Preliminary Examination in the Process of Filing a Bankruptcy Case (Comparison of Hong Kong with Indonesia)

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Abstract

Each country has different mechanisms and requirements for filing bankruptcy cases against debtors. Indonesia, through Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations, sets relatively simple requirements: the presence of two or more creditors and the failure to pay a debt that is due and collectible. However, this system does not recognize a preliminary examination mechanism to assess whether the debtor is truly insolvent or still solvent. This condition differs from the legal system in Hong Kong, which adheres to the common law tradition, where before a bankruptcy case is submitted to court, a preliminary examination is first conducted through the statutory demand mechanism. Creditors are required to file a legal demand against the debtor to pay the debt within 21 days. If the debtor can prove to the court that they are still solvent, the statutory demand can be rejected, preventing the bankruptcy petition from proceeding to trial.

Keywords: Bankruptcy; Insolvency; Preliminary Examination.

Introduction

Each country has different requirements for filing for bankruptcy against individuals and legal entities. Some countries regulate bankruptcy requirements that are more favourable to the interests of debtors, while others are more favourable to the interests of creditors. Indonesia, for example, Law No. 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations (hereinafter referred to as Law No. 37 of 2004) can be classified as a bankruptcy regulation that is more favourable to the interests of creditors. This can be seen in Article 2 paragraph (1) of Law No. 37 of 2004, which states, "A debtor who has two or more creditors and does not pay off at least one debt that is due and collectible shall be declared bankrupt by a court decision, either at his own request or at the request of one or

more of his creditors". In this article, the conditions for a bankruptcy ruling against a debtor include:

a) Having two or more creditors;
b) Failure to pay in full a debt that has fallen due and is collectible.

There are additional requirements for a bankruptcy ruling to be issued, as stated in Article 8 paragraph (4) of Law No. 37 of 2004, which reads as follows: "A petition for bankruptcy must be granted if there are facts or circumstances that clearly prove that the requirements for a declaration of bankruptcy as referred to in Article 2 paragraph (1) have been met".

There is no mention of whether the debtor's financial condition is good or bad, even though if the debtor's financial condition is good, bankruptcy will actually have a negative impact on all stakeholders related to the debtor. It should be a requirement that the debtor is insolvent, so that it is appropriate to declare them bankrupt. Bankruptcy is a situation where the debtor is unable to pay their debts to creditors. The inability to pay is usually caused by financial distress due to the decline of the debtor's business. Meanwhile, bankruptcy is a court decision that results in the seizure of all the assets of the bankrupt debtor, both existing and future assets.[1]

In filing for bankruptcy in Indonesia, there is no such thing as an insolvency test as in countries that adopt the common law system, where in various countries that adopt the common law system, any party wishing to declare a person/legal entity bankrupt prior to the trial process will first conduct an examination to determine whether the bankruptcy respondent is solvency/capable or insolvency/incapable of paying debts to creditors, known as a preliminary examination. Meanwhile, in Indonesia, the process of declaring someone bankrupt is very easy and simple, as stated in Article 2(1) of Law No. 37 of 2004, which requires the existence of two or more creditors and the non-payment of one debt that is due and collectible. This regulation makes it highly likely that many

[1] Hadi Shubhan, 2008, *Hukum Kepailitan: Prinsip, Norma, dan Praktik di Peradilan,* Jakarta: Kencana Prenada Media Group, hlm. 1.

companies that are still solvent, where the company's assets exceed its debts, will be declared bankrupt.

In the bankruptcy petition proceedings in Indonesia, it is not mandatory for a petitioner to prove that the respondent/debtor is still solvent/able to pay their debts to creditors. This raises concerns that it could become a loophole for mafia groups or business rivals of an individual or legal entity to destroy and shut down a debtor's business by declaring them bankrupt.

The ease of the bankruptcy process is frightening for the business world's , and will certainly add to the factors causing the decline of the Indonesian economy due to the large number of solvent companies being declared bankrupt. Several cases where solvent/capable companies have been declared bankrupt by courts in Indonesia include Telkomsel, Prudential, and PT Asuransi Jiwa Manulife Indonesia (AJMI). The size of assets is not a consideration for a judge in deciding bankruptcy cases, as the regulations do not require such consideration.

The definition of insolvency itself is mentioned in the explanation of Article 57 paragraph (1) of Law No. 37 of 2004, namely "insolvency refers to the inability to pay". There is no further explanation in the law regarding the causes of this inability to pay. It may not be due to the company being insolvent, but rather due to uncertainty regarding the rights and obligations of the debt, meaning that there is still a dispute regarding the debt. There are times when a judge decides to reject a bankruptcy petition due to complex facts or circumstances, but these complexities are not related to the solvency or insolvency of the company.

This is different from the mechanism for filing for bankruptcy in Hong Kong, where there is a preliminary examination mechanism for bankruptcy cases that are to be filed. When filing for bankruptcy, creditors are required to include a request for the debtor to pay their debts in the statutory demand, the format of which is regulated in the Bankruptcy Ordinance. If the debtor does not pay their debts within 21 days of receiving the statutory demand, the creditor is then allowed to file for bankruptcy.

The debtor has 18 days after receiving the statutory demand to file a petition for the court to set aside/dismiss the statutory demand on the grounds that the

existence of the debt referred to by the creditor is still in dispute. The debtor may also request the court to dismiss the statutory demand on the grounds that the company is still solvent, as evidenced by financial statements, statements from financial authorities and/or the tax office.[2]

With the preliminary examination mechanism in Hong Kong, not many bankruptcy petitions proceed to trial. This is because most of these petitions are dismissed or set aside during the preliminary examination.

In fact, the concept of a statutory demand/petition, which requests that the debtor make payments to creditors, is almost the same as the settlement proposal submitted by the debtor to creditors in bankruptcy or PKPU in Indonesia.

However, the essential difference is that the settlement proposal is submitted after the bankruptcy/PKPU decision has been made, so that if the creditors do not agree to the settlement proposal, the debtor is legally insolvent as referred to in Article 178 paragraph (1) of Law No. 37 of 2004, which states that "if no settlement plan is offered at the debt reconciliation meeting, the settlement plan offered is not accepted, or the settlement is rejected based on a decision that has obtained permanent legal force, the bankrupt assets are deemed insolvent by law".

Insolvent debtors only have the opportunity to submit a settlement proposal during the bankruptcy proceedings, so if the majority of creditors do not agree, the debtor loses the opportunity to maintain their business. What if the majority of creditors' votes are held by their business rivals who want the debtor to go bankrupt from the outset, so that even if the settlement proposal is made as good and attractive as possible, these creditors will still reject it, resulting in the debtor being declared insolvent and the bankrupt debtor's assets being settled by the curator.

One example that was widely discussed in 2012 was the bankruptcy of PT. Telkomsel, which was declared bankrupt simply because creditors filed for bankruptcy with a claim of Rp. 5.3 billion, while its assets at that time amounted to

[2] Fredrik, J. Pinakunary, 2005, "Perlindungan terhadap Perusahaan Solven dari Ancaman Kepailitan," *Hukumonline*, diakses 24 November 2024, https://www.hukumonline.com/berita/baca/hol13887/perlindungan-terhadap-perusahaan-solven-dari-ancaman-kepailitan?page=3.

around Rp. 58.7 trillion.[3] This would not have happened if our bankruptcy law system had implemented a preliminary examination, because the creditor's petition would have been rejected or dismissed before the trial took place.

As in previous studies discussing the insolvency test mechanism that will be used as a reference in this paper, the first is entitled "Effectiveness of Indonesia's Simple Proof Test in Bankruptcy".[4] This study discusses the application of the simple proof test to fulfil the elements of bankruptcy according to Article 2 paragraph (1) in conjunction with Article 8 paragraph (4) of Law No. 37 of 2004, and evaluates whether this rule is adequate to prevent the misuse of bankruptcy petitions. This study essentially discusses the vulnerability of solvent debtors to bankruptcy petitions due to the absence of a preliminary insolvency test. Then there is a study entitled "Comparison of Bankruptcy Requirements According to Indonesia-Malaysia Bankruptcy Law".[5] This study discusses " " comparing the substance of bankruptcy requirements in Indonesia and Malaysia; highlighting differences in thresholds, evidence of bankruptcy, and debtor protection. It shows that comparative studies have been conducted, but the comparators are not Hong Kong and the focus is different (e.g., minimum debt threshold, procedures). The most recent study is entitled "Restructuring and Insolvency in Hong Kong" (overview), and the official ORO/HK guide on statutory demand" (Latham & Watkins LLP, 2020). This study discusses the statutory demand mechanism and the role of preliminary examination (the Master/court clerk examines whether there are simple grounds to proceed; the debtor is given 21 days to respond to the statutory demand). This source is the basis for Hong Kong providing a preliminary process that screens insolvency petitions before they go to court.

The distinguishing feature of this study, entitled "Preliminary Examination in the Process of Filing for Bankruptcy ( ) (A Comparison of Hong Kong and

[3] "Telkomsel Pailit, BRTI Kecolongan," *Bisnis.com*, diakses 26 November 2024, https://teknologi.bisnis.com/read/20120915/101/95716/telkomsel-pailit-brti-kecolongan

[4] Udin Silalahi dan Louise Kalista Iskandar. 2024. Effectiveness of Indonesia's Simple Proof Test in Comparison to the US Code. *Journal of Law and Sustainable Development* 12 (1).

[5] Raja Desril Yalid. 2021. Comparison of Bankruptcy Requirements According to Indonesia–Malaysia Bankruptcy Law, *Rigeo.* 11 (7).

Indonesia)", is that it focuses on the study of bankruptcy law in Indonesia through a comparative approach with the legal system in Hong Kong, which applies a preliminary examination and statutory demand mechanism before bankruptcy cases are examined in court. Unlike previous studies, which generally only highlighted the weaknesses of the simple proof test in Law No. 37 of 2004 or compared Indonesia with civil law countries such as Malaysia, this study presents a new perspective by examining in depth the initial screening mechanism in the common law system.

The main contribution of this study lies in its analysis of the possibility of legal transplant of the preliminary examination mechanism into the Indonesian bankruptcy law system. This study is not only descriptive-comparative in nature, but also offers a conceptual framework and practical recommendations for policymakers to balance protection between creditors and debtors. Thus, this study is expected to contribute academically to the development of economic and bankruptcy law, as well as serve as a reference for the formulation of legal reforms that are more equitable, efficient, and adaptive to international practices, particularly in preventing the use of bankruptcy proceedings as a tool for unfair business competition.

Thus, the problems to be discussed are: how does the bankruptcy mechanism in Indonesia, which does not require an insolvency test, impact the protection of solvent debtors compared to the bankruptcy system in Hong Kong, which implements a preliminary examination, and how is it possible to transplant the law on the application of preliminary examination in bankruptcy petitions in Hong Kong to be adapted to the bankruptcy law system in Indonesia?

Research Method

This research is normative legal research with a comparative law approach that uses a comparative method to compare the norms in Indonesian and Hong Kong legislation regarding the bankruptcy filing process. The comparative approach is

used because it focuses on comparing specific rules, cases, and legal institutions.[6] This method is applied to find solutions to bankruptcy problems in Indonesia by learning from Hong Kong's bankruptcy law system, which is considered more effective.

Sources of legal materials consist of primary legal materials, namely the Fourth Amendment to the 1945 Constitution of the Republic of Indonesia, Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations, SEMA No. 2 of 2016 concerning Improving Efficiency and Transparency in Handling Bankruptcy and Suspension of Debt Payment Obligations in Court, Permenkumham No. 18 of 2013 concerning Requirements and Procedures for Registering Curators and Administrators, and the Bankruptcy Ordinance Cap. 6 Hong Kong; and secondary legal materials in the form of relevant literature, journals, and online sources. Legal materials were collected through literature studies, then processed through classification and systematisation to obtain relevant data. The analysis was conducted using descriptive-comparative and functional methods to assess the effectiveness of Indonesian bankruptcy regulations compared to Hong Kong and to formulate recommendations for improving the national bankruptcy system.

Results and Discussion Bankruptcy Filing Mechanism in Indonesia

The commencement of bankruptcy proceedings is preceded by the filing of a bankruptcy petition by the authorised parties. The petition is submitted to the Commercial Court whose jurisdiction covers the last legal domicile of the debtor. The bankruptcy petition must be submitted in writing by a legal advisor who is licensed to practise and experienced in legal matters, so that the proceedings can be conducted expeditiously and fairly.

The requirements for filing for bankruptcy are specified in Article 2 paragraph (1) of Law No. 37 of 2004, which states, "A debtor who has two or more creditors and has not paid off at least one debt that is due and collectible shall be declared

[6] Barda Nawawi Arief, 2003, *Beberapa Masalah Perbandingan Hukum Pidana*, Jakarta: PT RajaGrafindo Persada, hlm. 4.

bankrupt by a court decision, either at his own request or at the request of one or more of his creditors". Additional requirements are specified in Article 8 paragraph (4) of Law No. 37 of 2004, which states: "A petition for bankruptcy must be granted if there are facts or circumstances that clearly prove that the requirements for a declaration of bankruptcy as referred to in Article 2 paragraph (1) have been met".

In Indonesia, there is no requirement that a company must be insolvent in order to file for bankruptcy, so it is possible for a company that is still healthy/solvent to file for bankruptcy.

After receiving the petition, the court clerk shall immediately register the petitioner and enter them into the register, as well as provide the petitioner with a registration number accompanied by written evidence signed by the clerk, whereby the date of receipt must correspond to the date on which the petitioner registered with the court. The court clerk is obliged to reject the registration of a petition for bankruptcy for institutions as referred to in Article 2 paragraphs (3), (4), and paragraph (5) of Law No. 37 of 2004 if it is not in accordance with the provisions in those paragraphs. The court clerk must submit the petition to the chief justice within 24 hours, and the chief justice must review the bankruptcy petition within 48 hours and set a date for the hearing.

The chief justice shall summon the parties to attend the bankruptcy hearing, which must be held no later than 20 days after the petition is filed. For bankruptcy cases filed by the debtor, the court is not required to summon the debtor (Article 8 paragraph (1) of Law No. 37 of 2004). For bankruptcy cases filed by the public prosecutor's office, the debtor must be summoned no later than 7 days before the hearing to give the parties the opportunity to study the petition and allow sufficient time for the parties who live far away to attend the hearing on time.

The hearing of a bankruptcy case may be postponed for 20 days if there are sufficient grounds from the parties, in which case the judge will hear statements from the petitioner, the respondent, and witnesses, accompanied by concrete evidence. During the examination period, the judge may order the court clerk or deputy court clerk to seal or seize some or all of the debtor's assets (boedel) at the request of the creditor.

The creditor also has the right to apply to the court to appoint a temporary curator whose duty is to supervise the management of the debtor's business and oversee payments to the debtor, as well as the transfer or collateralisation of the debtor's assets, which requires the curator's approval. This will be granted by the court on the condition that the seizure is absolutely necessary to protect the interests of the creditor. After a bankruptcy petition is accepted and then examined and adjudicated by a panel of judges at the Commercial Court, the examination of the petition is declared complete with the issuance of a decision. Within a maximum period of 5 (five) days after the date of the bankruptcy ruling is received by the Trustee and Supervisory Judge, the Trustee shall announce in the State Gazette of the Republic of Indonesia and at least 2 (two) daily newspapers designated by the Supervisory Judge, a summary of the bankruptcy ruling containing the following information:

a) the name, address, and occupation of the Debtor;
b) the name of the Supervising Judge;
c) the name, address, and occupation of the Trustee; the members of the temporary Creditors' Committee, if appointed; and
d) the place and time of the first creditors' meeting.

The Curator is also authorised to manage the bankruptcy estate ( ) even if an appeal or review is requested to the Supreme Court, and if the appeal or review is granted, all legal actions taken by the Curator remain valid and binding on the debtor (Article 16 of Law No. 37 of 2004). The trustee is also responsible for managing all correspondence between other parties and the debtor. All costs related to the termination of bankruptcy are borne by the debtor and must be determined by the judge by issuing an Execution Order, which has absolute legal force and cannot be challenged or appealed in any form.

Bankruptcy Filing Mechanism in Hong Kong

Hong Kong is a common law jurisdiction with strong characteristics in terms of procedural fairness and protection for solvent economic entities.

In the context of bankruptcy law , the Hong Kong system stands out because it implements a preliminary examination mechanism before a bankruptcy case is examined in court. This mechanism functions as a judicial filter to ensure that only debtors who are truly insolvent can be declared bankrupt.

Unlike Indonesia, which adheres to the formalistic principle as stipulated in Article 2 paragraph (1) and Article 8 paragraph (4) of Law No. 37 of 2004, where the requirement for bankruptcy is simply the existence of two creditors and one mature debt, the Hong Kong system adds the dimension of an "inability to pay test" as a substantive element of a bankruptcy petition.

In Hong Kong, before creditors can bring the matter to a bankruptcy decision (winding-up petition or bankruptcy petition), common practice requires creditors to take administrative/formal steps in the form of a statutory demand, which gives the debtor the opportunity to settle or file a defence within a certain period of time. For companies, the general compliance period granted is 21 days after receipt of the statutory demand; for the purpose of applying to the court to have the statutory demand set aside, the debtor must generally file an application to set aside within 18 days according to procedural rules. If the debtor fails to pay or fails to set aside the statutory demand within that time limit, the creditor may proceed by filing a petition with the court.

An important point in this mechanism is that the statutory demand is not merely a formality. It serves as an initial screening mechanism; if the debtor can quickly show evidence of solvency (e.g., convincing financial statements, statements from the tax authorities, or proof of payment), the statutory demand can be dismissed without the need for a full court process. Conversely, if the debtor does not respond or the response is unconvincing, the creditor obtains a fast track ( ) to commence a petition. This creates a balance: creditors have the right to demand payment, while debtors are given a short opportunity to prove that the debt is disputed or that they are solvent.

In Hong Kong practice, the Court Master (or Master) plays a central role at the initial stage. The Master receives the petition, assesses whether the documents meet the administrative requirements, and decides on urgent or procedural applications

(leave to issue a petition without a statutory demand in special circumstances). Furthermore, if the debtor applies to set aside the statutory demand, the Master/court chamber will assess whether there are sufficient grounds, for example: a bona fide dispute of the debt, payments already made, or evidence of solvency that could give rise to reasonable doubt as to the creditor's claim. The latest Practice Directions clarify how setting aside applications and petition management should be handled efficiently (e.g., administrative procedures, scheduling); this demonstrates procedural reform efforts to optimise the initial screening function and minimise abuse of bankruptcy procedures.

The Bankruptcy Filing Mechanism in Hong Kong has a standard of proof at the preliminary stage, which is not a full substantive examination but sufficient for screening purposes. The difference between Hong Kong's preliminary examination and a full hearing is the standard and depth. At this stage, the court does not conduct a full examination of the facts as in a substantive hearing; what occurs is a preliminary examination with a prima facie standard/simple facts to determine whether the petition is admissible. Hong Kong court rulings (case law) confirm that failure to pay after a valid statutory demand can create a presumption of insolvency sufficient to allow the petition, but the debtor still has the opportunity to contest it ( ) by demonstrating strong grounds for solvency or a genuine dispute over the debt. The existence of this presumption does not eliminate the debtor's right to defend themselves; rather, it introduces a procedural balance between the efficiency of settling creditors' claims and the protection of disputed claims.

According to Baker McKenzie, Norton Rose Fulbright, Hogan Lovells, and the official Hong Kong LRC guidelines, statutory demand and preliminary examination are considered important tools for preventing unnecessary bankruptcy litigation and maintaining market efficiency. They emphasise two main benefits:

a) Efficiency and certainty: statutory demand expedites the settlement of genuine debts without the need for lengthy proceedings; when the debt is clear, creditors do not have to wait indefinitely.[7]
b) Protection against abuse: short deadlines and set-aside mechanisms enable solvent debtors to immediately shut down attempts motivated by anti-competitive objectives or dirty business tactics. Practitioners assert that court practice directions and jurisprudence also limit the possibility of judicial abuse by irresponsible parties.

Another opinion is expressed by experts such as Charles D. Booth, who assesses that the statutory demand system creates a balance between efficiency for creditors and protection for debtors who are still solvent.[8] A similar view is also expressed by Michael Hwang , who states that this preliminary examination "provides a procedural safeguard against abusive insolvency petitions.[9]

However, this mechanism is not without risk. Doctrine and practice reveal several vulnerable areas: (a) statutory demands can be used as commercial pressure to force a settlement even when there is a substantive dispute; (b) multinational companies with crossborder creditors face enforcement and jurisdiction issues; (c) there are cases where the use of statutory demands quickly leads to petitions that ultimately result in controversial bankruptcies; therefore, the role of the Master and the availability of effective set-aside mechanisms are critical. Reform recommendations in Hong Kong itself (Law Reform reports) indicate ongoing efforts to balance these rights.

Transplanting the Preliminary Examination Law in Hong Kong to Bankruptcy in Indonesia.

[7] Baker Mc. Kenzie. 2022. Global Financial Services Regulatory Guide. Diakses 26 November 2024. https://resourcehub.bakermckenzie.com/en/*r esources*/global-financial-services-regulatory-guide

[8] Fredrik J. Pinakunary. 2005. Perlindungan Terhadap Perusahaan Solven dari Ancaman Kepailitan," *Hukumonline*. Diakses 26 November 2024, https://www.hukumonline.com/berita/a/perlindungan-terhadap-perusahaan-solven-dari-ancaman-kepailitan-hol13887/

[9] Ibid.

Bankruptcy petitions in Hong Kong, which are regulated by the Bankruptcy Ordinance (Cap. 6), require a preliminary examination process before the petition is submitted to the court. In Hong Kong courts, the selection process is carried out by a court official known as a master. It is the master who is responsible for screening bankruptcy petitions to determine whether they can proceed to court or be dismissed. This process is quite effective and efficient because, in the author's opinion, the preliminary examination minimises the number of solvent companies that are declared bankrupt.

As stipulated in the following provisions: Bankruptcy Ordinance (Cap. 6) Part II Proceedings from Bankruptcy Petition to Discharge

Section 3. Who may present a bankruptcy petition

(1) A petition for a bankruptcy order to be made against a debtor may be presented to the court:

a) by one of the debtor’s creditors or jointly by more than one of them;

b) by the debtor himself;

c) by the nominee of, or any person (other than the debtor) who is for the time being bound by, a voluntary arrangement proposed by the debtor and approved by his creditors; or

d) where a criminal bankruptcy order has been made against the debtor, by the Official Petitioner.

(2) Subject to the following provisions of this Part, the court may make a bankruptcy order on any such petition.

Section 4. Conditions to be satisfied in respect of the debtor

(1) A bankruptcy petition shall not be presented to the court under section 3 (1)(a) or (b) unless the debtor: (a) is domiciled in Hong Kong; (b) is personally present in Hong K kong on the day on which the petition is presented; or (c) at any time in the period of 3 years ending with that day: (i) has been ordinarily resident, or has had a place of residence, in Hong Kong; or (ii) has carried on business in Hong Kong.

(2) The reference in subsection (1)(c) to a debtor carrying on business includes: (a) the carrying on of business by a firm or partnership of which the debtor is a member; and (b) the carrying on of business by an agent or manager for the debtor or for such a firm or partnership.

Section 5 Other preliminary conditions

(1) Where a bankruptcy petition relating to a debtor is presented by a person who is entitled to present a petition under two or more paragraphs of section 3(1), the petition shall be treated for the purposes of this Part as a petition under whichever of those paragraphs is specified in the petition. (2) A bankruptcy petition shall not be withdrawn un ly without the leave of the court.

(3) The court has a general power, if it appears to it appropriate to do so on the grounds that there has been a contravention of rules or for any other reason, to dismiss a bankruptcy petition or to stay such a petition and, where it stays such a petition, it may do so on such terms and conditions as it thinks fit.

(4) Without prejudice to subsection (3), where a petition under section 3(1)(a), (b) or (c) in respect of a debtor is pending at a time when a criminal bankruptcy order is made against him, or is presented after such an order has been so made, the court may, on the application of the Official Receiver, dismiss the petition if it appears to it appropriate to do so.

Section 6. Grounds for a creditor's petition

(1) A creditor’s petition must be in respect of one or more debts owed by the debtor, and the petitioning creditor or each of the petitioning creditors must be a person to whom the debt or (as the case may be) at least one of the debts is owed. (2) Subject to sections 6A to 6C, a creditor’s petition may be presented to the court in respect of a debt or debts if, but only if, at the time the petition is presented:

(a) the amount of the debt, or the aggregate amount of the debts, is equal to or exceeds £10,000 or a prescribed amount ;

(b) the debt, or each of the debts, is for a liquidated sum payable to the petitioning creditor, or one or more of the petitioning creditors, either immediately or at some certain, future time, and is unsecured;

(c) the debt, or each of the debts, is a debt which the debtor appears either to be unable to pay or to have no reasonable prospect of being able to pay; and
(d) there is no outstanding application to set aside a statutory demand served under section 6A in respect of the debt or any of the debts. (3) A debt shall not be regarded for the purposes of subsection (2) as a debt for a liquidated sum by reason only that the amount of the debt is specified in a criminal bankruptcy order. (4) Notwithstanding subsection (2)(c) , and (d), a creditor's petition may be presented if there are reasonable grounds for believing that the debtor intends to depart, or has departed, from Hong Kong and the debtor knows or ought reasonably to know that his departure would result in defeat or delay for his creditors, and this subsection applies irrespective of the reason for his departure. (5) The Financial Secretary may, by regulation, prescribe an amount greater than £10,000 for the purposes of subsection (2)(a).

Section 6A. Definition of inability to pay, etc.; the statutory demand
(1) For the purposes of section 6(2)(c), the debtor appears to be unable to pay a debt if, but only if, the debt is payable immediately and either:
(a) the petitioning creditor to whom the debt is owed has served on the debtor a demand (known as the statutory demand) in the prescribed form requiring him to pay the debt or to secure or compound for it to the satisfaction of the creditor, at least three weeks have elapsed since the demand was served and the demand has been un , neither complied with nor set aside in accordance with the rules; or
(b) execution or other process issued in respect of the debt on a judgment or order of any court in favour of the petitioning creditor, or one or more of the petitioning creditors to whom the debt is owed, has been returned unsatisfied in whole or in part.
(2) For the purposes of section 6(2)(c), the debtor appears to have no reasonable prospect of being able to pay a debt if, but only if, the debt is not immediately payable and:
(a) the petitioning creditor to whom it is owed has served on the debtor a demand (also known as the statutory demand) in the prescribed form requiring him to

establish to the satisfaction of the creditor that there is a reasonable prospect that the debtor will be able to pay the debt when it falls due;
(b) at least three weeks have elapsed since the demand was served; and;
(c) the demand has been neither complied with nor set aside in accordance with the rules;

Section 6C. Expedited petition
In the case of a creditor's petition , presented wholly or partly in respect of a debt which is the subject of a statutory demand under section 6A, the petition may be presented before the end of the 3-week period mentioned therein if there is a serious possibility that the debtor's property or the value of any of his property will be significantly diminished during that period and the petition contains a statement to that effect.

Section 6D. Proceedings on creditor's petition
(1) The court shall not make a bankruptcy order on a creditor's petition unless it is satisfied that the debt, or one of the debts, in respect of which the petition was presented is either: (a) a debt which, having been payable at the date of the petition or having since become payable, has been neither paid nor secured nor compounded for; or (b) a debt which the debtor has no reasonable prospect of being able to pay when it falls due.
(2) In a case in which the petition contains such a statement as is required by section 6C, the court shall not make a bankruptcy order un , until at least three weeks have elapsed since the service of any statutory demand under section 6A.
(3) The court may dismiss the petition if it is satisfied that the debtor is able to pay all his debts or is satisfied: (a) that the debtor has made an offer to secure or compound for a debt in respect of which the petition is presented; (b) that acceptance of that offer would have required dismissal of the petition; and (c) that the offer has been unreasonably refused, and, in determining for the purposes of this subsection whether the debtor is able to pay all his debts, the court shall take into account his contingent and prospective liabilities.

(4) In determining for the purposes of this section what constitutes a reasonable prospect that a debtor will be able to pay a debt when it falls due, it is to be assumed that the prospect given by the facts and other matters known to the creditor at the time he entered into the transaction resulting in the debt was a reasonable prospect. (5) Nothing in sections 6 to 6C or this section prejudices the power of the court, in accordance with the rules, to authorise a creditor's petition to be amended by the omission of any creditor or debt and to be proceeded with as if things done for the purposes of those sections had been done only by or in relation to the remaining creditors or debts.

Normative Analysis of the Provisions of the Bankruptcy Ordinance (Cap. 6)

In the Hong Kong bankruptcy law system, Section 3 of the Bankruptcy Ordinance (Cap. 6) regulates the parties authorised to file for bankruptcy, namely creditors, debtors, parties bound by voluntary arrangements, and the Official Petitioner in criminal bankruptcy cases.[1] This provision reflects the principle of equal standing, namely the equal legal position of creditors and debtors in initiating bankruptcy proceedings. However, this authority is not absolute, as it must still meet the substantive and procedural requirements of the " " as stipulated in the following articles. Unlike Indonesia, where creditors have a dominant position in filing for bankruptcy, the Hong Kong legal system provides symmetrical access for both parties.[10]

Thus, bankruptcy law in Hong Kong is not only creditor-oriented but also emphasises distributive justice for debtors who still have financial capacity.[11]

Furthermore, Section 4 emphasises the importance of territorial connectivity and personal jurisdiction between the debtor and the Hong Kong court. Debtors must have resided, been present, or conducted business activities in Hong Kong in the three years prior to filing the petition. This provision reflects the application of the principle of territoriality in bankruptcy law, whereby the court only has the

[10] Charles D.Booth. 1995. *Transnational Aspect of Hongkong Insolvency Law.* (2 Sw.j.l & trade Am I: 1995) , p. 88

[11] Ibid.

authority to examine cases that have a real legal connection with the territory of Hong Kong ( ). Doctrinally, this provision is in line with the lex fori concursus theory, which asserts that bankruptcy law only applies within the jurisdiction where the debtor's assets are located.

Section 5 grants the court discretionary power to reject, postpone, or impose additional conditions on a bankruptcy petition. This section forms the legal basis for the preliminary examination mechanism, in which the court acts as a gatekeeper to ensure that the petition filed meets the elements of substantive justice and is not used as a means of abuse of process. This provision serves to provide preventive protection to companies that are still solvent so that they do not become victims of economically or competitively motivated bankruptcy.

Section 6 sets out the material requirements for creditors, namely the " " which are a minimum debt value of HK$10,000, liquidated and unsecured debts, the debtor's apparent inability to pay their debts (inability to pay test), and no pending application for cancellation of the statutory demand. This provision shows that the main element of bankruptcy in Hong Kong lies in the debtor's inability to pay debts, both actual and prospective. Thus, the Hong Kong system adopts a substantive insolvency approach that assesses the debtor's financial condition comprehensively.[12]

From a comparative law perspective, this differs from Indonesia, which still uses a formal insolvency approach based on simple evidence without considering the debtor's solvency.

Furthermore, Section 6A , is at the core of Hong Kong's bankruptcy system as it regulates the obligation of creditors to first submit a statutory demand before initiating a bankruptcy petition. The debtor is given 21 days to settle the debt, provide collateral, or file a set aside application if they feel they are still solvent.[13] This stage is a concrete form of preliminary examination, in which the debtor can submit financial reports and proof of solvency to prove the company's healthy

[12] Clarita Stefanie, R. Kartikasari, dan Artaji. 2022. Keabsahan Keadaan Solven Debitor sebagai Dasar Pertimbangan dalam Perkara Kepailitan. *Media Iuris* 5, (1) : 27.

[13] *he Government of Hong Kong. (1996). Bankruptcy Ordinance (Cap. 6). Hong Kong e-Legislation. Retrieved from https://www.elegislation.gov.hk/hk/cap6*

condition. If the court accepts this evidence, the statutory demand will be cancelled and the case will not proceed to trial.[14]

Thus, this mechanism functions as an effective judicial filter in preventing the exploitation of bankruptcy law by creditors with bad intentions.

Meanwhile, Section 6C provides room for creditors to expedite the bankruptcy process if there are indications that the debtor will transfer their assets or harm creditors during the 21-day grace period. This provision reflects the principle of equitable balance of interests, namely the effort to maintain a balance between protecting solvent debtors and the interests of creditors who may be harmed by fraudulent conveyance. This principle reflects an ideal balance between procedural justice and economic legal certainty.

Finally, Section 6D stipulates that the court may only declare bankruptcy if the debtor is unable to pay or has no realistic prospect of paying off their debts. However, the court has the authority to reject the petition if the debtor is able to pay off all their debts or has offered a reasonable payment that has been unreasonably rejected by the creditor. This provision affirms the substantive principle of fairness in bankruptcy, namely that bankruptcy should not be used as a coercive tool against debtors. Judges in Hong Kong have judicial discretion to reject cases based on substantive justice, unlike in Indonesia, where they are more bound by simple evidence as stipulated in Article 8 paragraph (4) of Law No. 37 of 2004.

In summary, there are three fundamental principles that can be concluded from the above articles. First, the principle of substantive insolvency, whereby bankruptcy can only be declared if the debtor is truly unable to pay their debts, both currently and prospectively. Second, the principle of preliminary examination, which ensures efficiency and fairness in the bankruptcy process through a statutory demand mechanism before the case is heard. Third, the principle of equitable balance of interests, which protects solvent debtors without neglecting the rights of creditors acting in good faith. This entire mechanism shows that the Hong Kong

[14] Chales Booth, "*Transnational Aspects of Hong Kong Insolvency Law*," 112.

bankruptcy system has a comprehensive and fair structure and is a suitable model for the reform of bankruptcy law in Indonesia.

Based on the above provisions, it is understood that before filing for bankruptcy, an applicant is required to submit a statutory demand or legal claim in the form of a request for payment of debt to the debtor. Within 21 days, the debtor is obliged to make the payment as specified in Bankruptcy Ordinance Cap 6 Sections 6A, 6C and 6D. The debtor has 18 days to request the court to set aside the statutory demand on the grounds that the company is still solvent or its finances are still healthy. In this process, the company or debtor can prove the company's solvency by presenting evidence such as financial statements and a list of assets to convince the Master or court clerk appointed at the preliminary examination that the statutory demand should be set aside or rejected. If the statutory demand is rejected, the bankruptcy petition does not need to be examined in court.

The existence of a preliminary examination, which requires the applicant to file a statutory demand for bankruptcy in Hong Kong, indicates that not every case to bankrupt a debtor can go to trial if the debtor can prove to the Master/court clerk that they are a solvent company. Thus, the bankruptcy requirements stipulated in Section 6 of the Bankruptcy Ordinance are not met. Based on the above description, it is clear that the bankruptcy laws and procedures applied by Hong Kong, which adheres to the common law system, are quite effective in protecting solvent companies from the threat of bankruptcy. Thus, solvent companies in Hong Kong do not have significant concerns about the threat of bankruptcy, compared to solvent companies in Indonesia.

In contrast to the bankruptcy petition mechanism in Indonesia, although solvent companies can also be saved from the threat of bankruptcy under Law No. 37 of 2004, this is highly dependent on the interpretation of judges who have full independence in interpreting legislation. In this regard, it should be noted that there have been cases where bankruptcy rulings were handed down against AJMI and Prudential, which were solvent companies, even though the Bankruptcy Law in force at the time also provided opportunities for judges not to declare these two solvent companies bankrupt.

There is no preliminary examination mechanism for bankruptcy petitions in Indonesia, unlike in Hong Kong. Under Law No. 37 of 2004, it is sufficient to prove the existence of debt ( ) and at least two creditors, and if the case is proven to be straightforward, the bankruptcy petition can be granted. Therefore, the purpose of this legal comparison is to preliminary examination in Hong Kong, where a statutory demand or legal claim in the form of a request for debt payment to the debtor is required. With this statutory demand, the debtor has the right to appear before a court clerk or master to prove that the debtor is still solvent or capable and can request that the statutory demand from the bankruptcy petitioner be set aside. The transplantation of these rules can be accommodated in the planned amendment to Law No. 37 of 2004 or the KPKPU Bill so that the rules governing bankruptcy petitions can be changed. Only insolvent companies can be brought to trial.

In fact, the concept of preliminary examination has already been implemented in cases before the State Administrative Court (PTUN) and the Constitutional Court, so it is not unfamiliar to our judicial system. It only needs to be adopted in bankruptcy cases so that it can be implemented by also adopting the bankruptcy law system in Hong Kong. In a preliminary examination, creditors must submit a statutory demand containing a request for payment of debts to the debtor, as well as other processes regulated in the preliminary examination under the Hong Kong legal system.

The author's objective in comparing the bankruptcy law systems in Hong Kong and Indonesia is to transplant the law, where the author hopes that the above comparison of bankruptcy laws can provide input for the planned amendment to Law No. 37 of 2004. It is important to adopt the legal system in bankruptcy that exists in Hong Kong, particularly the preliminary examination, to protect companiesthat are solvent so that they are not easily declared bankrupt. This will have a very positive impact on the Indonesian economy if the number of companies going bankrupt decreases. Legal transplantation is the step of adopting foreign law to be incorporated into the law of a particular country. In essence, legal transplantation stems from comparative law studies, which then contextualise the legal practices of one country with those of another in two or more countries, giving

rise to the need for legal innovation and additions to the law. Legal transplantation does not arise in a vacuum, but is constantly influenced by developments over time.

Correlating the above argument with preliminary examination, a comprehensive comparative study needs to be conducted, considering that preliminary examination originated and is effectively applied in countries with a common law system.

Conclusion

The bankruptcy mechanism in Indonesia, as regulated in Law No. 37 of 2004, is still formalistic in nature, as it only requires the existence of two creditors and one debt that has fallen due without considering the debtor's financial capacity (solvency). As a result, many debtors who are actually still solvent can be declared bankrupt, thereby weakening legal protection for debtors and making the bankruptcy process susceptible to abuse.

In contrast, the bankruptcy system in Hong Kong implements a preliminary examination through a statutory demand mechanism, which gives debtors the opportunity to prove their solvency before the case is brought to court. This system better upholds substantive justice and of the legal process.

Therefore, the application of the preliminary examination concept in Indonesian bankruptcy law ( ) through legal transplantation from Hong Kong is important to create a balance between the interests of creditors and protection for solvent debtors. This adaptation can strengthen the national bankruptcy system to make it more fair, selective, and efficient.

Recommendations

It would be preferable if Law No. 37 of 2004 or the KPKPU Bill could 24 also regulate and apply statutory demands or legal claims in the form of debt repayment requests to debtors for bankruptcy petitioners. Statutory demands are examined during the preliminary examination, where there is an opportunity for bankrupt debtors to prove that they are still solvent/capable.

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