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The Status of Debtor and Creditor in the Process of Deferment of Debt Payment Obligation (DDPO) in the Perspective of Debt Agreement and Bankruptcy Law in Indonesia

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Abstract
Deferment of Debt Payment Obligations or DDPO aims to enable debtors to submit a peace plan which includes offers of payment of part or all of the debt to their creditors. This research is focused on knowing the status of the debtor and creditor in the debt agreement in the DDPO process and in the case of bankruptcy, based on Law Number 4 Year 1998. The role of creditors and debtors as the main actors in DDPO is demanded to show fairness, transparency, and get the same treatment. Debt settlement through DDPO remains important on the basis of the reason for postponing the Obligation of Fixed Debt Payment to be used, so that the Debtor will not fall to bankruptcy and his business can rise again. The method used in this study is normative legal research using five approach methods, i.e. historical approach, legislative approach, conceptual approach, comparative approach, and case approach. The used analysis technique was grammatical interpretation or interpretation according to language, and Comparative Interpretation (interpretation by comparing the search for clarity regarding a law, which in this case is Law No. 37 Year 2004 concerning Bankruptcy and DDPO).This study concludes that the Debtor can still sell or transfer the debt assets freely, except that the assets are burdened with liability, while in the bonding of bankrupt debt, the Debtor loses that right. Authority on the management of the assets is under the authority of the curator appointed by the judicial decision, which also in Supervision of the supervisory judge, until the settlement of the bankrupt assets (boedel) settlement is complete. Whereas the Creditors' position remains in accordance with its position, meaning that there are Separatist Creditors, Preferent Creditors, and Concurrent Creditors.
Keywords: DDPO, Debtor, Creditor, Bankruptcy, Assets.

1. Introduction

The Deferment of Debt Payment Obligation (DDPO) is regulated in article 222 of Law No. 37 Year 2004 concerning Bankruptcy and Deferment of Debt Payment Obligation (DDPO),[1] basically containing two aspects.[2] First, the debtor cannot be forced directly by the creditor to pay the debt and/or the execution of the Debtor's assets is suspended (morotorium).[3] Second, the debtor restructures its debt by submitting a peace plan. This is in accordance with the philosophy of the Bankruptcy Law, namely providing legal protection to both parties to the dispute.

Deferment of Debt Payment Obligation (DDPO) is divided into Provisional DDPO and Permanent DDPO. Provisional DDPO can be given for a period of 45 days as stipulated in Article 225 paragraph (4) of Law No. 37 Year 2004 concerning Bankruptcy and Deferment of Debt Payment Obligation (DDPO),[4] while Permanent DDPO is granted for a maximum period of 270 days as stipulated in Article 228 paragraph (6) of the same law.[5] In contrast to the Provisional Deferment of Debt Payment Obligation (Prov-DDPO) that must be granted by the court, Permanent Deferment of Debt Payment Obligation (Perm-DDPO) and its extension[6] can only be granted after obtaining approval from the concurrent creditor or the creditor holding the liability right at the creditor meeting.

Research on debt settlement through DDPO remains important on the basis of the first reason, Permanent

[1] Based on article 222 paragraph (I), the Deferment of Debt Payment Obligation (DDPO) can be submitted by a Debtor who has more than 1 (one) Creditors or by Creditors. In Indonesia, it is stipulated in the Law No. 37 Year 2004 concerning Bankruptcy and Deferment of Debt Payment Obligation. Supplementary of State News, in State Gazette Number 4443, Article 222 paragraph (1).
[2] *Indonesia,* Law No. 37 Year 2004 concerning Bankruptcy and Deferment of Debt Payment Obligation. Supplementary of State News, in State Gazette Number 4443, Article 222.
[3] *Indonesia,* Law No. 37 Year 2004 concerning Bankruptcy and Deferment of Debt Payment Obligation. Supplementary of State News, in State Gazette Number 4443, Article 242 Paragraph 1.
[4] *Indonesia,* Law No. 37 Year 2004 concerning Bankruptcy and Deferment of Debt Payment Obligation. Supplementary of State News, in State Gazette Number 4443, Article 225 Paragraph (4).
[5] *Indonesia,* Law No. 37 Year 2004 concerning Bankruptcy and Deferment of Debt Payment Obligation. Supplementary of State News, in State Gazette Number 4443, Article 228 Paragraph (6).
[6] *Indonesia,* Law No. 37 Year 2004 concerning Bankruptcy and Deferment of Debt Payment Obligation. Supplementary of State News, in State Gazette Number 4443, Article 229 Paragraph (1).

Deferment of Debt Payment Obligation can be used on the purpose to save the Debtor from bankruptsy. DDPO aims to protect the debtor, who due to a condition such as being illiquid and having difficulty obtaining credit, is declared bankrupt, whereas if the debtor is given time and opportunity, it is expected that he will be able to pay his debt. Second, is to help his business tp work again, hence, every individualistic debt settlement actions carried out by creditors, who compete with each other on the principle called *first come first serve,* needs to be prevented. The promulgation of the Bankruptcy Law has brought significant changes in the procedure of proceedings for bankruptcy cases.

According to Hikmahanto Juwana, it was argued that the amendment to the Bankruptcy Law was very dominant in protecting the interests of creditors. This can be seen from the conditions for being declared bankrupt as set forth in Article 1 paragraph (1), i.e. the existence of two or more debts and one of them is due. Strangely, in the amendments to the Bankruptcy Law, not a single provision requires that debtors must no longer be able to pay (insolvent). This certainly contradicts the universal philosophy of Bankruptcy Law, namely to provide a resolution for debtors and creditors when the debtor is in a state of unavailability to pay the debt.[1]

Therefore, DDPO is the best solution compared to bankruptcy because the debtor can get a chance to run his business, as well as creditors can still get their rights according to their bills. DDPO is actually an institution to avoid bankruptcy which generally leads to the confiscation of debtor's assets (bankruptcy).

Bankruptcy and DDPO law not only sees law as a set of rules and principles that govern society, but also must include institutions and processes. The concept of Bankruptcy and DDPO Law based on changes in the legal principles above are expected to change people's understanding, especially economic actors in assessing DDPO as a means to propose debt restructuring. Changes in the understanding of DDPO in particular, are part of development. The concept of Bankruptcy and DDPO Law is a means of development to move towards change to regulate human life in society.

Whereas bankruptcy law has a very important function, namely through bankruptcy law, a general seizure (mass execution) will be held towards all debtor's assets, which will then be distributed to its creditors in a balanced and fair manner under the supervision of authorized officers.[2]

The nature of the decision on bankruptcy statements can be carried out in advance even though the decision is submitted for legal remedies (uitvoerbaar bij voorraad), as stipulated in Article 8 paragraph (7) of Law Number 37 Year 2004 concerning Bankruptcy and Deferment of Debt Payment Obligation (DDPO), and pursuant to Article 16 paragraph 1 of Law Number 37 Year 2004 which states that the Curator has the authority to carry out the tasks of managing and or depositing bankrupt assets from the date the bankruptcy decision is pronounced. Another issue which become an advantage to the bankruptcy provision is the establishment of a Commercial Court in the general court environment to deal with trades, particularly the issues of bankruptcy and the Deferment of Debt Payment Obligation (DDPO) (Law Number 4 Year 1998).

The emergence of disputes between debtors and creditors is usually due to problems in the inability of one party to carry out their achievements or obligations, especially in the payment of debts that fall due. The emergence of these problems can be seen from 2 (two) aspects of the approach, i.e. because of differences between das Sollen and das Sein, and the difference between what is always desired to what actually happens.[3] In the difference between what happens (das Sein) and what is desired (das Sollen), the further the difference will cause the greater the problem, and if the difference is closer, the smaller the problem. However, if between das Sollen and das Sein there have been indifferent then there will be no more problems for the parties. The same condition was stated by Sudikno Mertokusumo, that das Sollen is a rule of law that contains normative reality (what should be done) and does not contain natural reality or concrete events (das Sein).[4]

The use of Bankruptcy Law is the last legal action that can be taken if the steps in the form of peace[5] or debt restructuring[6] have failed to be implemented. The Bankruptcy Law does not mention the causes of bankruptcy and Deferment of Debt Payment Obligation. The Bankruptcy Law specifically does not address the issue of whether Debtors can be held accountable for their financial wealth. The Bankruptcy Law speaks neutral about

[1] Hikmahanto, Juwana, ***Hukum Sebagai Instrumen Politik: Intervensi Atas Kedaulatan Dalam Proses Legislasi di Indonesia***. Delivered during Academic Oration in the 50th Anniversary of the Law Faculty of North Sumatera University on 12 January 2004.
[2] Zainal Asikin, ***Hukum Kepailitan dan Penundaan Pembayaran di Indonesia,*** (Jakarta: Rajawali Pers, 1991), Pg. 24.
[3] A. Mukti Arto, ***Mencari Keadilan (Kritik dan Solusi Terhadap Praktik Peradilan di Indonesia),*** (Yogyakarta: Pustaka Pelajar, 2002), Pg. 28-29.
[4] Sudiko Mertokusumo, ***Mengenal Hukum (satu pengantar),*** (Yogyakarta, Liberty, 1986), pg. 16.
[5] Accord/Peace Plan in the Bankruptcy Law can be taken before the Bankruptcy Decision, that is during the stage of Suspension of Payment and after the Debtor is declared bankrupt, which is offered at the verification meeting, Article 144 and Article 222 paragraph 3 of Law No. 37 Year 2004.
[6] Debt restructuring, according to Remy Syahaldeini can take the form of: 1) providing a moratorium (Deferment of Debt Payment) to the Debtor; 2) rescheduling loan repayments; 3) re-fulfill the loan agreement; 4) restructuring the loan amount, including reducing the principal amount of debt, reducing interest rates, and providing additional debt (injection credit); 5) injecting new capital by investors or new shareholders. Sutan Remy Syahdeini, ***Undang-Undang Kepailitan: Dalam Persfektif Hukum, Politik dan Ekonomi,*** Paper presented in a discussion concerning Bankrupcy Law in the perspectives of Law, Politics, and Economy" that organized by F-KP DPR-RI, on 7 May 1998, Jakarta.

Bankruptcy involving Debtors who are in a state of unable to pay.[1]

The demands of the debtor's obligation to carry out his achievements in accordance to Bankruptcy Law, are as follows:

a. The debtor is responsible for all his wealth, both in the form of movable and immovable property, both at present and in the future, which is a guarantee of all his debts (Article 1131 and Article 1133 of the Civil Code).
b. In contrast to the provisions contained in material rights, personal rights arising at different times have the same rank (Paritas Creditorum) (Article 1132 of the Civil Code).
c. If several creditors have the same debtor who consecutively submits claims to the debtor's assets, they will be fulfilled according to their demands according to an orderly order for submitting the bill. This means that creditors who apply for billing will first get payment in advance compared to other creditors.

Based on the above background, the problem in this study is how the position of the debtor and creditor in the debt agreement on the DDPO process and in the case of bankruptcy.

2. Research Method

This type of research is normative legal research, which also known as doctrinal method or doctrinal research.[2] The used research approaches were statute approach, case approach, historical approach, comparative approach, and conceptual approach.[3] The type of legal material in this study consists of primary, secondary, and tertiary legal materials. Primary, secondary and tertiary legal materials were obtained from libraries and related agencies and NGOs.

Collection of legal materials is carried out through the study of documents in the form of primary, secondary, and tertiary legal materials through inventory, selection, and systematization, to trace documents and literature in accordance with research problems. The technique for obtaining legal material was by searching literatures through library, either in the library of various universities, public libraries, and also through the internet. Legal materials that have been collected are analyzed qualitatively using inductive and deductive thinking processes, hence they can be interpreted in the form of statements. The used analysis technique was grammatic interpretation or interpretation according to language[4] and Comparative Interpretation, which is interpretation by comparing the search for clarity regarding the law, which in this case is Law no. 37 Year 2004 concerning Bankruptcy and DDPO.[5]

3. Results and Discussion

3.1 The Status of Debtor and Creditor in Debt Agreement in General

To be able to provide a more detailed description on the position between the debtor and creditor in the agreement on debt, then first that must be considered is the understanding of debt as interpreted by Jerry Hoff who states that[6] debt is not only an obligation to pay a certain amount of money because the debtor has received a number of certain money due to an agreement on debt, but also the obligation to pay debts arising from other agreements.

With regard to Law No. 4 Year 1998 before being finally revoked and replaced with the Bankruptcy-DDPO Law, Kartini Muljadi,[7] argues that the term debt in Article 1 and Article 212 of Act Number 4 Year 1998 (should) refer to the law of internal engagement civil law. Kartini Muljadi attributed the definition of debt to Article 1233 and Article 1234 of the Civil Code (Civil Code). From the description of Kartini Muljadi, it can be concluded that she interpreted debt as the definition of obligation.

Kartini Muljadi provides several examples of obligations arising from agreements (which are included in the definition of debt as referred to in Law Number 4 Year 1998), as follows:[8]

1) The obligation of the debtor to pay interest and principal debt to the lending party.
2) The obligation of the seller to deliver the car to the buyer of the car.
3) The obligation of the builder to build a house and give it to the purchaser of the house.
4) The obligation of the guarantor to guarantee the repayment of the debtor's loan to the creditor.

Debtor's debts, which are "the right to obtain a payment of money" or a right to payment for creditors, must

[1] Mr. J.B. Huizink, *Insolventie, Op. cit.,* pg. 1.
[2] Id. Pg. 22
[3] Id. Pg. 93
[4] Sudikno Mertokusumo, ***Penemuan Hukum****,* 5th edition, (Yogyakarta: Universitas Atma Jaya, 2010), pg. 74.
[5] Id. Pg. 80.
[6] Jerry Hoff, *Indonesia Bankruptcy Law, Undang-Undang Kepailitan di Indonesia*, translation by Kartini Muljadi, Jakarta: PT. Tata Nusa, 2000, pg. 181.
[7] Kartini Muljadi, "*Kepailitan dan Penyelesaian Utang Piutang*", in Rudhy A Lontoh, (ed). *Penyelesaian Utang Piutang melalui Pailit atau PKPU*, Bandung: Alumni, pg. 168.
[8] Kartini Muljadi, *Pengertian dan Prinsip-prinsip Umum Hukum Kepailitan,* in Rudhy A. Lontoh, et.al *Penyelesaian Utang piutang Melalui Pailit atau Penundaan Kewajiban Pembayaran Utang,* Bandung: Alumni, 2001, pg. 186.

exist when the debtor is declared bankrupt by the court. If the creditor's rights have not yet emerged, then the creditor's right cannot be said to be debtor's debt which can be registered for the verification of debts in the framework of bankruptcy of the debtor. In the event of disagreement regarding the "existence" of the debt, the existence of the debt must first be decided by the court. The court must even decide certainty regarding the "size" of the debt. The court that examined the "existence" and "size" of the debt, is the commercial court that examined the bankruptcy. The examination was carried out together with an examination of the application for the bankruptcy statement.

Moving on from the above thoughts, if a debtor has an obligation to another party, which is not an obligation to pay money, then it is not including debt as referred to in Article 1 paragraph (1) of the Bankruptcy Act.

Recognizing the emergence of confusion regarding the notion of debt since there is no definition or explanation of what is meant by "debt" in the Government Regulation in Lieu of Law Number 1 Year 1998 as enacted by Law Number 4 Year 1998, the Law Number 37 Year 2004 concerning Bankruptcy and Deferment of Debt Payment Obligation (Bankruptcy and DDPO Law) has provided the definition of debt as referred to in Article 1 number 6 as follows:

> "Debt is a liability that is stated or can be expressed in the amount of money, both in Indonesian currency and foreign currency both directly and in the future (contingent), which arises because of an agreement or law that must be fulfilled by the debtor, and if not fulfilled, it gives the creditor the right to get fulfillment from the debtor's assets. "

The sentence "liability that can be stated in the amount of money" in Article 1 point 4 of the Bankruptcy Act refers to an obligation that does not certain the value of money. If a "liability that can be stated in the amount of money" can be categorized as a debtor's debt, it can be registered in the verification list, hence who will determine the value of the debt? If the curator is authorized to judge, either with or without the approval of the Supervisory Judge, it will only cause problems. Nor should the determination of the value of the obligation be based on an agreement between the concerned creditor with the debtor or curator.

3.2 Status of Debtor and Creditor in Debt Agreement in DDPO Process

The Bankruptcy Law provides an opportunity for debtors who cannot, or predict that they will not be able, to continue to pay their debts that have fallen due and can be billed for requesting payment delays (surceance van betaling or suspension of payment) to the commercial court.[1] This Deferment of Debt Payment Obligation (DDPO) can be filed against debtors who have more than one creditor, and the debtor cannot or is expected to be unable to continue the debt payment that has fallen due and can be billed.

Article 222 paragraph (2) of Bankruptcy and Deferment of Debt Payment Obligation Law determine that a debtor who cannot or estimated to be unable to continue paying his debts that have fallen due and can be billed, can request DDPO, with the intention to submit a peace plan which includes offers of payment of part or all of the debt to creditors. Creditors can also submit DDPO applications to debtors. After going through the trial process, the commercial court must grant DDPO in the form of Provisional DDPO. Along with the decision, the commercial court must also appoint a supervising judge and one or more administrators who together with the debtor take care of the debtor's assets.

Provisional DDPO can turn into Permanent DDPO after going through the stipulation of the commercial court. Based on Article 229 of the Bankruptcy and Deferment of Debt Payment Obligation Law, if the application for a bankruptcy statement and DDPO application is examined at the same time, the DDPO application must be decided in advance. Otherwise, if DDPO application is filed after the bankruptcy application filed against the debtor to be decided in advance, it must be submitted at the first hearing to examine the application for bankruptcy statement. A debtor, during the Deferment of Debt Payment Obligation, does not lose his right to control and manage his assets in his possession. It's just that based on Article 240 of the Bankruptcy and Deferment of Debt Payment Obligation Law, in carrying out management actions and ownership of all or part of his property, he must be supervised with the approval of the management.

According to Article 255 of the Bankruptcy and Deferment of Debt Payment Obligation Law, DDPO can be terminated at the request of a Supervisory Judge, one or more creditors, or on a court initiative. The termination of DDPO must go through the decision of the commercial court. If the commercial court has decided the termination of DDPO, the debtor must be declared bankrupt in the same decision. As stated above, that the DDPO application was submitted to obtain peace. In connection with this, Article 265 of the Bankruptcy and Deferment of Debt Payment Obligation Law determines that the debtor at the time of submitting the DDPO application has the right to offer a peace to the debtor. The peace plan must be submitted to the supervisors, administrators, and experts if there are any. The plan is then submitted to the clerk.

According to Article 281 paragraph (1) of the Bankruptcy and Deferment of Debt Payment Obligation Law,

[1] See Article 222 of Bankruptcy and Deferment of Debt Payment Obligation Law.

if the concurrent creditors do not approve the peace plan, compensation is given at the lowest value between the collateral value or the actual value of the loan which is directly guaranteed by collateral rights. If the peace plan is accepted, the supervisory judge must submit a written report to the commercial court for approval. If the commercial court rejects the ratification of the peace plan, then in the same decision, the court is obliged to declare the debtor as bankrupt.

In the process during DDPO, one or more administrator was appointed. The management is appointed in the event of a Debt Payment Obligation. The duties of the management are only limited to administering the process of Deferment of Debt Payment Obligation (DDPO). It should be noted that in DDPO the debtor still has the authority to take care of his property, hence the authority of the board is limited to just supervising. As the result, the debtor in DDPO is still given the opportunity to repay his debt through peace efforts as stipulated in the Bankruptcy and DDPO Law No. 37 Year 2004.

3.3 The Status Debtor and Creditor in Debt Agreement when Bankruptcy Arise

The juridical impact of bankruptcy decision on the assets of the debtor is in the forms:

1) Bankruptcy decisions can be executed firsthand (immediately)
   In principle, bankruptcy decisions are immediate and can be carried out against the verdict which is still a further legal effort.
2) Public Attachment (Gerechtelijk Beslag)
   Debtor property that included in bankrupt assets is a public attachment and is obtained during bankruptcy.
3) Engagement after bankruptcy
   All debtor agreements are issued after the bankruptcy decision is not paid from the bankrupt assets. If the provisions are violated by the bankrupt, the action does not bind his wealth unless the engagement brings profit to the bankrupt assets.
4) Payment of bankrupt debtor's debts
   Payment of receivables from the bankrupt debtor after the bankruptcy decision can be paid to the bankrupt, as if it is not paid off, the debt is still deemed incomplete.
5) Employment contract with bankrupt company's employees
   Workers who work for the debtor can break the employment contract and the curator can terminate by taking into account the time period according to the agreement or the applicable legal provisions, so that the employment contract can be decided 45 days in advance.

Kartini Muljadi stated:[1] the level of creditors in Article 1 paragraph (1) of the Bankruptcy law includes:[2]

a. Separatist creditors
   Separatist Creditor is creditor who can exercise their rights as if there were no bankruptcy, for instance for mortgage holders, fiducia guarantee holders, or creditors with material guarantees, and regulated in Article 1150 up to Article 1160 Book III of Chapter XX of the Civil Code which applies to movable objects. Separatist creditors are holders of material guarantees based on Article 1134 paragraph (2) of the Civil Code, i.e. mortgage pawns. Besides that, separatist creditors are also holders of material guarantees regulated in Law No. 4 Year 1996 concerning Mortgage Rights, Law no. 42 Year 1999 concerning fiducia guarantees, and also rights holders in Law no. 9 Year 2006 as amended by Law no. 9 Year 2011 concerning warehouse receipt systems.[3]
b. Preferent creditor, creditor with privileges
   The definition of Preferent or special creditor in Bankruptcy and DDPO Law is as referred to in Article 1139 and 1149 of the Burgerlijk Wetboek (BW)/the Civil Code (explanation of article 60 of Bankruptcy and DDPO Law) with Article 1139 of BW stated that the receivables take precedence over certain goods, moving goods, or immovable property as the implementation of the decision on the claim regarding the ownership or control of costs paid with the proceeds from the sale of the objects, the creditor get first priority from other rights holder.
c. Concurrent Creditors
   Concurrent creditors are creditors who are satisfied with the payment of their receivables from the proceeds of the sale of bankrupt assets after being taken part by Separatist Creditor and Preferent Creditor. Concurrent creditors have the right to get repayments altogether without prior rights, calculated the amount of each receivable to the receivables as a whole from all debtor assets.

Based on the notions of creditors above, it is concluded that in the practice of commercial courts, the

[1] Parwoto Wignjosumarto. *Peran dan Hubungan Hakim dengan Kurator/Pengurus serta Permasalahan dalam Praktik Kepailitan PKPU*. Jakarta:2002, pg.129.
[2] Bagir Mannan. *Mengenal PERPU Kepailitan dalam Penyelesaian Utang Piutang melalui Pailit atau Penundaan Kewajiban Pembayaran Utang*, Bandung: Alumni, 2001, pg.78.
[3] Law Number 4 Year 1998 concerning the Establishment of Government Regulation in Lieu Law Number *1 Year 1998 concerning Changes in Bankruptcy Law* (State Gazette Year 1998 Number 135), referred as Bankruptcy Law 1998.

settlement of the division of the remaining assets of concurrent creditors must be proportionally shared with other creditors from the sale of debtors who are not burdened with collateral rights. In practice, it is often found that concurrent creditors get the last position in the shares from bankrupt assets sales.[1]

The intention of the legislators by revising the Bankruptcy Law was not in accordance with the expectations of many parties. The provisions of the Bankruptcy Law are not used properly. In the amendment to the new Bankruptcy Law, i.e. Law Number 37 Year 2004, in Article 1 number 2 of the Law, the creditor is a person who has receivable accounts because of an agreement that the creditor is a person who has receivables due to an agreement or law that can be billed in advance court. Article 2 Paragraph 1 of the Law is said that the debtor has two or more creditors and does not pay in full at least one debt that has fallen due, and can be billed, is declared bankrupt with a court decision, either on his own request or on the request of one or more creditors.[2]

Debt settlement through bankruptcy institutions is intended to get a fair share of creditors. However, for separatist creditors, the provisions for postponing the execution and limitation of the period of execution of collateral in the Bankruptcy Law are not in line with the legal provisions of the guarantee, which have the potential to harm separatist creditors. In the discussion of this paper, it can be concluded that it is necessary to make adjustments either through revision of the law or by establishing Government Regulation, so that it can provide legal certainty regarding the presence or absence of the right of execution of separatist creditors.[3]

3.4 Actio Pauliana In Bankruptcy

Actio Pauliana is an institution that protects creditors' rights, from the actions of bankrupt debtors that harm creditors. Basically actio pauliana is a legal course given to the curator to cancel the legal actions carried out by the debtor before the declaration of bankruptcy is dropped, if the curator considers that the legal actions carried out by the bankrupt debtor are regulated in Article 1341 of the Civil Code and regarding bankruptcy implementation in Article 41 to Article 44 of the Bankruptcy Law.[4]

In the civil law system there are three types of actio pauliana, namely:[5]

1. Actio pauliana (general) as stipulated in article 1341 of the Civil Code
2. Actio pauliana (inheritance) as stipulated in Article 1061 of the Civil Code.
3. Actio pauliana in bankruptcy, Article 41 to 47 of the Bankruptcy Law.
   Actio Pauliana applies to the legal actions of bankruptcy committed before the bankruptcy decision. Actio pauliana in bankruptcy cases actually refers to the provisions of Article 1341 of the Civil Code with the provisions of Article 1131 of the Civil Code regulating the principle of creditorium parity. All debtors' assets by law are collateral for debtor's debts.[6]

Actio Pauliana's lawsuit in bankruptcy is required that the debtor and the party with whom the action is carried out knowing or properly knowing the action will cause a loss to the creditor.

In a debt agreement that has not fall to bankruptcy or delay of payment, the Debtor and Creditors are still balanced in the sense that the Debtor is still free to manage company assets, while in bankruptcy, the Debtor is under supervision and deemed ineligible, so that all are regulated by the Management in the Deferment of Debt Payment Obligation and Curator in a bankruptcy.

The shift in the position of the Debtor from a lawful subject to be under supervision, according to the author, does not reflect a sense of justice, especially in receivables debt accompanied by liability rights. The decision of general confiscation to debtor's assets through Bankruptcy decision by the Commercial Court needs to be reconsidered in the amendment to the Bankruptcy and Deferment of Debt Payment Obligation Law. Seizure should be limited to assets that are relevant to the existing debt, and the amount must be significant.

3.5 Separatis Creditor According to Liability Law Number 4 Year 1996 and Bankruptcy and DDPO Law Number 37 Year 2004

a. Legal Basis and Main Provision in Liability

With the enactment of Law Number 4 Year 1996 concerning Liability, as a guarantee institution for land to replace mortgages and *credietverband*, this Liability Law is better positioned than when the mortgage and *credietverband* came into force, in the sense that Liability Law has the characteristics of convenience and certainty on the execution of the liability object.

b. Principles of Liability

There are several principles that distinguish Liability Law from other debt guarantee institutions. The principles consist of:

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[1] Situmorang, Victor M., and Hendri Soekarso. *Pengantar Hukum Kepailitan Indonesia*. Jakarta: Eka Cipta. 1993, pg. 79.
[2] Ibrahim Assegaf. *Hasil Survei Kurator dan Pengurus: Harapan Praktisi, Makalah disampaikan Lokakarya Kurator*. Jakarta: 2002, pg. 71.
[3] Suyudi, Aria, and Herni Sri Nurbayanti., *Kepailitan di Negeri Pailit*. Jakarta: Center of Law and Policies Studies in Indonesia. 2004, pg. 70.
[4] Sutan Remy Sjahdeini, "*Hukum kepailitan*". Jakarta: Pustaka Utama Grafiti. 2002, pg. 210-211.
[5] Jery Hoff. *Undang-undang Kepailitan di Indonesia*. Jakarta: Tatanusa. 2000, pg. 56.
[6] Yuhassarie, Emmy, and Sri Muriyani. Jakarta: *Penyempurnaan Undang-undang kepailitan* . 2003, pg. 72.

1. Principle of Publicity (Article 13 paragraph (1) of the Liability Law)
2. Principle of Speciality (Article i Paragraph (1) of the Liability Law)
3. Principle of Undivided (Article 2 paragraph (1) of the Liability law)

c. Characteristics of Liability

Liability as a material guarantee institution has several special characteristics, including:

1. Liability are forcing (*Dwingen recht*)
   Liability Agreement is an accessoir agreement to Liability Agreement, and not an independent agreement.
2. Liability can be switched or transferred
3. Liability is Individualiteit
   Individualiteit means that the objects to be possessed as material is anything that according to law can be determined separately (Individueelbepaald).
4. Liability is Totaliteit
5. Liability can be used as collateral for new debt.
6. The execution of Liability is Easy and Definitely Excessive

d. Subjects and Objects of Liability

There are 2 (two) main parties in Liability, namely:

1. Provider of Liability
   - Debtor himself
   - Other party
   - Debtors and other parties
2. Recipient or Holder of Liability

Liability holders, according to Article 9 of Liability Law are explained with the notion of "the transfer of Liability are individuals or legal entities domiciled as debt parties". In this banking practice, it is found that the provider of Liability is a legal entity, namely the debtor of a company as the owner of collateral that has the authority to impose the Liability and the Liability Holder is the Bank as the party providing the credit who will receive the Liability.

Liability Objects in Article 4 paragraph (4) of Liability Law are explained that "Liability can also be imposed on land rights, along with buildings, plants, and works that have already or will exist, as a unit with the land, and constitute belongs to the holder of the land rights whose charges are stated in the relevant Liability Transfer Certificate.

The Liability execution process is carried out through two stages, namely:

1. Stage of granting Liability. With the Liability Transfer Certificate made by Land Certificate Officials, which is preceded by guaranteed debt agreements.
2. The registration stage is by the land office, which is the time the loan is charged.

e. Stages of Granting and Registering Liability

The granting of Liability is preceded by a promise to provide Liability as a guarantee of repayment of certain debt, which is stated in and is an inseparable part of the concerned debt agreement or other agreement that gives rise to the debt.

If the object of Liability is in the form of rights on land originating from the conversion of old rights that have fulfilled the requirements to be registered but the registration has not been carried out, the granting of the Liability is carried out together with the application for registration of the related land rights.

The obligation to register Liability is contained in the provisions of Article 13 paragraph (1) of the Liability Law which states: "Granting of Liability must be registered at the Office of Land Registry". Based on Article 13 paragraph (2) and (3) of Liability Law, no later than 7 (seven) days after the signing of Liability Transfer Certificate, the Liability Transfer Certificate along with Liability Granting Letter and other required files must be sent later by the Office of Land Registry to be registered by making a book of Liability land and recorded in the book of right to land, which is the object of Liability and copies the record of the concerned certificate of right to land.

The registration of Liability is carried out by the Office of Land Registry by making a book of Liability and recording the book in the book of land rights holder which is the object of Liability and copying the notes to the concerned certificate of rights to land. The date of the Liability land book is the date of the seventh day after the complete receipt of the documents required for registration, and if the 7th day falls on a holiday, the relevant land book is given / dated the following working day. The date of the Liability book determines the birth of the Liability, therefore the principle of publicity is fulfilled.

f. Liability Certificate

As a proof of the Liability, the Office of Land Registry issuing a Liability Certificate. Liability Certificate consists of a copy of the book of Liability land right and a copy of Liability Transfer Certificate, both issued by the head of the Office of Land Registry and bound into one in the document cover. The cover of the certificate is

affixed with the words "On Behalf of Justice Based on the One and The Only God". The steps listed in Liability Certificate have the same executorial power as the court decision, which has permanent legal force and will be used by creditors as a means of carrying out the execution of Liability later when the debtor fails to fulfill a promise. If not agreed upon, the Liability Certificate that has been affixed with a note on the assignment of Liability is returned to the owner / holder of the Liability, and the Liability Certificate is handed over to the Liability Holder.

g. Authority to Grant Liability

Liability Granting Letter is a Letter or Deed which is due to the procuration from or given by the Collateral Giver / Property Owner (Proxy) to the Party who receives the procuration to represent the proxy

The issuance of Liability Granting Letter must meet the provisions set out in the applicable laws and regulations and must be obeyed by every Notary or Land Certificate Officials who will issue the Liability Granting Letter or must be obeyed by the Land Certificate Officials who will issue the Liability Transfer Certificate made based on Liability Granting Letter. Liability Granting Letter in addition must be made by a deed from Notary or Land Registry Officials, as stipulated in Article 15 paragraph (1) of the Liability Law, that it must fulfill several requirements, including:

1. Does not contain the power to carry out legal actions other than to impose Liability
2. Does not issue substitutive power
3. Clearly state the object of the Liability, the amount of the debt, and the name and identity of the creditors, and the name and identity of the debtor if the debtor is not the Grantor of the Liability.
4. Failure to fulfill the above requirements resulting in the Liability Granting Letter to be null and void and cannot be used as the basis for issuing Liability Transfer Certificate. In practice, Liability Granting Letter is given by the debtor (in the case of the debtor is the owner of the Liability object) to the bank at the same time in the agreement.

Based on the provisions of Article 15 paragraph 1 of Liability Law, it is clear that the granting of power in the framework of granting Liability (Liability Granting Letter) must be made with an authentic deed made before a Notary or Land Registry Officials. Certainly, the Notary or Land Certificate Officials referred to in Article 15 paragraph 1 of Liability Law is an authorized Notary or Land Certificate Officials in accordance with the provisions of legislation in Indonesia, namely Notary or Land Certificate Officials in Indonesia. Hence, it is clear that Liability Granting Letter cannot be isued with an underhand letter / deed.

Liability Granting Letter cannot be withdrawn or cannot end by any reason, unless it has been implemented or has expired. Liability Granting Letter on registered land rights (certificate) must be followed by making Liability Transfer Certificate no later than 1 month if the certificate is not yet reach 3 months. The provisions of this time do not apply to Liability Granting Letter given to guarantee certain loans, such as program loans, small loans, and house purchase loans. Liability Granting Letter which is not followed by the issuance of Liability Transfer Certificate within the specified time is considered null and void by law.

h. Liability as Materials Guarantees

Bank as one of the institutions that provides credit loans to public which requires a credit guarantee from creditor applicant, that is the debtor, to guarantee the repayment of his credit in the future. In the law, there are two types of guarantees, namely:

1. Personal Guarantee (Borgtoch / Personal Guarantee)
   Personal Guarantee is a guarantee in the form of a statement of ability given by a third party to guarantee the fulfillment of debtors' obligations to creditors, if the concerned debtor fails (default). This guarantee can also be said as a debt underwriting which is regulated in articles 1820-1850 of the Civil Code.
2. Material Guarantee (zakelijke zekerbeid / security right in brake)
   Material Guarantee is a guarantee in the form of assets by separating part of the property from the debtor or from a third party, in order to guarantee the fulfillment of the obligations of the debtor in default.

From the above definition, we can know the difference between material guarantee with individual guarantee, namely:

1. In individual guarantee there is a third party that undertakes to fulfill the deed agreement if the debtor is in default;
2. In Material guarantee, only debtor's assets that can be used as collateral for repayment of credit if the debtor is fail to fulfill the promise.

According to Kartini Muljadi, Liability is a form of guarantee of debt repayment with rights beforehand, with the object of collateral in the form of land rights stipulated in the Basic Principles of Agrarian Law. "If seen from the characteristics of the guarantee and definition of Liability, then Liability is included in Material Guarantee rights, because there are certain objects in the form of land that are specifically bound as collateral and can be maintained against all types of creditors and to third parties. In addition, these rights always follow the object including giving rights and authority to creditors to carry out their own execution of the collateral objects.

i. Legal Consequence of Bankruptcy towards Materials Liability

In a debt agreement, it will run smoothly if each party fulfills its performance. However, if the debtor cannot fulfill his performance, the creditor has the right to demand the fulfillment of his debt, namely the right of execution to the debtor's assets. The law of execution is a law that regulates the exercise of the rights of creditors in the interest directed at the debtor's assets by debtors.

Based on the provisions of Article 20 paragraph (1), the execution of Liability is divided into 2 (two) types, namely:

a) Parate executie

Direct execution of collateral objects bearing a Liability if the debtor is fail to perform, the holders of material guarantees with the promise to sell on their own power can carry out their rights directly without going through the decision of judge or notary's grosse deed. Provisions regarding Parate Executie can be seen in Article 6 of Liability Law, that is if the debtor is fail to fulfill the promise, the first Liability holder has the right to sell the Liability Object on his own power through a public auction and take the repayment of the debt and proceeds the sale.

Based on the provisions of Article 6, it can be seen that "the granting of parate executie is by law (ex lege), with the aim of and to strengthen the position of creditors of the Liability holders and parties who obtain the rights thereof. Right of execution in Parate executie is asserted in an agreement by the parties as outlined in the Liability Transfer Certificate. Uncertainty in the implementation of Parate executie can cause losses to the debtor and creditor, especially in terms of overunning cost and execution time which are increasingly delayed. Looking at this, a clear regulation is required to ensure Parate executie to be carried out directly without interference from the court.

b) Title executie

The execution power from the contents of Liability Certificate is clearly stated in Article 14 paragraph (3) of Liability Law, as follows:

1) has an executive power similar to a court decision that has obtained permanent legal force
2) applies as a substitute for hypotheek groosse acte as far as land rights are concerned.

Execution through Title executie is based on general explanation number 9 of Liability Law and explanation of Article 26 of Liability Law where it is said that the execution is regulated in Article 224 of the updated Indonesian Regulation (HIR) and Law number 258 of Reglement Procedural Law for regions outside Java and Madura (RBg). Provision of execution as in Article 224 HIR and Article 258 RBg is the execution intended for the grosse of debt recognition certificate. Therefore, the execution is subject to the implementation of a court decision, which must be carried out at the order of the head of the district court. Because of that, it can be said that the execution procedure with Title executie must be through the grant and order of the head of the district court (Fiat the Head of the District Court) and followed by public autions.

The public auction procedure on guarantee of Liability both in Parate executie and Title executie is carried out through an auction of execution based on the regulation of the Minister of Finance No. 40 / PMK.07 / 2006 concerning the following instructions for auction.

Executionary auction is an auction to carry out court decisions / stipulations or other documents, which are in accordance with the applicable laws and regulations, similar to that, in order to assist law enforcement, among others: Auction for the committee of execution of the state receivables, Executionary Auction Courts, Tax Executionary Auction, Executionary Auction for Bankrupt Assets, Executionary Aution for the implementation of Article 6 of Liability Law, Executionary Aution that controlled or not controlled by customs duty, Executionary Aution for the implementation of Article 45 of Civil Procedural Code, Executionary Aution for Confiscated objects, Executionary Aution for Findings, Executionary Aution for Fiduciary, and Executionary Aution for Mortgage pawns.

In addition to public auction sales, sales can be done under the hands as in Article 20 paragraph (2) of Liability Law, namely "On the agreement of the giver and the Liability holder, the sale of the Liability object can be carried out under the hand if it will obtain the highest price that benefits all parties."

Selling through public auctions usually costs too high and the selling price of Liability objects is low, resulting in losses for the creditor, then the bank often organizes underhand sales in order to obtain the highest price which approved by the Bank and the debtor. However, underhand sales are difficult to organize because usually the debtor who has been declared or has experienced unsuccessful credit refuses to meet the Bank as its creditor.

j. Execution of Liability Guarantee Objects on Bankrupt Debtor According to Liability Law

Liability Execution in bankruptcy can be done through 2 (two) ways, namely:

a) Execute separately

Separate executions are executions that carried out as if there was no bankruptcy. Bankruptcy and DDPO Law provides an opportunity for Separatist creditors to freely exercise their separatist rights and authority in executing their collateral. The provision is as in Article 55 paragraph (1) of Bankruptcy and

DDPO Law which reads: "by continuing to pay attention to the provisions referred to in Article 56, Article 57, and Article 58, each creditor, pawn holder, Fiduciary guarantee, Liability, Mortgage, or collateral right over materials or other objects can exercise their rights as if there was no bankruptcy." However, in bankruptcy, there was a suspension of executions of separatist rights in which Article 56 paragraph (1) states: "the right of execution as referred to in Article 55 paragraph (1) and the rights of third parties to claim assets which are in the possession of bankrupt debtors or curators are suspended for a period no later than 90 (ninety) days from the date the decision on the bankrupt statement was issued."

b) Sold along with bankrupt assets (boedel) by the curator
After passing the period of 2 (two) months after the insolvention, then, according to Article 59 paragraph (2) of Bankruptcy and DDPO Law, in which Separatist creditor is still unable to sell the collateral, the curator must demand that the collateral be handed over. Henceforth, it is sold according to the method as intended in Article 185 of Bankruptcy and DDPO Law without reducing the right of the creditor as the right holder to the process of sales on the collateral. The provision implies that the sales of Liability object is along with all bankrupt assets (boedel) whose sale will be carried out by the curator. In banking practice, banks are often subject to bankruptcy applications which directly propose the appointment of a curator to the judge, so that the sale of liability objects is also fully authorized to the curator.

The philosophy of the literature review on Liability according to Liability Law is to provide guarantees certainty to creditors, that the money that has been owed to the Debtor is safe, which means that there is certainty that the money is not lost, but there are collateral objects which can be disbursed / executed by the Creditors when the Debtor is default. This is in line with the theory of legal certainty and legal protection, which in essence, the law must be definite in accordance with the rules and must provide legal protection to the community. Thus, the laying of General Confiscation is generally found in all of debtor's assets which declared bankrupt by the court, and or who have been sentenced to defer the obligation to pay debts, according to the author is too excessive. Thus, the law can give a sense of justice to both the Debtor and Creditors.

4. Conclusions and Suggestions

4.1 Conclusions

The position of debtor in the engagement generally still has power over all his assets in the sense that the debtor can still sell or transfer his assets freely, except if the assets are burdened with liens, while in the bonding of bankrupt debt, the Debtor loses that right, because the principle of bankruptcy is a general seizure of all Debtor's assets, thus the Debtor loses the right to organize and manage the asset. The Authority of assets management is under the authority of the curator appointed by judiciary decision, which is under the supervision of the supervisory judge, until the bankrupt asset (boedel) release is complete. While the position of creditors remains capable of carrying out legal actions. And the creditor is in accordance with his position, meaning that there are Separatist Creditors, Preferent Creditors, and Concurrent Creditors.

Considering the position of the curator as the party that plays a very important role in the bankruptcy process in the form of management to bankrupt debtor's assets for the distribution of receivables from each existing creditor, then in carrying out their duties, the curator must have no conflict of interest either with the debtor or creditor so as not to harm one party.

4.2 Suggestions

Changes to the rules or principles of bankruptcy law need to be carried out to be not prioritizing DDPO as a means to provide debtors with the opportunity to repay their debts, conduct debt restructuring and make their business work again. The bankruptcy law must hold that bankruptcy is the last resort before the debtor takes the DDPO procedure first. Therefore, DDPO should not be requested but for the sake of the law "must" be given by the court in every filed bankrupt application before the court itself imposes a bankrupt decision on the debtor. Creditors and courts should put forward the aspects of business feasibility and good faith in the debtor and cooperatively with creditor as an effort to get approval for the peace plan in DDPO.

References

Arto, A. Mukti, *Mencari Keadilan (Kritik dan Solusi Terhadap Praktik Peradilan di Indonesia),* (Yogyakarta: Pustaka Pelajar, 2002), Pg. 28-29.

Asikin, Zainal, *Hukum Kepailitan dan Penundaan Pembayaran di Indonesia,* (Jakarta: Rajawali Pers, 1991), Pg. 24.

Assegaf, Ibrahim, *Hasil Survei Kurator dan Pengurus: Harapan Praktisi, Makalah disampaikan Lokakarya Kurator*. Jakarta: 2002, pg. 71.

Hoff, Jerry, *Indonesia Bankruptcy Law, Undang-Undang Kepailitan di Indonesia*, translation by Kartini Muljadi,

Jakarta: PT. Tata Nusa, 2000, pg. 181.

Juwana, Hikmahanto, *Hukum Sebagai Instrumen Politik: Intervensi Atas Kedaulatan Dalam Proses Legislasi di Indonesia.* Delivered during Academic Oration in the 50th Anniversary of the Law Faculty of North Sumatera University on 12 January 2004.

Mannan, Bagir, *Mengenal PERPU Kepailitan dalam Penyelesaian Utang Piutang melalui Pailit atau Penundaan Kewajiban Pembayaran Utang*, Bandung: Alumni, 2001, pg.78.

Mertokusumo, Sudikno, *Mengenal Hukum (satu pengantar),* (Yogyakarta, Liberty, 1986), pg. 16.

_____, *Penemuan Hukum***,** 5th edition, (Yogyakarta: Universitas Atma Jaya, 2010), pg. 74.

Muljadi, Kartini, "*Kepailitan dan Penyelesaian Utang Piutang*", in Rudhy A Lontoh, (ed). *Penyelesaian Utang Piutang melalui Pailit atau PKPU*, Bandung: Alumni, pg. 168.

_____, *Pengertian dan Prinsip-prinsip Umum Hukum Kepailitan,* in Rudhy A. Lontoh, et.al *Penyelesaian Utang piutang Melalui Pailit atau Penundaan Kewajiban Pembayaran Utang,* Bandung: Alumni, 2001, pg. 186.

Syahdeini, Sutan Remy, *Undang-Undang Kepailitan: Dalam Persfektif Hukum, Politik dan Ekonomi,* Paper presented in a discussion concerning Bankrupcy Law in the perspectives of Law, Politics, and Economy" that organized by F-KP DPR-RI, on 7 May 1998, Jakarta.

Situmorang, Victor M., and Hendri Soekarso. *Pengantar Hukum Kepailitan Indonesia*. Jakarta: Eka Cipta. 1993, pg. 79.

Sjahdeini, Sutan Remy, "*Hukum kepailitan*". Jakarta: Pustaka Utama Grafiti. 2002, pg. 210-211.

Yuhassarie, Emmy, and Sri Muriyani. Jakarta: *Penyempurnaan Undang-undang kepailitan* . 2003, pg. 72.

Suyudi, Aria, and Herni Sri Nurbayanti, *Kepailitan di Negeri Pailit*. Jakarta: Center of Law and Policies Studies in Indonesia. 2004, pg. 70.

Wignjosumarto, Parwoto, *Peran dan Hubungan Hakim dengan Kurator/Pengurus serta Permasalahan dalam Praktik Kepailitan PKPU*. Jakarta:2002, pg.129.

Laws and Regulations

Law Number 37 Year 2004 concerning Bankruptcy and Deferment of Debt Payment Obligation. Supplementary of State News, in State Gazette

Law Number 4 Year 1998 concerning the Establishment of Government Regulation in Lieu Law Number 1 Year 1998 concerning Changes in Bankruptcy Law (State Gazette Year 1998 Number 135), referred as Bankruptcy Law 1998.