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The Urgency of Implementing the Insolvency Test in Bankruptcy Cases in Indonesia

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Original Article

Abstract

The process of resolving bankruptcy cases in Indonesia, which only determines two simple requirements for debtors to be declared bankrupt as stipulated in the provisions of Article 2 paragraph (1) of Law No. 37 of 2004, has resulted in many cases of debtors still in a solvent state but declared bankrupt. This research focuses on the urgency of applying the insolvency test to bankruptcy cases in Indonesia, with the aim of knowing how the urgency of applying the insolvency test in Indonesia, and also knowing how judges apply the concept of the insolvency test even though the insolvency test has not been regulated in the bankruptcy provisions in Indonesia. Normative research using a conceptual approach, and a case approach results in a conclusion that the bankruptcy of a debtor who is still solvent is something that is not in accordance with the principles of bankruptcy. Therefore, it is necessary to have an insolvency test instrument to assess the solvency of the debtor. In addition, this research also found several cases where the panel of judges applied the concept of insolvency test in considering the case being handled.

Keywords: *Insolvency, Test, bankrupt, Urgency*

Abstrak

Penyelesaian perkara kepailitan di Indonesia yang hanya mensyaratkan dua ketentuan sederhana sebagaimana diatur dalam Pasal 2 ayat (1) Undang-Undang No. 37 Tahun 2004 sering kali menyebabkan Debitor yang masih solven dinyatakan pailit. Penelitian ini membahas urgensi penerapan *insolvency test* di Indonesia serta analisis penerapan konsep tersebut oleh hakim meskipun belum diatur dalam ketentuan kepailitan. Dengan pendekatan normatif dan kasus, penelitian ini menyimpulkan bahwa mempailitkan Debitor yang solven bertentangan dengan prinsip kepailitan. Diperlukan instrumen *insolvency test* untuk menilai solvabilitas Debitor, dan ditemukan beberapa kasus di mana hakim telah mempertimbangkan konsep tersebut dalam putusannya.

Kata kunci: *Insolvensi, Tes, Kepailitan, Urgensi*

1. INTRODUCTION

Article 2, Paragraph (1) of Law No. 37 of 2004, concerning bankruptcy and debt payment postponement obligations, establishes the conditions for filing bankruptcy declarations. The provision states that a debtor who has two or more creditors and fails to repay at least one debt that is due and collectible may be declared bankrupt by court decision, either through self-petition or at the request of one or more creditors. These provisions require only two conditions for declaring a debtor bankrupt: the existence of two or more creditors and the presence of matured, collectible debt. These bankruptcy declaration requirements are considered vulnerable to misuse, that several cases have emerged where financially healthy companies, capable of paying their debts and possessing assets significantly exceeding their liabilities, have been declared bankrupt due to certain provisions in Indonesian bankruptcy law that deviate from international standards and are subject to multiple interpretations.¹

Shubhan² attributes this issue to Article 2, Paragraph (1), which establishes only two requirements for filing bankruptcy: the existence of two creditors and one matured debt, without specifying a minimum debt threshold. This position is reinforced by the Constitutional Court's decisions in cases Number 071/PUU-II/2004 and Number 001-002/PUU-III/2005, which identified the lenient bankruptcy filing requirements as a legislative oversight in the formulation of Article 2, Paragraph (1). The Court further noted that without establishing "inability to pay" as a prerequisite for bankruptcy declaration, creditors can readily file bankruptcy petitions without having to demonstrate the company's insolvency.

A notable case illustrating the consequences of disregarding a debtor's payment capacity in bankruptcy declarations is that of PT Manulife Indonesia Life Insurance. The company was declared bankrupt despite being considered solvent at the time. This case, which should inform potential reforms of Indonesian bankruptcy regulations, prompted concern from the Canadian Minister, who stated that the Manulife case could undermine global investor confidence in Indonesia. The Minister noted that when investors from Japan, Australia, or Canada observe that Manulife Financial—one of Canada's premier companies with proven solvency and ability to service its debts—is affected by this case, it raises questions about investment security worldwide. The Minister further emphasized the significance of this issue given Indonesia's high unemployment rate and its consequent need for substantial foreign investment.³

The bankruptcy of solvent debtors who remain capable of fulfilling their financial obligations represents an undeniable problem that generates various negative consequences

¹ Syafrudin Makmur, "Kepastian Hukum Kepailitan Bagi Kreditur Dan Debitur Pada Pengadilan Niaga Indonesia," *Mizan: Jurnal Ilmu Syariah* 4, no. 2 (2016): 337–68, <https://doi.org/10.32507/mizan.v4i2.187>.

² Muhammad Hadi Shubhan, "The Utilization of Unwritten Laws in Bankruptcy Disputes," *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional* 8, no. 1 (2019): 85–98, <http://dx.doi.org/10.33331/rechtsvinding.v8i1.299>.

³ "Kilgour: Kasus Manulife Tak Merusak Hubungan Indonesia-Kanada," *Liputan 6*, 2002, <https://www.liputan6.com/news/read/36477/kilgour-kasus-manulife-tak-merusak-hubungan-indonesia-kanada>.

extending beyond harm to the debtor. In response to this issue, several countries, including the United States, Thailand, Japan, and England, have implemented insolvency testing procedures that must be completed before a bankruptcy judgment can be issued against a debtor.

The insolvency test is a comprehensive assessment of a debtor's ability to service their debts, comprising both cash flow and balance sheet analyses. The cash flow test evaluates solvency by comparing incoming and outgoing cash flows in relation to debt service obligations. A company's solvency status can be determined through the results of the cash flow test: a negative result indicates insolvency, while a positive result demonstrates solvency.

The balance sheet test evaluates a company's solvency by comparing total liabilities against total assets. A company's solvency status is determined by this comparison: if total debt exceeds total assets, the company is classified as insolvent; conversely, if total assets exceed total liabilities, the company is deemed solvent.⁴

Indonesian bankruptcy law does not incorporate insolvency testing requirements for bankruptcy petitions, meaning that asset valuation is not considered when evaluating bankruptcy applications. This omission has proven detrimental to debtors' interests, as evidenced by several cases where solvent companies have been declared bankrupt. This situation has motivated calls for implementing insolvency testing in Indonesia. Notably, despite the absence of formal insolvency testing provisions in Indonesian bankruptcy law, there have been several bankruptcy cases in which judicial panels have applied insolvency test concepts in their deliberations.

This study examines the urgency of implementing insolvency testing in Indonesian bankruptcy cases and analyzes how judges apply insolvency test concepts in bankruptcy proceedings. The research aims to evaluate the critical need for insolvency testing in Indonesian bankruptcy cases and to provide a comprehensive analysis of how insolvency test principles are applied in judicial considerations, despite the absence of formal insolvency testing requirements in Indonesian bankruptcy law.

Examining the urgency of implementing the insolvency test, there are several related studies, the first of which is research conducted by Charina Putri Besila, Tazkya Salsabila and Shrishti⁵, this research also shows concern about the current bankruptcy provisions in Indonesia because it makes it very easy for Debtors to be declared Bankrupt, thus suggesting the implementation of an insolvency test. The second research was research conducted by Hervana Wahyu P, Sunarmi, and Rahmad Hendra⁶, this research highlights

⁴ Muhammad Hadi Shubhan, "Insolvency Test: Melindungi Perusahaan Solven Yang Beritikad Baik Dari Penyalahgunaan Kepailitan," *Jurnal Hukum Bisnis* 33, no. 1 (2014): 11–20.

⁵ Charina Putri Besila, Tazkya Salsabila, and Shrishti Shrishti, "Urgensi Terhadap Pelaksanaan Insolvency Test Dalam Penetapan Status Pailit Di Indonesia," in *Seri Seminar Nasional Ke-III Universitas Tarumanagara: Nilai Budaya Indigenous Sebagai Pendukung Sustainable Development Di Era Industri 4.0.*, 2021, 85–92, <https://journal.untar.ac.id/index.php/PSEERINA/article/view/16147/8924>.

⁶ Hervana Wahyu Prihatmaka, Sunarmi Sunarmi, and Rahmad Hendra, "Insolvensi Dalam Hukum Kepailitan Di Indonesia: Studi Putusan No.48/Pailit/2012/Pn.Niaga.Jkt.Pst Antara PT. Telekomunikasi Selular vs PT.

bankruptcy provisions which are more inclined towards creditor protection, which is considered to be contrary to bankruptcy principles. Furthermore, the research also explains problems related to insolvency in Indonesia and suggests conducting an insolvency test.

Lastly, there is research conducted by Serlika Aprita⁷, this research emphasizes that the resolution of bankruptcy disputes must maintain balanced protection between debtors and creditors, particularly given the absence of insolvency testing requirements. Serlika acknowledges this weakness in Indonesian bankruptcy provisions and suggests that implementing the business continuity principle could help protect potential debtors' interests in the absence of formal insolvency testing. This study differs from Serlika's research in both the specific cases examined and its findings, which demonstrate that despite the lack of codified insolvency testing requirements in Indonesian bankruptcy law, some judicial panels have independently applied insolvency test principles in their rulings.

2. RESEARCH METHODOLOGY

This research employs the Normative Juridical Method, utilizing both case and conceptual approaches. The case approach, a standard methodology in normative legal research, enables the researcher to construct legal arguments based on real-world cases that are intrinsically connected to specific legal events. In this context, the researcher must analyze the ratio decidendi—the legal reasoning judges employ to reach decisions in the examined bankruptcy cases. Specifically, this study investigates bankruptcy cases where ostensibly solvent companies were declared bankrupt, and examines judicial reasoning in bankruptcy decisions that implement the insolvency test concept.⁸

The conceptual approach in legal research analyzes problems through the lens of underlying legal concepts, examining how the values embedded in regulatory frameworks relate to these core concepts. This approach is primarily employed to evaluate the alignment between legislative norms and the fundamental principles of their underlying legal concepts. Drawing from established views and doctrines in legal science, researchers identify ideas that shape legal understanding, concepts, and principles relevant to the issue under examination. In this study of the urgency of implementing insolvency testing in Indonesian bankruptcy cases, the researcher evaluates whether the handling of bankruptcy cases in Indonesia, as evidenced by the examined judicial decisions, aligns with established bankruptcy principles and objectives.

3. RESEARCH RESULT AND DISCUSSION

Primajaya Informatika," *Fiat Justisia: Jurnal Ilmu Hukum* 8, no. 2 (2014): 326–41, <https://doi.org/10.25041/fiatjustisia.v8no2.295>.

⁷ Serlika Aprita, "Asas Kelangsungan Usaha Sebagai Landasan Filosofis Perlindungan Hukum Bagi Debitor Pailit Sehubungan Tidak Adanya Insolvency Test Dalam Penyelesaian Sengketa Kepailitan," *Nurani: Jurnal Kajian Syari'ah Dan Masyarakat* 17, no. 2 (2018): 153–79, <https://doi.org/10.19109/nurani.v17i2.1842>.

⁸ Huzaimah Al-Anshori and Mariana Febriana, "Pertimbangan Hakim Dalam Implementasi Rehabilitasi Penyalahguna Narkotika: Studi Putusan Nomor 392/Pid.Sus/2021/PN Mdn," *Mizan: Jurnal Ilmu Hukum* 12, no. 1 (2023), <https://doi.org/10.32503/MIZAN.V12I1.3622>.

3.1. Conditions for Declaring Bankruptcy Under Indonesian Law

Bankruptcy law encompasses three primary objectives: first, to ensure equitable distribution of proceeds from the liquidation of debtor assets among creditors; second, to prevent insolvent debtors from taking actions detrimental to creditor interests; and third, to provide protection for good-faith debtors in their dealings with creditors. Sjahdeini argues that Indonesian bankruptcy law was established to implement Articles 1131 and 1132 of the Civil Code. He elucidates that when a debtor becomes insolvent, with liabilities exceeding the total value of assets, the liquidation of these assets would be insufficient to satisfy all creditor claims. Therefore, he contends that legal regulation of asset distribution among creditors became necessary to prevent creditors from engaging in a destructive race to seize and liquidate debtor assets—a scenario that would otherwise occur under the provisions of Articles 1131 and 1132 of the Civil Code.

Article 1131 of the Civil Code stipulates that all debtor property, both movable and immovable, existing and future, shall serve as security for all personal obligations. In the context of bankruptcy proceedings, the agreement referenced in Article 1131 of the Civil Code specifically pertains to debt agreements (credit agreements). Article 1132 of the Civil Code establishes that all debtor assets shall constitute collective security for all creditors, with proceeds from the liquidation of these assets to be distributed proportionally according to the size of each creditor's claim, except where legally valid grounds exist for priority treatment of certain creditors.⁹

Sjahdeini¹⁰ emphasizes that bankruptcy law was established to prevent creditors from engaging in competitive seizure and liquidation of debtor assets, which could result in inequitable asset distribution. This legal framework illuminates the core objectives, benefits, and functions of bankruptcy law: specifically, to prevent creditors from engaging in a destructive competition for control and liquidation of debtor assets when those assets are insufficient to satisfy outstanding debts—in other words, when the debtor's liabilities exceed their assets.

Bankruptcy petitions may be filed either by the debtor or by one or more creditors. Such petitions must satisfy several conditions as stipulated in Indonesian Bankruptcy Regulations. Article 2, paragraph (1) of the UUKPKPU (Indonesian Bankruptcy and Suspension of Debt Payment Obligations Law) stipulates that a debtor with two or more creditors who fails to fully pay at least one debt that is due and collectible may be declared bankrupt through a court decision, whether upon their own petition or that of one or more creditors. Based on these provisions, three essential conditions must be met for bankruptcy

⁹ Revita Pirena Putri and Endang Prasetyawati, "Urgensi Pengaturan Prinsip Minimal Utang Sebagai Syarat Kepailitan Bagi Debitor," *Bureaucracy Journal: Indonesia Journal of Law and Social-Political Governance* 3, no. 1 (2022): 507–517, <https://doi.org/10.53363/bureau.v3i1.197>.

¹⁰ Sutan Remy Sjahdeini, *Sejarah, Asas, Dan Teori Hukum Kepailitan: Memahami Undang-Undang No. 37 Tahun 2004 Tentang Kepailitan Dan Penundaan Kewajiban Pembayaran Utang*, 2nd ed. (Jakarta: Prenadamedia Group, 2008).

declaration: (1) the existence of debt; (2) at least one debt must be due and collectible; and (3) the debtor must have a minimum of two creditors.¹¹

The provisions of Article 2, paragraph (1) of the Indonesian Bankruptcy Law (UUK-PKPU) do not incorporate the debtor's financial insolvency status as a prerequisite for declaring bankruptcy. This omission represents a significant weakness within Indonesia's bankruptcy framework. Notably, the conditions for declaring a party insolvent lack two critical elements: first, a specified minimum debt threshold, and second, the implementation of an insolvency test.¹² In contrast to other countries, such as the United States and the Netherlands, insolvency criteria are required for filing bankruptcy petitions. The requirement for an insolvency test carries legal consequences, as it ensures that if a debtor brought before the court by a creditor is proven to remain solvent, the debtor cannot be subjected to bankruptcy proceedings. This is because the debtor is deemed capable of fulfilling their obligations to creditors.¹³

3.2. Insolvency as a Determinant in Bankruptcy Proceedings

Insolvency represents a critical stage in bankruptcy proceedings, as it determines the debtor's fate—specifically, whether the debtor's assets will be liquidated to satisfy existing debts or preserved for addressing future obligations through an accepted reorganization plan or debt restructuring.¹⁴ The following section outlines several insolvency tests utilized in American corporate and bankruptcy law. These tests can be categorized into three types:¹⁵

- 1) The cash-flow insolvency test is used to assess the debtor's ability to pay their debts as they come due. According to the Uniform Commercial Code 1-201(b)(23)(A) and (B), insolvency is defined as a condition in which the debtor: (i) has debts arising from ordinary business activities that are not subject to bona fide disputes, and (ii) is unable to pay those debts upon maturity. This test also incorporates predictions about future financial conditions, rather than solely focusing on the debtor's current state. Importantly, the ability to pay is not merely determined by expected cash flow exceeding the amount of debt. This is because, even with the potential for significant

¹¹ Tata Wijayanta, "Kajian Tentang Pengaturan Syarat Kepailitan Menurut Undang-Undang Nomor 37 Tahun 2004," *Jurnal Mimbar Hukum* 26, no. 1 (2014): 1–13, <https://doi.org/10.22146/jmh.16063>.

¹² Prihatmaka, Sunarmi, and Hendra, "Insolvensi Dalam Hukum Kepailitan Di Indonesia: Studi Putusan No.48/Pailit/2012/Pn.Niaga.Jkt.Pst Antara PT. Telekomunikasi Selular vs PT. Primajaya Informatika."

¹³ Luh ayu Maheswari Prabaningsih and Made Nurmawati, "Pengaturan Insolvency Test Dalam Penjatuhan Putusan Pailit Terhadap Perusahaan," *Kertha Semaya: Journal Ilmu Hukum* 7, no. 8 (2019): 1–12, <https://doi.org/10.24843/KM.2019.v07.i08.p14>.

¹⁴ Aprita, "Asas Kelangsungan Usaha Sebagai Landasan Filosofis Perlindungan Hukum Bagi Debitor Pailit Sehubungan Tidak Adanya Insolvency Test Dalam Penyelesaian Sengketa Kepailitan."

¹⁵ Kementerian Hukum dan Hak Asasi Manusia Badan Pembinaan Hukum Nasional, "Naskah Akademik Rancangan Undang-Undang Tentang Perubahan Atas Undang-Undang Republik Indonesia Nomor 37 Tahun 2004 Tentang Kepailitan Dan Penundaan Kewajiban Pembayaran Utang," 2018, https://bphn.go.id/data/documents/naskah_akademik_ruu_kepailitan_dan_pkpu_final_2018.pdf.

future cash flows, it may still be evident that the debtor will be unable to fulfill their obligations to pay debts when they fall due.

- 2) The balance-sheet insolvency test is used to assess the relationship between the debtor's assets and liabilities, determining whether the value of the assets exceeds the amount of debt or vice versa. This type of insolvency test is applicable to both ongoing operations (continuing the debtor's business despite insolvency) and liquidation. The balance-sheet insolvency test involves two stages of validation. The first stage is the valuation analysis process, which aims to calculate the fair value of the debtor's assets. This is done by analyzing the best and highest expenditures within the company. From this analysis, an analyst can draw conclusions about the company's future prospects, assuming it continues as a going concern. The second stage involves analyzing and comparing the debtor's assets and liabilities. At this stage, the analyst will first determine the fair value of the debtor's assets, including both movable and immovable property, based on the selected valuation premise. Afterward, the analyst calculates the total amount of debt, including both existing and future obligations, that the debtor must satisfy.

The capital-adequacy test is a transactional test or analysis used to assess debt by allowing a postponement of debt payments, commonly referred to as a Postponement of Debt Payment (PKPU). The primary goal of this test is to provide debtors with the opportunity to reorganize the company from its inception, enabling it to recover and regain financial stability.¹⁶

Clear parameters defining how a debtor can be deemed insolvent, as outlined above, are critical considerations. These parameters must balance the interests of creditors in securing their rights with the need to protect the interests of debtors. The application of the cash-flow insolvency test demonstrates this balance by addressing not only the resolution of current debts but also anticipating future obligations. This approach underscores a commitment to safeguarding creditors' rights. Similarly, the balance-sheet insolvency test, as previously described, accounts for both creditor and debtor interests. By conducting this test, the company's future prospects can be assessed, particularly if it continues operations. This reflects an effort to identify optimal solutions, ensuring that bankruptcy law functions appropriately as a measure of last resort (*ultimum remedium*). The next test, known as the capital-adequacy test, provides a framework for assessing a company's financial condition—specifically, whether it still possesses sufficient capital. This is accomplished by examining the debtor's balance sheet, which reveals whether the debtor's assets exceed its liabilities or vice versa.

In other words, the results of the balance sheet analysis determine whether the debtor is in a state of solvency or insolvency. Fundamentally, the author argues that all three tests are grounded in the same principle: balancing the interests of both debtors and creditors.

¹⁶ Lilik Warsito, "Urgensi Pembuktian Syarat Kepailitan Dan Tes Insolvensi Dalam Permohonan Kepailitan," *Jurnal USM Law Review* 7, no. 2 (2024): 822–34, <http://dx.doi.org/10.26623/julr.v7i2.9018>.

By establishing a debtor's ability to meet its obligations as a criterion for declaring bankruptcy, these tests underscore that bankruptcy should serve as the last resort for resolving disputes between the involved parties.

3.3. Excessive Simplicity of Bankruptcy Requirements in Indonesia

The requirements for filing a bankruptcy declaration, as stipulated in Article 2, Paragraph (1) of Law No. 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations, are excessively lenient, susceptible to abuse, and inconsistent with internationally accepted bankruptcy standards. The simplicity of these requirements has, at times, led to the misuse of bankruptcy proceedings. Rather than serving as an *ultimum remedium* for resolving debt and receivable disputes, the bankruptcy mechanism is often exploited by creditors as a mere tool for debt collection.

Even when a debtor remains solvent—meaning their assets still exceed the debts that must be paid—they can still be declared bankrupt if they are deemed to fulfill the criteria set forth in Indonesia's bankruptcy provisions. Referring to Sjahdeini's earlier explanation, the purpose of establishing a bankruptcy system is to prevent creditors from competing to secure their claims first when the debtor's assets are insufficient to settle all obligations. However, when the bankruptcy process is reduced to merely an instrument for creditors to collect debts from debtors, it allows even solvent debtors to be declared bankrupt. This clearly demonstrates a misinterpretation of the true purpose, benefits, and functions of bankruptcy law.

In this regard, Sjahdeini, in his book, explains that a debtor is considered insolvent only if the total value of their liabilities exceeds the value of their assets, a condition referred to as balance-sheet insolvency. Conversely, the opposite scenario is known as cash-flow insolvency, which occurs when a debtor lacks sufficient liquidity to meet their obligations or pay debts as they mature due to cash inflows being smaller than cash outflows. This condition can arise even when the debtor's assets still exceed their liabilities, meaning balance-sheet insolvency has not yet occurred.

Based on this, Sjahdeini argues that if a debtor fails to pay their debt due to cash-flow insolvency, the case should not be adjudicated by the bankruptcy court (Commercial Court) in Indonesia but rather by an ordinary civil court, such as the District Court. According to him, instances of non-payment of debts by debtors who have not experienced balance-sheet insolvency do not constitute bankruptcy cases but instead represent cases of breach of contract (default). Sjahdeini further emphasized that a situation in which a debtor fails to pay their debt to a creditor does not always arise because the debtor is unable to pay; it may also occur because the debtor is unwilling to pay.

In other words, the issue may not be a lack of ability to repay but rather a lack of willingness to do so. Importantly, a debtor's unwillingness to pay is not necessarily due to bad faith; it could, in fact, stem from the creditor's bad intentions. For example, this may occur when a creditor, acting as a seller, delivers goods that do not meet the agreed-upon specifications, as stipulated in the contract, to the debtor, who is the buyer and responsible

for payment. In such cases, the debtor's refusal to pay may be justified, as the creditor has failed to fulfill their obligation to deliver goods as agreed. Therefore, there are various reasons why a debtor may refuse to make payment, and these reasons are not always indicative of bad faith on the debtor's part.

By understanding the consequences of declaring a debtor bankrupt, it becomes clear that improvements to Indonesia's current bankruptcy provisions are necessary. As noted by Isis Ikhwansyah and Lambok Marisi Jakobus S. in their writings that the Law Number 37 of 2004 has not been able to provide optimal legal protection for debtors. Debtors categorized as established companies with high solvency levels such as PT. Citra Jimbaran Indah Hotel, PT. Asuransi Jiwa Manulife Indonesia (PT. Manulife Indonesia Life Insurance), and PT. Telkomsel can be easily declared bankrupt by the court. It is a legal consequence that arises because of the simplicity of bankruptcy requirements in Law Number 37 of 2004 that is only proven in a simple manner, without considering the debtor's ability to fulfil his/her obligations to creditors.¹⁷

In this regard, the author argues that cases in which a solvent debtor is declared bankrupt, causing losses to the debtor, have raised questions about Indonesia's bankruptcy provisions at an international level. For instance, in the case of PT Manulife Life Insurance, Canada responded with criticism, as the company's solvent condition was not taken into consideration before declaring bankruptcy. This case should serve as a lesson and motivation to reform Indonesia's bankruptcy laws. Such reforms are essential to restore the intended objectives, functions, and benefits of bankruptcy institutions in line with established bankruptcy principles. This aligns with Kendry Tan's opinion¹⁸, in which he states that companies with good future prospects can be assessed by conducting an insolvency test. According to him, the insolvency test serves as legal protection for debtors acting in good faith to resolve their debts.

Moreover, the insolvency test can prevent creditors with bad intentions from bankrupting debtors for their own personal interests. The insolvency test is closely related to the purpose of bankruptcy, particularly regarding debtors who still have the potential to continue their business operations. As stated by Kendry Tan, Adi Nugroho also asserts that Law Number 37 of 2004 incorporates the principle of business continuity, allowing prospective debtors to continue their business activities. To identify prospective debtors, one approach is to assess their financial condition. Therefore, the Bankruptcy Law should include provisions that consider the debtor's financial condition as a requirement for declaring bankruptcy.¹⁹

¹⁷ Isis Ikhwansyah and Lambok Marisi Jakobus Sidabutar, "The Implementation of Insolvency Test on Debtors' Bankruptcy in Performing the Principle of Justice," *Jurnal Media Hukum* 26, no. 2 (2019): 240–51, <https://doi.org/10.18196/jmh.20190137>.

¹⁸ Kendry Tan, "Preventing Debtor Bankruptcy during the Covid-19 Pandemic: Benefits of Suspension of Debt Payment Obligations & Insolvency Test?," *Journal of Judicial Review* 24, no. 2 (2022): 305–18, <https://doi.org/10.37253/jjr.v24i2.7363>.

¹⁹ Adi Nugroho Setiarso, "Analisis Yuridis Terhadap Keadaan Insolvensi Dalam Kepailitan: Studi Normatif Pasal 2 Ayat 1 Undang-Undang No 37 Tahun 2004 Tentang Kepailitan Dan Penundaan Kewajiban Pembayaran Utang,"

Based on this explanation, one of the key actions that must be taken is to incorporate insolvency requirements into the provisions of Article 2, Paragraph 1 of Bankruptcy Law No. 37 of 2004. This aligns with Sjahdeini's²⁰ suggestion in his writing that insolvency requirements should be included in Article 2, Paragraph 1 of the Bankruptcy Law as a prerequisite for declaring bankruptcy. This view is also emphasized by M. Hadi Subhan, who argues that to protect debtors acting in good faith from the abuse of bankruptcy proceedings by creditors with bad faith, the insolvency test should be integrated into future amendments to the bankruptcy law. Furthermore, the application of the insolvency test should not be separate from the bankruptcy petition hearing but rather remain a part of the hearing process. In relation to the insolvency requirements, determining whether a debtor is solvent can be achieved by applying an insolvency test, as is practiced in many other countries. While three test models have been explained previously, further research is necessary to identify which test model would be most suitable for implementation in Indonesia.

3.4. The Legal Considerations of Judges Applying the Concept of Insolvency Test

Decision Number 385 K/Pdt.Sus-Pailit/2014 between PT Golden Spike Energy Indonesia vs PT Global Pacific Energy

PT Golden Spike Energy Indonesia filed an appeal against the decision of the Central Jakarta Commercial Court, with Decision Number 02/Pdt.Sus. Cancellation of Peace/2014/PN.Niaga.Jkt.Pst, jo. Number 63/PKPU/2012/PN.Niaga.Jkt.Pst, dated April 30, 2014. The decision essentially declared PT Golden Spike Energy Indonesia bankrupt, along with all associated consequences, by canceling the Postponement Agreement for Debt Payment Obligations, as requested by PT Global Pacific Energy. PT Golden Spike Energy Indonesia explained that one of its sources of funding has been generated since 2013 from the proceeds of lifting crude oil and gas. PT Golden Spike Energy is experiencing difficulties in paying its debts due to a number of unpaid debts from Pertamina, totaling US\$ 4,150,434.52 (four million one hundred fifty thousand four hundred thirty-four United States dollars and fifty-two cents). These debts are the result of lifting crude oil and gas, and this is one of the reasons PT Golden Spike Energy Indonesia asserts that it is still fully capable of fulfilling its obligations.

PT Golden Spike Energy Indonesia's cassation appeal was granted by the panel of judges, with the following key points of consideration:

- 3) The panel of judges also opined that, since the debtor is in the best position to know whether they can continue making payments to the creditor, it is impossible for the

Branwijaya Law Student Journal 1, no. 3 (2013): 1–27,
<https://hukum.studentjournal.ub.ac.id/index.php/hukum/article/view/139>.

²⁰ Sjahdeini, *Sejarah, Asas, Dan Teori Hukum Kepailitan: Memahami Undang-Undang No. 37 Tahun 2004 Tentang Kepailitan Dan Penundaan Kewajiban Pembayaran Utang*.

- creditor to know the debtor's actual condition with certainty. Therefore, as a benchmark for the creditor in determining whether the debtor can continue paying debts that are due and collectible, it must be based on a financial audit and analysis conducted by an independent public accountant, rather than relying on the debtor's subjective assessment.
- 4) The panel of judges also upheld the reasons for the cassation application filed by PT Golden Spike Energy Indonesia, the cassation applicant, as they believed that, after the peace decision, the cassation applicant had proven to have made two installment payments toward its debt: USD \$50,000.00 on February 28, 2013, and USD \$50,000.00 on June 5, 2013. Additionally, the panel of judges considered that the cassation petitioner still had an outstanding receivable from Pertamina, amounting to USD \$4,150,434.52, which Pertamina was obligated to pay to the cassation applicant.
 - 5) The previous request for the Postponement of Debt Payment Obligations (PKPU) was not based on an assessment by a public accountant regarding the debtor's current ability, as the cassation petitioner. Furthermore, the cassation petitioner's business is still capable of development, and the petitioner still has receivables from both the respondent and other parties. The court has also not exercised the leniency required by the relevant statutory provisions. Therefore, it is necessary to provide the cassation petitioner with an opportunity to fulfill their obligation to repay debts to the cassation respondent. This is reinforced by Decision Number 63/PKPU/2012/PN.Niaga.Jkt.Pst, dated May 17, 2013, which states that the peace agreement dated May 14, 2013, remains valid and binding.

Based on the panel of judges' considerations in this case, it is evident that the principle of the insolvency test was applied. To determine whether the debtor can continue meeting their obligations, a financial audit and analysis conducted by an independent public accountant are necessary as benchmarks to assess the debtor's ability to fulfill their obligations.

Furthermore, according to the author, the test model recommended by the judge in this case is the balance sheet test approach, which focuses on comparing the assets owned by the debtor with the obligations the debtor must fulfill. Debtors who fail to pay their debts are considered insolvent if their total obligations (including liquidation costs) exceed all of their assets. In the case of PT Golden Spike Energy Indonesia, the company was able to demonstrate that it still has the ability to pay its debts by presenting evidence of a receivable from PT Pertamina that exceeds its outstanding debt.

Decision number 04/Pdt-Sus-Pailit Niaga. Jkt.Pst. Jo No. 27 Pdt. Sus. PKPU/2015/PN. Niaga.Jkt/2015/PN.Ps.

PT. Bumi Asih Jaya Life Insurance, hereinafter referred to as PT. AJBAJ, has been filed for bankruptcy by the Board of Commissioners of the Financial Services Authority. There

are several reasons for filing a bankruptcy petition against PT. Bumi Asih Jaya Life Insurance, including the following:

- 1) PT. AJBAJ is considered to have violated its obligations under statutory regulations due to a decline in its solvency level, which decreased to 74.14% in 2007, as indicated by the analysis of the 2007 Quarter II Financial Report conducted by the Ministry of Finance.
- 2) Furthermore, according to the Audit Results Report, the solvency ratio calculation for PT. AJBAJ for the reporting period ending on June 30, 2013, was minus 1,045.62%, indicating a shortfall of IDR 1,020,752,000,000 (one trillion twenty billion seven hundred fifty-two million rupiah) (Exhibit P-13). Based on this information, PT. AJBAJ is deemed to lack the ability to fulfill its obligations to policyholder claims.

However, PT. AJBAJ rejected the arguments presented by OJK, the Petitioner, in support of the Bankruptcy Declaration Application. In its defense, PT. AJBAJ cited potential funding sources, including investments/deposits, unit links, equity investments, asset sales, cash and bank balances, policy loans, other net assets, affiliated receivables, other assets, and reserve claims. Additionally, the total shareholder deposit from the City Government amounts to IDR 879,780,040,325. When compared to the obligations that PT. AJBAJ must fulfill, totaling IDR 772,726,952,123, it demonstrates that PT. AJBAJ still possesses the capacity to meet its obligations, with a difference of IDR 107,053,088,202 between funding sources and liabilities.

In the Golden Spike Energy case, an analysis of the panel of judges' considerations reveals that the court applied the principle of the insolvency test. In making its decision, the panel did not focus solely on the two conditions specified in the bankruptcy provisions for declaring a debtor bankrupt. Instead, the panel concentrated on the debtor's ability to pay. The judges explained in their reasoning that the debtor is best positioned to determine whether they can continue making payments, as the creditor cannot definitively know the debtor's actual financial condition.

This suggests that creditors could potentially use the Postponement of Debt Payment Obligations (PKPU) procedure as a shortcut to make a debtor bankrupt, rather than pursuing a bankruptcy declaration through the trial process. Therefore, to assess whether the debtor can continue paying debts that are due and collectible, the court emphasized that the determination should be based on a financial audit and analysis conducted by an independent public accountant, rather than relying solely on the creditor's subjective judgment.

Based on this description, several important points that the author finds interesting are as follows: In this decision, PT. AJBAJ was found to have failed to meet the solvency requirement of at least 120% (one hundred and twenty percent) of the potential loss risk arising from deviations in asset and liability management. Additionally, PT. AJBAJ experienced a negative equity of IDR 931.65 billion, which violated Government Regulation Number 81 of 2008. This violation served as the basis for the Financial Services

Authority (OJK) to file for a bankruptcy declaration. Furthermore, PT. AJBAJ was also proven to have failed to pay claims due to several policyholders.

However, in its response, PT. AJBAJ stated that it was still capable of paying the outstanding claims. This is not a mere assertion without foundation, but is supported by data on potential funding sources, which demonstrate that PT. AJBAJ remains financially capable. Based on this data, it can be observed that the total available funding is IDR 879,780,040,325, compared to the obligations PT. AJBAJ must fulfill, which amount to IDR 772,726,952,123. This results in a surplus of IDR 107,053,088,202 between the funding sources and the required payments.

In this regard, according to the author, the panel of judges in this case applied the concept of an insolvency test, utilizing a model test similar to the one in the first case, specifically the balance sheet test approach. PT. AJBAJ was shown to have unpaid debts to policyholders; however, PT. AJBAJ was able to demonstrate that its assets exceed its liabilities.

Decision No. 297 K/Pdt.SUS/2011, This case is between PT. Sumber Daya Nusaphala (PT. SDN), PT. Bank Rakyat Indonesia (Persero), Tbk, and Sinatra Lima

PT. Nusaphala Resources (PT. SDN) and PT. Bank Rakyat Indonesia (Persero), Tbk, as the cassation applicants, and Sinatra Liman, as the cassation respondent, previously filed a request for a bankruptcy declaration against PT. Nusaphala Resources (PT. SDN). The reason for submitting the Bankruptcy Petition by Sinatra Liman is based on the Agreement made between PT. SDN and Sinatra Liman, which concerns the obligations PT. SDN must fulfill. PT. SDN had agreed to settle these obligations using the Albergo Apartment, valued at IDR 2,000,000,000.00 (two billion Rupiah). According to the Agreement, once the asset was sold, the sales proceeds were to be paid to the Second Party (Applicant) by the First Party (Respondent) no later than December 15, 2009.

However, since the asset was not sold by that deadline, the IDR 2,000,000,000.00 obligation remained unresolved. As a result, a Bankruptcy Declaration Petition was filed, leading to the declaration of PT. Sumber Daya Nusaphala (PT. SDN) as bankrupt, with all legal consequences, by the Commercial Court at the Central Jakarta District Court. This situation provided the basis for PT. Sumber Daya Nusaphala (PT. SDN) to take legal action at the cassation level. One of the important points raised by PT. Sumber Daya Nusaphala in the cassation application states that PT. SDN is still in a state of Solvent.

PT. Sumber Daya Nusaphala emphasized that it remains in a solvent state, noting that for nearly six years, it has been a debtor with smooth collectibility. As of now, there are no outstanding obligations for the payment of principal, interest, or other costs, all of which PT. Sumber Daya Nusaphala has been able to fulfill properly. Furthermore, PT. Sumber Daya Nusaphala explained that the filing of the bankruptcy declaration petition by Sinatra Liman had the most significant impact on the company.

Additionally, according to PT. Sumber Daya Nusaphala (PT. SDN), the agreement does not stipulate a monetary obligation on the part of the Cassation Petitioner. Instead,

the obligation pertains to the apartment unit that must be handed over by the Cassation Petitioner. Based on an agreement between both parties, the apartment unit was to be sold and valued at IDR 2 billion. Therefore, the obligation constituting the debt of the bankruptcy petitioner is not the payment of IDR 2 billion, but rather the obligation to transfer the apartment unit for sale, valued at the equivalent of IDR 2 billion.

The Panel of Judges at the Cassation level granted the request of PT. Sumber Daya Nusaphala (PT. SDN). The panel stated that the reasons for the cassation were justified, noting that based on Deed No. 12, the Cassation Petitioner's obligation was not to pay a debt of IDR 2,000,000,000.00 (two billion Rupiah), but rather to transfer an apartment unit valued at IDR 2,000,000,000.00 (two billion Rupiah). The assets were to be sold no later than December 15, 2009, and if sold, the sale proceeds would be handed over to the Cassation Respondent, with A.G. Osen designated as the party responsible for selling the assets. Additionally, there was no agreement on the price per square meter between the Cassation Petitioner and the Cassation Respondent. Although the Cassation Petitioner agreed that the apartment unit would be transferred to the Cassation Respondent at a price of IDR 9,000,000.00 (nine million Rupiah) per square meter, the Cassation Respondent was only willing to pay IDR 8,000,000.00 (eight million Rupiah) per square meter. Since the apartment unit had not been sold, the Cassation Petitioner had not yet been able to transfer the funds to the Cassation Respondent, and therefore, the Cassation Petitioner had not committed a breach of contract.

The third case, involving PT. Sumber Daya Nusaphala and Sinatra Liman, is one whose proof, according to the panel of judges, is not straightforward. However, in this case, the panel of judges still took the debtor's ability to pay into account. Although the panel did not explicitly apply the concept of an insolvency test, the judges permitted PT. Nusaphala to sell its assets first in order to settle its debts. According to the author, this decision demonstrates that the panel of judges considered the debtor's ability to pay, based on the assets it owned.

Next, from the decisions examined, there are several key aspects regarding how the panel of judges applies the principle of the insolvency test in its considerations. The first is that the respondent, whose ability to pay is being evaluated, must clearly explain their financial condition. This includes providing accompanying financial statements, asset lists, financing sources, and other relevant documents. According to the author, this transparency plays a crucial role in determining how confident the judge is in the respondent's ability to fulfill its obligations. Unfortunately, there are several bankruptcy respondents who fail to provide complete data, instead only stating that they are capable without presenting clear evidence.

Furthermore, there are specific provisions for insurance companies, which require them to maintain a solvency level of at least 120%. This requirement is outlined in Article 2, paragraph (1), and Article 43, paragraph (2), letter c of KMK Number: 424 of 2003 and its amendments. In several cases where insurance companies were the bankruptcy respondents, the OJK filed bankruptcy petitions on the grounds that the insurance

company did not meet the prescribed solvency level, as evidenced by the financial reports. In relation to the explanation above, these provisions led the panel of judges in several cases to also consider the debtor's financial condition, as they evaluated the data presented by the OJK.

CONCLUSION

The two simple conditions stipulated in Indonesian bankruptcy provisions are susceptible to abuse, making it relatively easy for debtors to be declared bankrupt even if they remain solvent. In addition to being inconsistent with bankruptcy principles, this also poses a risk of harm to debtors and could have negative consequences for the economy in Indonesia. This situation highlights the need for improvements in Indonesian bankruptcy provisions. One necessary reform is to make the debtor's ability to pay a prerequisite for declaring bankruptcy.

Specifically, if the debtor is in a state of being unable to pay their due debts (i.e., insolvent), then the debtor should be declared bankrupt. The debtor's ability to pay can be assessed through the application of the Insolvency Test, which is why its implementation in Indonesia is urgently needed. While the Insolvency Test is not formally recognized in Indonesian legal practice, there are several cases in which the panel of judges has applied the principle of the Insolvency Test. This is evident from the examined decisions, where the panel of judges considers the debtor's ability to pay by evaluating financial statements, asset data, sources of financing, and other relevant information as evidence that the debtor remains capable of fulfilling its obligations. Debtors whose ability to pay is considered are those who can clearly explain their financial condition and demonstrate their continued ability to meet their obligations. This transparency is one of the key factors that convinces the judge to consider the debtor's ability to pay in the decision-making process.

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