptcy to the Court. Article 214 paragraph (2) of the UUK-PKPU states that the Court is required to grant a temporary PKPU and must appoint a Supervisory Judge and appoint 1 (one) or more administrators who are joint debtors. Furthermore, the debtor applying for the temporary suspension of debt payment obligations must provide the names and addresses of the creditors, including the amount of the combined creditors. If it is ready, the debtor can also submit a peace plan.

The decision of the Commercial Court regarding the Suspension of Temporary Debt Payment Obligations is valid for a maximum of 45 (forty-five) days (Article 214 paragraph (3)

Article 215 Article). After that, it is decided whether the temporary PKPU can be continued as a Fixed Debt Obligation. UU-PKPU Article 225 paragraph (3), dan (5) reads The application for supervisor oratorship with creditors to the Court within no later than 20 days from the date on which it was registered, the application letter, must grant the request for appointment of the supervisor of the mandatory appointment take care of the Debtor's assets. Usually in case the debtor is not present at the trial as meant in paragraph (4) postponement of debt payment obligations while finally ending the court (Damlah, 2017).

Article 225 paragraph (3) above causes creditors to be able to file a PKPU even on legal issues, which are actually legal issues, such as other lawsuits. Based on the UUK-PKPU, it is possible to file a Bankruptcy Application if the creditor finds evidence that the debtor has a debt that is due and collectible and there are at least 2 (two) other creditors, and the debtor who is filed for bankruptcy can still file a PKPU as explained in Article 224 UUK- PKPU which states that in the event that the debtor is the defendant in bankruptcy, the debtor can apply for a PKPU. In case number 36.Pdt.Sus-PKPU/2019/PN Niaga Sby dated September 13, 2019 between PT. KHARISMA GRAHA NUSANTARA against PT. MENTARI SEJATI PERKASA it was proven that the case was based on the evidence of bankruptcy presented before the Panel of Judges, but this was not considered by the Panel of Judges because there was a fact that the PKPU had decided on the case before the Surabaya Commercial Court gave consideration to the evidence submitted by the PKPU Petitioner.

The purpose of bankruptcy law as in creditor theory can at least be seen from two dimensions. First, bankruptcy law was created to create a system that allocates risks between the parties,with predictable, equitable and transparent parameters. Predictable means that regulations relating to the bankruptcy process must be identified through a legal process and must be applied consistently. Equitable requires, for example, that all creditors jointly bear and prevent fraud. Transparency means that interested parties must be given sufficient and adequate information as well as clear reasons for making a decision. Second, bankruptcy law is to protect and increase value for the benefit of interested parties. On the other hand, the notion of efficiency in bankruptcy law also refers to allocative efficiency, meaning when the company is experiencing financial difficulties at the same time capable minimalization social fees (Anisah, 2008).

PKPU has the aim that debtors who are companies have sufficient time for companies to make peace with creditors in settling debts. Even though the PKPU has provided an opportunity for debtors to reorganize their business or company management, it is time for PKPU to restructure their debts. PKPU is an effort that can be done by debtors to avoid bankruptcy. In essence, PKPU is different from bankruptcy. PKPU is not intended for the interests of the debtor only, but also for the interests of its creditors, especially concurrent creditors. In the Bankruptcy Act, delays in payment of debt obligations are regulated in Chapter III.

In PKPU, they still have the authority to carry out legal actions to transfer and manage their assets as long as this is done with the approval of the specially appointed administrator by the Court. Meanwhile, in the event that the debtor is declared bankrupt by the Court, the debtor is no longer authorized to take care of and transfer his assets which have become the property owner. In contrast to Law Number 4 of 1998 which only allows PKPU to be submitted by debtors, the UUK-PKPU concerning Bankruptcy and PKPU provides the possibility for PKPU to also be submitted by creditors. The provision that creditors can propose a postponement of the

obligation to pay debts is a new provision in UUK-PKPU, in 4 of 1998 and FV, only debtors can only have submitted PKPU.

In principle, there are two patterns of delays in payment of debt obligations. First, the postponement of the obligation to pay debts which is a defense for the debtor against the bankruptcy application submitted by the creditor. Second, the delay in payment of debt obligations on the debtor's own initiative who estimates he is unable to pay his debts to creditors. Based on the US Bankruptcy Code, debt is only defined as claims, namely rights to payment (right to receive payment) and breach of performance if such breach gives rise to rights of payment (breach of promise to payment of a sum of money). Based on these two meanings, debt is limited to a debt agreement and does not include breach of contract as a result of non-performance of the agreement in the form of work that must be carried out by the debtor.

In terms of insolvency, it is defined as the condition of a business in which the assets are smaller than the liabilities, in other words, the company's debt is greater than its assets. According to Sutan Syahdeini, insolvency is the condition of a debtor who has a debt that exceeds his total assets. From this understanding, it is necessary to first prove how much the total debt of the debtor is and how large the total assets are. Another opinion states that the definition of insolvency is a condition where the assets of a business actor are no longer sufficient to pay his debts, as a result of the losses he has experienced, with reference to the provisions of Article 47 of the Commercial Code if the losses of the limited liability company have been eroded by five years. tens of percent of the debtor's business capital is declared insolvent (Aprillia et al. 2018).

A company is said to be insolvency bankruptcy if the book value of its total liabilities exceeds the value of the company's assets. According to the Business of Term Dictionary, Insolvency is defined as the inability to meet financial obligations when they fall due like in a business, or excess liabilities compared to assets within a certain time, while the principle that explains the meaning of insolvency in bankruptcy law is referred to as the solvency principle.

From an economic point of view, bankruptcy can actually be understood from two approaches, namely the legal approach and the technical approach. Legal bankruptcy is bankruptcy marked by the ratification of bankruptcy by the Court because it has fulfilled the bankruptcy requirements according to the laws and regulations. Meanwhile, bankruptcy based on a technical approach is an individual/company that has negative equity, where debt is greater than total assets (Hery, 2015).

Bankruptcy in Indonesia so far has only been viewed from one point of view, namely that bankruptcy is a mere legal issue. The Commercial Court decides bankruptcy if it has fulfilled the conditions specified in the bankruptcy law, without considering the debtor's financial condition, so that when it is possible for bankruptcy of a debtor to occur legally, even though it is technically unfit for bankruptcy, this creates injustice, especially for debtors who have positive equity, i.e. assets are greater than total debt.

This technical approach from an economic point of view is in line with the philosophy of bankruptcy, namely if the debtor is in a state of inability to pay his debts, because the amount of debt exceeds the total assets. Based on this, the issue of bankruptcy needs to be viewed in two approaches, namely the legal approach and the economic approach, namely if based on economic analysis, the debtor technically deserves to be bankrupt because it is not prospective because it

has a debt amount that is much larger than assets, then such a situation will result in bankruptcy confirmed by the decision of the bankruptcy statement by the court.

Economic analysis carries the principle of efficiency in the economy while still prioritizing justice, which can be used to optimize the application of legal instruments to be used. Due to the limited legal capacity, making decisions regarding bankruptcy requires an analysis of economic theory. From the economic point of view, the law gets a new reflection in order to sharpen the level of precision in the preparation of laws and regulations and their application to create order and justice in society. Economic analysis of the law is used to answer basic questions regarding the law, namely, first, whether the rules promulgated have been in accordance with their application by the parties authorized to carry out the contents of the law, secondly whether the effect of implementing the law provides social benefits as well as social benefits which are expected. This is because the understanding of bankruptcy law is not just a collection of debts, but the bankruptcy system is basically to overcome financial problems.

In general, economics on law works by using a theoretical framework to analyze the rules and laws used. The use of economic analysis of the law to draw conclusions about human desires and all the consequences from a legal perspective and how best the legal arrangements should be. Prediction of various possible human reactions to the enactment of a rule of law can be done through economic analysis with the help of exact formulas that are precise and can be accounted for from a scientific point of view of the theories used both in terms of economic theory and legal theory (Zulaeha, 2016).

Economic analysis of law can be used as an approach to answer legal problems to get justice in law. The approach and use of this analysis must be prepared with economic considerations without eliminating the element of justice, so that justice can become an economic standard based on three basic elements, namely value, utility and efficiency based on human rationality.

In addition, the economic approach can be used as a reference to assess the extent of the impact of enacting a legal provision or legislation on the wider community, so that it can be easier to know the public's reaction and the benefits that such legal or statutory provisions can provide. The Bankruptcy Law in Indonesia does not yet reflect provisions outside the bankruptcy norm. Bankruptcy law should recognize and respect things outside of bankruptcy. Bankruptcy law is not only a matter of debtor's financial difficulties, but also includes moral, individual and social political issues that affect the parties related to the financial difficulties. The law must be able to encourage and facilitate the economic sector (Wijaya et al, 2019).

The definition of insolvency contained in the UUK-PKPU is not the same as the notion of insolvency in general, insolvency according to the UUK-PKPU is defined as a state of stopping paying, but the reason for stopping paying debts is not absolute only because the creditor is unable to pay his debt as a result of his debt being greater than his assets, but it could also be because the debtor does not want to pay his debt, the debtor is considered to be in a state of insolvency.

The statement of insolvency is one of the important stages in the bankruptcy process, this stage is important because at this stage the fate of the bankrupt debtor is determined whether the debtor's assets will be completely distributed to his creditors to cover all his debts or whether the

debtor's business can still be saved by accepting the reconciliation plan to be carried out debt restructuring.

Judging from the entire bankruptcy process, the insolvency stage is almost at the end of the bankruptcy process, the legal consequence of insolvency from the debtor is that the bankrupt assets are immediately executed and distributed to all creditors unless there are certain considerations (eg business considerations) which cause delays in execution and delays in distribution will be more profitable; In principle there is no rehabilitation, this is because insolvency occurs because there is no reconciliation, while the assets of the bankrupt debtor are smaller than their obligations.

The petition for a declaration of bankruptcy can only be filed in the event that the debtor does not pay his debts to one or most of the creditors who have a total claim of at least more than 50% of the total debt of the debtor to all his creditors. In other words, if a creditor does not pay only certain creditors, while other creditors who have claims of more than 50% of the total amount of their debts still carry out their obligations properly, then the debtor should not be able to submit a petition for a declaration of bankruptcy either by the creditor or by the debtor. alone. (Regarding the solvency principle, which requires that a declaration of bankruptcy can only be filed against debtors who are insolvent, namely those who do not pay their debts to the majority creditors), while debtors whose assets are still sufficient to pay their debts should not be declared bankrupt, but debt restructuring is carried out.

UUK-PKPU does not provide a definition of what is meant by insolvency, normatively in the explanation of Article 57 paragraph (1) insolvency is defined as a state of being unable to pay. However, this inability to pay was not a condition for a declaration of bankruptcy to be issued, so it was not further regulated in one of the articles in the Bankruptcy Law, therefore it cannot be explained how the provisions of this Bankruptcy Law determine the condition of being unable to pay.

In addition to Article 57 paragraph (1), there are several other articles in the UUK-PKPU which mention insolvency, namely, Article 57 paragraph (1) states that the period as stipulated in Article 56 paragraph (1) ends by law when the bankruptcy is terminated earlier or at the time the bankruptcy is terminated. the commencement of the state of insolvency as referred to in Article 178 paragraph (1). Article 59 paragraph (1) states that while maintaining the provisions of Article 56, Article 57 and Article 58, creditors holding rights as referred to in Article 55 paragraph (1) must exercise their rights within a period of no later than 2 (two) months from the start of the insolvency situation as referred to in Article 59 paragraph (1). Article 178 paragraph (1). Article 187 paragraph (1) states that after the bankruptcy estate is in a state of insolvency, the Supervisory Judge may convene a meeting of creditors on the day, hour and place determined to hear as necessary regarding the settlement of the bankruptcy estate and, if necessary, carry out verification of the intended receivables after the expiration of the grace period as referred to in Article 113 paragraph (1) and has not been matched as intended in Article 133. Elucidation of Article 292 states that the provisions in this Article mean that the decision on the declaration of bankruptcy results in the bankruptcy estate of the debtor being directly in a state of insolvency (David, 2005).

These articles do not provide a clear definition of what is meant by insolvency according to UUK-PKPU. So insolvency according to the UUK-PKPU is actually as stipulated in Article

178 paragraph (1) which reads: "if at the meeting the reconciliation of receivables is not offered, it is not accepted, or the ratification of the reconciliation is rejected based on a decision that has obtained permanent legal force, by law the bankrupt property is in a state of bankruptcy insolvent."

According to this provision, insolvency occurs if there is no reconciliation and by law the bankrupt property is in a state of being unable to pay all the debts that must be paid, so that procedurally according to the provisions of this article in a bankruptcy, the bankruptcy estate is considered to be in a state of insolvency or unable to pay if fulfilled the following conditions:

a. In the verification meeting no peace was offered;
b. The peace offered has been rejected;
c. The ratification of the peace has definitely been rejected.

To determine whether a debtor is in a state of insolvency, the proof is carried out after the debtor is declared bankrupt, namely at the time of verification for those led by the Supervisory Judge, the method of formation is carried out using the principle of presumption, namely if at the creditor meeting the debtor does not submit a reconciliation plan or proposed reconciliation plan. the debtor is rejected, then in a state of insolvency. This means that the Bankruptcy Law stipulates the condition of stopping paying after verification of the debt when the debtor has been declared bankrupt.

At the creditor meeting, the debtor can exercise his right to avoid bankruptcy, namely by proving that he is still solvent, by submitting a reconciliation plan, at this stage the solvency principle is applied, at this stage the solvency of the debtor will be tested to determine whether the debtor deserves to be given the opportunity to restructure debt or not, the indicator is whether the debtor's assets within the specified time limit according to a reasonable calculation are sufficient to pay his debts to his creditors, if with this test the debtor's solvency is met, the judge will grant the reconciliation plan proposed by the debtor.

In the United States as a Common Law country which is often a reference in making laws in other countries, there is no exception regarding the bankruptcy law or the so-called Bankruptcy Reform Act of 1978 or known as the Bankruptcy Code. The law has adopted this insolvency test method, but basically there is still a debate about the most suitable insolvency test method to be applied in every bankruptcy application that appears. This is actually not surprising because before the enactment of this Bankruptcy Code, America used The Bankruptcy Act of 1898 which gave an "ambiguous" impression of the application of the insolvency of this test. This was reinforced by objections from practitioners who at that time felt uncertain about the implementation of the suggestions in terms of corporate restructuring. Then before the Bankruptcy Code and created Insolvency-Based Liens, the application of this test is different from the conditions specified in the Bankruptcy Code. For example, by using an equitable insolvency test, a State can confiscate collateral when the debtor is unable to pay off its debt within the allotted time, and at the same time, the Bankruptcy Code is translated as a law that adopts a balance sheet test. (Anisah, 2009).

With such a background of problems, the Bankruptcy Code together with other laws such as the Uniform Commercial Code, the Uniform Fraudulent Transfer Act (UFTA) tries to answer

by providing solutions regarding the possibility of several insolvency tests that can be applied to prove an insolvent debtor to be applied for. and was declared bankrupt.

To find out whether a business is a business that is still solvent or not, there are 3 theories of Financial Test which in practice the common law system is often used, namely (Amrullah, 2016):

1. The Balance Sheet Test

A test to prove whether the debt or obligations of the debtor have exceeded or are more or greater than their assets, in other words whether the debtor's financial condition, the debtor's obligations according to a reasonable calculation are greater than his assets, according to this test a debtor is considered to have entered the area of insolvency at the time of his debts exceed his assets. A debtor is in a state of insolvency based on a balance sheet test when the fair value of the assets of the debtor as a running company exceeds its responsibilities including liquidation costs.

Determination of insolvency using the balance sheet test is more complicated to evaluate than other financial tests, because there is no standard for determining the value of assets compared to liabilities, namely whether the basis for the assessment is carried out while the business is still running or when the company is in liquidation. The regulation regarding the balance sheet test is also contained in the German Bankruptcy Law which has been in effect since January 1, 1999. However, this test can only be carried out if the debtor no longer has sufficient assets to pay his debts. Based on the balance sheet test, the Court first evaluates the company's assets whether the company can still continue its business activities rather than liquidation.

2. The Equity Test or Cash Flow Solvency Test

A test used to determine whether a company can still pay its debts that have matured, and whether a debtor is past due and unable to pay. The financial test method in Australia generally adheres to the concept of cash flow insolvency, where when a company is unable to pay its maturing debts, the company is said to have entered the zone of insolvency. This equity insolvency test is often interpreted as generally not paying its debts as they become due. Thus, based on the equity insolvency test, to test whether the debtor is in a state of insolvency just by looking at whether the debtor is unable to pay its maturing debt, it is sufficient to prove that the debtor's debt has matured while the debtor no longer has the ability to pay it. The difference between this test and the balance sheet test is that the balance sheet test is to test whether the debtor's debt exceeds his assets, while the equity insolvency test shows a significant start from the debtor who does not pay his debts.

3. The Capital Adequacy Test or Transactional Analysis

An insolvency test by approaching through an economic analysis of legal issues, or in other words looking at the law from an economics instrument, this test is rarely carried out because for legal people it is quite difficult to implement. Transactional analysis applies when a company makes a transaction that causes the company's capital to decrease irrationally so that the company faces an unreasonable insolvency risk, in other words the company's financial

condition has entered the insolvency zone. This financial test model is rarely used, in practice balance sheet tests and equity tests are more often used (Badrulzaman, 2006).

The use of financial tests in these countries is carried out alternately depending on the situation and economic conditions that occur in that country, here the judge is very flexible and is given the freedom to determine what system is used, for example at one time a balance sheet test is used, but at other times the judge does insolvency test with Cash Flow test. The Constitutional Court in Case No. 071/PUU-II/2004 and Case No. 001-002/PUU-III/2005 have highlighted the importance of this insolvency test and suggested discussing it in the revision of the draft Bankruptcy Law in the future (Subhan, 2017).

In the UUK-PKPU only debtors who are insolvent can be declared bankrupt or apply for a PKPU. Bankruptcy applications can be submitted by the debtor himself or by the creditor. According to the legal principle, the applicant who submits the argument must prove the argument, then the applicant who proves the insolvency is the applicant. Without an insolvency test, the applicant often assumes that the debtor is insolvent or unable to pay. In the case of the bankruptcy of PT. Prudential Life Assurance (PT.PLA) Case Number: 13/Pailit/PN.Niaga/Jkt.Pst in one of its defenses PT.PLA stated that PT.PLA had a strong financial condition with an RBC rate of 225% as of December 31, 2003, far exceeds the provisions of the Ministry of Finance of the Republic of Indonesia by 100% (Mubarok, 2015).

3.2 Contract as a Legal Source

According to article 1233 of the Civil Code, debt arises because of an engagement, the engagement is born out of an agreement or by law. Engagements originating from agreements are regulated in Articles 1313 to 1351 of the Civil Procedure Code and Articles 1457 to 1864 of the Civil Procedure Code. According to Article 1352 BW, engagements originating from law are differentiated into engagements born from the law only (uit de wet allen) and engagements born from law due to human actions (uit de wet door's mensen toedoen). Then the engagement that is born from the law due to actions that are in accordance with the law (rechmatige) and acts that are against the law (Syahrani, 2013).

The relationship between an engagement and an agreement is an event where one person promises to another person or where the two people promise each other to carry out something. From this event, a relationship arises between the two people which is called an engagement. The agreement publishes an engagement between the two people who make it. In its form, the agreement is in the form of a series of words containing promises or promises that are spoken or written (Satrio, 2012).

Contracts are also part of an engagement which in Indonesia is normally governed by customary law or the Civil Code (*Burgerlijke Wetboek*). Customary law only applies to people who live in rural areas. Customary law in the Dutch era did not apply to transactions made by Europeans or international transactions. For Europe and the Foreign East, this is fully applicable as stated in book III of the Civil Code concerning engagement. When people from different population groups enter into transactions between them, then a question arises which law applies and because of that it is also a matter of choice of law.

Contracts are made between the parties based on good faith. This is in accordance with the provisions of article 1338 paragraph (3). To guarantee the existence of such good faith, the Judge of the Civil Court has the discretionary authority to supervise the implementation of a contract and guarantee the existence of good faith by using the principle of justice. About good faith Immanuel Kant a German philosopher (1724-1820 argued that something that is absolutely good, is good will, good will itself. According to Kant, the moral law is merely an intellectual effort to find it or in other words, the moral law is not created. Legal theorists have different approaches in analyzing law, justice and morals. There are those who support the relationship of law, justice and morals, some are separated depending on the judgment of society (Khairandy, 2004).

In the General Elucidation of the UUK-PKPU it is stated that the UUK-PKPU was made to prevent the misuse of bankruptcy institutions and institutions, both creditors and debtors with bad or dishonest intentions. Of course, in this case what must be protected by the Bankruptcy Law are debtors who have good intentions. A good Bankruptcy Law must provide benefits and also provide balanced protection for creditors, debtors and the public. Legal protection shows the function of law as a means of protecting human interests and at the same time shows that the purpose of law is to create an orderly social order, create order and balance, so that in society it is hoped that human interests will be protected. and protection of human rights. For the people of Indonesia, the principle of legal protection is the principle of recognizing and protecting human dignity which is rooted in Pancasila.

The principle of faith requires that in every agreement, the parties basically have the freedom to determine the contents of the agreement, with whom he makes the agreement and the agreement is based on the principle of good faith which is characterized by an agreement that does not violate the laws and regulations and does not violate the interests of the community. Article 1320 of the Civil Code stipulates the conditions for the validity of the agreement of those who bind themselves; The ability to make an engagement; A certain thing; And a lawful reason.

The first condition, the agreement, namely the agreement is basically a mutual agreement between the parties and such a mutual agreement must be stated orally or in writing. Agreements must be given on the basis of free will without error, coercion or fraud, mistakes regarding the substance or quality of the main agreement in the contract.

The second condition, which determines the validity of the contract is the ability to act. As a general rule of law everyone is considered capable of entering into contracts, with the exception of minors and persons placed under guardianship. Contracts made by minors or those placed under guardianship can be canceled by the court on the basis of an application submitted by the person concerned or the party having authority to represent them, provided that the application is submitted within five years of the contract being made. The obligations imposed on the other party in the contract will still apply because of the incompetence unless the contract has been cancelled.

The third condition, which determines the validity of the contract is certain things. By that is meant the substance of the contract. However, in the contract it is not required for the parties to specify the exact quantity of goods, as long as the contract provides a basis for determining the quantity of goods in the future. In general, certain things can include rights and obligations, services, goods or certain things, which exist or will exist as long as they can be determined.

The fourth condition, for the validity of the contract is a lawful cause or cause. If the substance of the contract is something that is against the law or contrary to good decency or public order, the contract is declared null and void. Specifically regarding agreements, the Civil Code does not clearly specify what form it will take, so that in practice it gives rise to various interpretations or interpretations of the agreement. Agreement is often equated with the term agreement, or equality of opinion between the parties to the agreement, but is also often interpreted as a mutual agreement between the parties to the agreement.

One of the most important aspects of the agreement is the implementation of the agreement itself. In fact, it can be said that it is precisely the implementation of this agreement that is the goal of the people who enter into the agreement, because it is precisely by implementing the agreement that the parties who make it will be able to fulfill their needs, interests and develop their talents. In legal practice in society, to determine since when a debtor is in default is sometimes not always easy, because when the debtor must fulfill the performance is not always specified in the agreement. In the sale and purchase agreement of an item, for example, it is not stipulated when the seller must deliver the goods he sells to the buyer, and when the buyer must pay the price of the goods he buys to the seller. Therefore, to fulfill this achievement, the debtor must first be given a warning (*sommatie ingebrekestelling*) so that he fulfills his obligations.

The silence of the creditor that exceeds the appropriate time limit can be considered that the creditor has accepted the delivery and has subsequently relinquished his right to demand the delivery of the object in accordance with the agreement. In order to apply the principle that the silence of the creditor can be considered as accepting the debtor's performance and relinquishing his right to protest, the condition must be met that the creditor is given an appropriate time to examine the object submitted.

Article 1338 stipulates that good faith demands that in the implementation of an agreement the parties heed the demands of decency and propriety that apply in social life. Likewise, creditors cannot arbitrarily state that the debtor is in a state of negligence. The rights of the debtor must also be protected. There are norms that must be heeded by creditors so that the warning applies as a valid subpoena (Mitchell, 2007).

The parties are also charged with making clear and firm agreements so that each party does not have their own interpretation of the contents of the agreement. In interpreting a contract, Catherine Mitchell in her book Interpretation of Contracts states that the interpretation in litigation cases is mostly carried out by judges in court. In the case of Interpretation, such precedent is often used as a means of interpreting the clauses of a contract.

In the provisions of article 1342 it is stated that "if the words in a contract are clear, it is no longer allowed to deviate from it by interpretation". This shows that the contract made and between the parties should be clear in its contents so as to provide certainty which in contract law is called the principle of sens clair or the doctrine of clarity of meaning (plain meaning rules) (Suhardana, 2008). Ideally a contract does not require any interpretation, therefore the sentence or words in the contract should by itself explain the existing clauses.

A contract or agreement is a legal event where one person promises to another person, or two people promise each other to do or not to do something. Through a contract, the parties

create a legal relationship that strengthens the rights and obligations of each party (Kusumohamidjo, 2017). In principle, contract law provides the widest freedom to enter into an agreement, as long as it does not violate public order and morality. In general, the contractual relationship begins with a process of negotiation and harmonization of existing differences, so that when the contract has been agreed, each party is considered to have understood and is bound by the contents of the contract (Simamora, 1997). In general, the process of forming up to the implementation of the contract consists of three stages, namely the pre-contract stage, the contract closing stage, and the contract implementation stage. Meanwhile, in terms of form, the parties are free to determine (Simamora, 1993).

The philosophy of contracting is in the context of carrying out legal relations in community relations. Legal subjects, both individuals and legal entities, have the legal ability to enter into contracts as legal relations to obtain rights and obligations in accordance with their respective interests. The legal relationship in the contract is built on the basis of the interests and needs of the legal subject to enter into the broadest possible engagement as long as it does not violate the laws and regulations, decency, propriety and public order. The principle in establishing legal relations through consensus or agreement is freedom of contract.

Contract law is about three principles, which are interrelated with each other. The three principles are:

1. The prinsiple of consensualism, *het onsensualisme*;
2. The prinsiple of the binding orce of contract, *deverbindende kracht van de overeenkomst*;
3. Prinsiple of freedom of contract, *de contractsvrijheid*.

In the principle of consensualism and the principle of freedom of contract lies in the pre-contract period. In consensualism, a contract is said to have been born if there has been an agreement or agreement between the parties who made the contract. With the promise, there is a will for the parties to achieve each other, there is a willingness to bind themselves together. Contractual obligations are a source for the parties to freely determine the contents of the contract with all its legal consequences. Based on this will, the parties freely reconcile their respective wills. This will on the part of the parties is the basis of the contract. The occurrence of legal actions is determined based on an agreement (consensualism). With the principle of freedom of contract, everyone is recognized as having the freedom to make a contract with anyone to determine the contents of the contract, determine the form of the contract, and choose the law that applies to the contract concerned.

The freedom of contract paradigm greatly influenced the formation of legislation at that time. In France, when the Civil Code was codified in 1904, the French people's minds were heavily influenced by individualism and liberalism. The German Civil Code (*Burgerliches Gezetzbuch or BGB*) is also inseparable from the paradigm of freedom of contract. In the 19th century the classical contract law theory was fundamentally formed. The formation of this new theory is a reaction and criticism of the medieval tradition of substantive justice. Judges and legal scholars in the UK and in the United States reject longstanding beliefs about the justification of contractual obligations derived from inherent justice or fairness of an exchange. They state that the source of contractual obligations is the convergence of the wills or the consensus of the parties making the contract.

In the new paradigm, two aspects arise in the contract, namely freedom (as much as possible) to enter into a contract; Contracts must be treated sacred by the Court because the parties enter into contracts freely and without restrictions. Thus the freedom of contract and the sanctity of the contract became the basis of the entire contract law that developed at that time. In other words, their orientation is chastity and freedom of contract. Regarding the pre-contract stage, Malloy said, "The pre-contract phase is characterized by gathering of information and by negotiation. Relevant legal considerations here might include duties to disclose and inspect, and the status of promises and representations made prior to executing and enforeable contracts" (Blandy, 2015). Meanwhile, at the closing stage of the contract, it is marked by an agreement by both parties. The agreement itself is one of the conditions for the validity of a contract, which in the perspective of *Burgerlijk Wetboek* (BW) is called an offer (*aanbod, offerte*) and acceptance (*aanvaarding, acceptatie*) (Prodjodikoro, 2011). Basically when the contract has been closed, the parties have agreed on the clauses that have been made, so that the parties are considered to have understood and agreed to the clauses outlined in the contract.

While the contract implementation stage is the stage of achievement fulfillment or payment stage. According to Nieuwenhuis, "The term payment in contract law is the performance of the required performance in a contractual relationship. This understanding deviates from the use of the term in everyday language which only means paying off a certain amount of money owed".

The doctrine of Pacta Sunt Servanda (contracts must be obeyed) is the basis for the birth of the obligation of each contracting party to fulfill each other's implementation of each of the agreed promises, where actions to fulfill each other's promises will result in mutual fulfillment of the rights of each contracting party. Elizabeth Warren argues about the relationship between contract law and bankruptcy law as a result of failure to carry out the agreed performance, as follows "The debtor-creditor system is itself part of larger, integrated order of public enforcement of promises between individuals, an analysis of promise enforcement should begin with contract law-the law enforcing private promises-and come full circle with bankruptcy law-the laws santioning default on private promises".

Default which is the main condition for the birth of an obligation from a debtor to pay fees, compensation and interest to the aggrieved party, is clearly regulated in Article 1243 of the Civil Code. And regarding the elaboration of the meaning of default as regulated in Article 1234 of the Civil Code, Subekti explained that there are four types of default acts, as follows: not doing what they are bound to do; Carry out what he promised, but not as promised; Did what he promised but was too late; do something according to the agreement that can't do it."

Based on Subekti's description above, the step of proof through an agreement against an act of default is very important. The clarity of an agreement in describing the obligations of each contracting party will make it easier to prove that there has been a default which requires the debtor to pay compensation to the creditor, including the status of whether the debt is due and collectible.

In Article 1 point 6 UUK-PKPU, debt is defined as an obligation that is stated or can be stated in the amount of money either in Indonesian currency or foreign currency, either directly or that will arise in the future or contingent, arising from an agreement or law. the law and which must be fulfilled by the debtor and if it is not fulfilled by the debtor and if it is not fulfilled it

gives the creditor the right to obtain fulfillment from the debtor's assets while in article 225 paragraph (2) it states: in the event that the application is submitted by the debtor, the Court within no later than 3 (three) days from the date of registration of the application letter as referred to in Article 224 paragraph (1) must grant a temporary PKPU and must appoint a Supervisory Judge from the Court Judge and appoint 1 (one) or more Supervisors who together with the debtor manage the debtor's assets and paragraph (1) (3) In the event that the application is submitted by a creditor, the Court within no later than 20 (twenty) days from the date of registration of the application letter, must grant the temporary PKPU application and must appoint a Supervisory Judge who together with the debtor manage the debtor's assets.

In UNIDROIT (International Institute for the Unification of Private Law) has issued UNIDROIT principles which are institutionalized in legal documents. These documents are in the form of International Conventions, Model Law, Legal Guides, general legal principles or contract standards. With the development of such institutions, especially after the second world war, which experts call the New Lex Mercatoria (The New Lex Mercatoria). Good faith is regulated in UNIDROIT in CHAPTER I concerning General Provisions Article 1.7 paragraph (1) states that each party must act properly and in good transactions in international trade, (2) the parties may not limit or exclude good faith in the agreement.

In the PKPU process, it may happen that the judge of the Commercial Court does not consider carefully that the debtor has had good faith in managing his debts to creditors. Article 8 (4) UUK-PKPU states that an application for bankruptcy declaration must be granted if there are facts or circumstances that are simply proven that the requirements to be declared bankrupt as referred to in Article 2 paragraph (1) have been fulfilled. Whereas in article (3), in the event that the application is submitted by a creditor, the Court within a period of no later than 20 (twenty) days from the date of registration of the application letter, must grant the temporary PKPU application and must appoint a Supervisory Judge who together with the debtor manages the debtor's assets.

The two articles emphasize that the judge's benchmark in fulfilling the requirements in the bankruptcy decision is enough to only meet the requirements in article 2 paragraph (1). Even the law states with the words "must be granted, which has the meaning of the norm which is inverative as a result, the Commercial Court can decide on bankruptcy decisions without considering other things" (Irianto, 2015).

In procedural terms, bank bankruptcy legal protection for customers can also be said to have not been maximized. The provisions of article 2 paragraph (3) of the UUK-PKPU concerning Bankruptcy and PKPU state that in the event that the debtor is a bank, the application for a declaration of bankruptcy can only be submitted by Bank Indonesia. This provision prevents depositors (bank creditors) from applying for bank bankruptcy, because it conflicts with the procedural rules that require that only Bank Indonesia is authorized to apply for a bankrupt statement. This implies that the depositing customer (bank creditor) does not have legal standing to be able to apply for a bank bankruptcy statement (Fauzi, 2010).

Conclusion

In bankruptcy, factual evidence is proof of the requirements contained in Article 2 paragraph (1) of the UUK-PKPU plus an examination of the debtor's financial statements, to see whether the debtor company is still solvent or not through the Balance Sheet Insolvency Test. The purpose of financial statements is to provide information about the company's assets, liabilities, and capital that is useful to help other parties evaluate the company's financial strengths and weaknesses as well as the company's liquidity and solvency. The application of simple evidence by the judge accompanied by an examination of financial statements, the judge can assess the financial condition of the debtor is still healthy or not by looking at the assets that are considered debt assets or not. By changing the factual evidence, it is hoped that potential debtors (people or companies that have assets and with good financial conditions) will not be easily bankrupt and can still continue their business.

In the Articles of UUK-PKPU there are things that are burdensome to bank debtors, in this case customers, there are facts that are not balanced between the interests of the bank and its customers. Banks can file for Bankruptcy against their customers but Customers cannot file for bankruptcy against the Bank. Customers (creditors) can apply for PKPU. Likewise, banks (debtors) can also apply for PKPU against their customers. If a bank goes bankrupt a creditor, then the right to go into bankruptcy is only owned by the customer (creditor) on the grounds of the bank's position as a preferred creditor who has special rights. Essentially, bankruptcy in its application must be carried out fairly in the sense of paying attention to the interests of debtors and creditors in a balanced way. The idea of balance encourages an acknowledgment of the equality of the position of the individual with the community in common life.

References

Amrullah, M. (2016). *Azas Integritas dalam Sistem Hukum Kepailitan sebagaiSarana Hukum Menyelesaikan Masalah Utang Piutang secara Adil, Cepat, dan Efektif*. Malang, Brawijaya University.

Anisah, S. (2008). *Perlindungan Kepentingan Kreditor dan Debitor dalam Hukum Kepailitan di Indonesia*. Depok, Indonesia University.

Anisah, S. (2009). Studi Komparasi Terhadap Perlindungan Kepentingan Kreditor dan Debitor Dalam Hukum Kepailitan. *Jurnal Hukum IUS QUIA IUSTUM*, 16, Special Edition, 30-50. https://journal.uii.ac.id/IUSTUM/article/view/3881/3457

Aprilla, A.P., Permadi, I., & Effendi, L. (2018). Status Hukum Hak Milik Atas Tanah Warga Negara Asing Dengan Meminjam Nama Warga Negara Indonesia. *Jurnal Ilmiah Pendidikan Pancasila dan Kewarganegaraan*, 3(1), 15-21. DOI: http://dx.doi.org/10.17977/um019v3i12018p015

Badrulzaman, M.D. (2006). *Kitab Undang-undang Hukum Perdata Buku III Tentang Hukum Perikatan Dengan Penjelasan*. Bandung, PT.Alumni.

Blandy, S.B.S. (2015). *Researching Property Law*, Palgrave Macmillan.

Damlah, J. (2017). Akibat Hukum Putusan Kepailitan Dan Penundaan Kewajiban Pembayaran Utang Berdasarkan Undang-Undang Nomor 37 Tahun 2004. *Lex Crimen*, 6(2), 91-98. https://ejournal.unsrat.ac.id/index.php/lexcrimen/article/view/15348/14896

David, L.K. (2005). *Insolvency Law in East Asia*. Roman Tomasic, Ashgate Publising Campany.

Fauzi, M. (2010). Menimbang Konstruksi Hukum Kepailitan Bank; Perspektif Nilai-nilai Dasar dan Tujuan Hukum (Law Construction of Bankruptcy; Basic Values and Orientation of Law Perspective). *Risalah Hukum*, 6(1), 1-8. https://e-journal.fh.unmul.ac.id/index.php/risalah/article/view/245/155

Hery. (2015). *Analisis Laporan Keuangan: Pendekatan Rasio Keuangan*. First Printed. Yogyakarta,Center For Academic Publishing Servise CAPS.

Irianto, C. (2015). Penerapan Asas Kelangsungan Usaha Dalam Penyelesaian Perkara Kepailitan Dan Penundaan Kewajiban Pembayaraan Utang (PKPU). *Jurnal Hukum dan Peradilan*, 4(3), 339-418. DOI: http://dx.doi.org/10.25216/jhp.4.3.2015.399-418

Khairandy, R. (2004). *Itikad baik dalam Kebebasan berkontrak*. Jakarta, Universitas Indonesia.

Kusumohamidjojo, B. (2017). *Teori Hukum Dilema antara Hukum dan Kekuasaan*, Edisi 2, Bandung, Yrama Widya.

Mitchell, C. (2007). *Interpratation of Contracts.* Abingdon, Routledge-Cavendish.

Mubarok, M.W. (2015). *Kajian Yuridis Terhadap Kepailitan Pt. Prudential Life Assurance (Studi Putusan Nomor 13/Pailit/2004/PN.NIAGA/JKT.PST)*. Available at http://repository.unej.ac.id/handle/123456789/64632 Accessedd at 23 March, 2021.

Nasution, B.J. (2008). *Metode Penelitian Ilmu Hukum*. Bandung, Mandar Maju.

Prodjodikoro, W. (2011). *Azas-Azas Hukum Perjanjian*. Bandung, Mandar Maju.

Rumadan, I. (2017). Peran Lembaga Peradilan Sebagai Institusi Penegak Hukum Dalam Menegakkan Keadilan Bagi Terwujudnya Perdamaian (Judicial Insttuton Role as Law Enforcement Insttuton Upholding Justce for Peace). *Jurnal RECHTSVINDING: Media Pembinaan Hukum Nasional*, 6(1), 69-87. DOI: http://dx.doi.org/10.33331/rechtsvinding.v6i1

Satrio, J. (2012). *Wanprestasi menurut KUHPerdata, Doktrin, dan Yurisprudensi*. First Printed. Bandung, PT.Citra Aditya Bakti.

Setiono, (2004). *Rule of Law (supremasi hukum)*. Surakarta, Universitas Sebelas Maret.

Shubhan, H. (2008). *Hukum Kepailitan: Prinsip, Norma, dan Praktik di Peradilan*. First Edition. Jakarta, Kencana Prenada Media Group.

Simamora, Y.G. (1993). Penyalahgunaan Keadaan Sebagai Bentuk Pelanggaran Terhadap Asas Kebebasan Berkontrak, *Yuridika: Jurnal Hukum Ekonomi*, Vol. 8.

Simamora, Y.G. (1997). Pengujian Dan Kontrol Terhadap Penggunaan Perjanjian Standar, *Jurnal Hukum Ekonomi*, 2(3).

Suhardana. (2008). *Contract Drafting:Kerangka Dasar dan Teknik Penyusunan Kontrak*. Yogyakarta, Universitas Yogyakarta.

Syahrani, R. (2013). *Seluk Beluk dan Asas-Asas Hukum Perdata.* Bandung, PT Alumni.

Wijaya, A.A., Murniati, R., and Trijaya, M.W. (2019). Hak Eksekusi Kreditor Separatis terhadap Benda Agunan dalam Kepailitan. *Pactum Law Journal*, 2(3), 713-724. http://repository.lppm.unila.ac.id/15062/1/1685-5414-1-PB.pdf

Zuaeha, M. (2016). *Konsep Kepailitan yang Memberikan Perlindungan Hukum Terhadap Debitor Perusahaan Yang Propektif.* Malang, Brawijaya University.