



Reconstruction of individual guarantor regulations for postponement application of debt payment obligations based on justice values

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Abstract

The uncertainty of the legal position of individual guarantors in the application process for Postponement of Debt Payment Obligations has given rise to differences in interpretation, especially the provisions of Article 254 of the Bankruptcy Law and Postponement of Debt Payment Obligations. This research aims to understand and analyze the weaknesses of individual guarantor regulations in requests for postponement of current debt payment obligations and to reconstruct individual guarantor regulations based on justice values. This research uses a post-positivism paradigm with a juridical-empirical approach by examining primary and secondary data by finding legal realities experienced in the field and qualitative description methods. The results of the research and discussion show that the regulation of individual guarantors in requests for postponement of debt payment obligations is not based on the value of justice due to weaknesses in legal substance where there are multiple interpretations of Article 254, there is no legal protection for banks with individual guarantors. Weaknesses in the legal structure consist of differences in legal interpretation by judges regarding classification. Law on individual guarantors who can apply for Postponement of Debt Payment Obligations. Not all avocados understand the substance of submitting a request for Postponement of Debt Payment Obligations which results in the request for Postponement of Debt Payment Obligations being rejected. Banks/creditors misunderstand the request for Postponement of Debt Payment Obligations. Weaknesses in legal culture include banking not implementing the principle of prudence in analyzing collateral as security for banking credit agreements, bad faith by debtors in paying debts, the absence of a database based on electronic technology information regarding which companies have applied for Postponement of Debt Payment Obligations and bankruptcy. To reformulate the values of justice in the Bankruptcy Law and Suspension of Debt Payment Obligations, what the author offers is the creation of a balance of justice rights between stakeholders, namely debtors, guarantors, creditors and the public, through Article 254 of Law No. 37 of 2004 concerning Bankruptcy and Postponement Debt Payment Obligations so that Article 254 becomes 2 paragraphs, namely (1) Postponement of debt payment obligations does not apply to the benefit of fellow Debtors and guarantors. (2) The insurer as intended in paragraph (1) does not apply to insurers who have waived their privileges.

Keywords: Individual guarantor, bankruptcy, value of justice

Introduction

The development of national Law is a form of realizing a legal system that leads to the national interest. In terms of the national interest, namely the growth and development of laws that should empower the wider community. To support the development of the national Law, it is necessary to have deliberation and various inputs in the formation of new laws and to review whether existing legal products are still relevant for use today. Especially legal products that are used to support national economic development. The legal product must be based on the values that exist in society as well as the values that grow and develop in the culture of the Indonesian people (Sabrina & Nuriskia, 2021) ^[1].

Legal certainty in the constitution of the Republic of Indonesia has been mandated through Article 28-D paragraph (1) of the Constitution of the Republic of Indonesia which states that "Everyone has the right to recognition, guarantees, protection and fair legal certainty as well as equal treatment before law".

The meaning of legal certainty stated in the staatsfundamentalnorm underlies the principle of the rule of law which provides the meaning of legal certainty in the formation of laws and regulations including the formation of Law no. 34 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations which must be based on the principle of legal certainty to create clarity on the norms that will be applied to parties. stakeholders, especially between debtors and creditors.

In legal transactions (especially contract law), there are at least two parties who are bound by the legal relationship, namely the creditor and the debtor. Each party has rights and obligations that arise from that relationship, namely achievements, and counter-achievements, giving, doing and not doing something, or what the law calls an onderwerp object (Kurniati, 2021) ^[7].

In principle, the whole concept of a guarantee is divided into two, general guarantees (jaminan umum) and special guarantees (jaminan khusus). General guarantees are regulated in Article 1131 of the Civil Code, which generally states that "all movable and immovable assets belonging to the debtor, both existing and future, serve as collateral for the debtor's individual agreements" Based on this, it can be understood that all the debtor's assets can be used as collateral for the debt (Ramadhania, 2023) ^[8].

Postponement of Debt Payment Obligations is regulated in Articles 222 to Article 294 of Law no. 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations. This PKPU is closely related to the debtor's inability to pay (insolvency) his debts to creditors (Resmini, Sakban, & Resmayani, 2020) ^[2].

The provisions of Article 254 of the Bankruptcy Law and Suspension of Debt Payment Obligations explain that an individual guarantor (bail) is not permitted to be petitioned together with the main debtor as the respondent for Postponement of Debt Payment Obligations because, in the process of Postponing Debt Payment Obligations, there has

been no confiscation of the debtor's assets. It was also explained according to Hadi Subhan, that in general principle, the aim of postponing debt payment obligations is restructuring to achieve peace, while bankruptcy aims at settlement or confiscation so that the legal consequence of bankruptcy is general confiscation while postponing debt payment obligations is not yet included in the realm of settlement or general confiscation. General confiscation is referred to in Article 1131 of the Civil Code, which regulates that all the debtor's property, both movable and immovable, both existing and new, will be borne by all individual obligations.

In its implementation, the Bankruptcy Law experienced several shortcomings which resulted in the reduction of the principles contained in the bankruptcy norms themselves. One of the shortcomings in question is that the definition of debt is not explained, giving rise to many interpretations that lead to legal uncertainty. On October 18, 2004, the Bankruptcy Law was repealed and replaced with Law Number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations which is expected to overcome the deficiencies contained in the Bankruptcy Law (Kenting & Parulian, 2022) [3].

Bankruptcy should be taken as a last resort to settle debts between debtors and creditors. In other words, bankruptcy should be the ultimate medium or the last resort, not the premium medium or the first resort for settling these debts. What must be done first is to reorganize the debtor's debts and then go through bankruptcy if an agreement to reorganize is not reached or the reorganization fails to be completed midway (Hengky, Priyo, & Amboro, 2021) [4].

Bankruptcy is a condition where an individual or company is experiencing a decline in the economic sector which results in delays in debt and business payments. According to Article 1 point 1 of the Law on Bankruptcy and Suspension of Debt Payment Obligations, it is: "a general confiscation of all assets of a bankrupt debtor whose management and settlement are carried out by a curator under the supervision of a judge or supervisor as regulated in this law." As a form of the debtor's inability to pay debts to creditors, he is declared bankrupt by the local court at the request of the debtor and creditor. "Bankruptcy is a situation where the debtor is unable to make payments on the debts of his creditors" (Nisa, 2019) [5].

The consequences of a bankruptcy decision for creditors are that the creditors' positions are the same (*paritascreditorum*) and because they have the same rights to the results of the execution of the bankruptcy court according to the size of their respective claims. However, there are exceptions for creditor groups who hold collateral rights over the existence and creditor groups whose rights take precedence. Other laws and regulations and Law No. 37 of 2004 introduced a new institution, namely the suspension of the creditor's execution rights, the suspension is carried out for a maximum period of 90 days from the date of the decision. a bankruptcy declaration was made (Anisah & Suarti, 2022) [6].

The actualization of these provisions occurred in the Decision on the Case of Postponement of Debt Payment Obligations No. 212/Pdt.Sus-PKPU/2019/PN. Niaga. Jkt. Pst, where PT. Asia Pacific Fortuna Sari as the main debtor has an individual guarantee (bail) Eddy Setiawan for the guarantee of repayment of his debts to his creditor PT. Permata Bank, Tbk. and PT. Jtrust Investments Indonesia.

In this case, the Commercial Judge decided to reject with a rational decision that with the inclusion of Eddy Setiawan as guarantor as the respondent for Suspension of Debt Payment Obligations at the same time as the main debtor, the process of completing the Suspension of Debt Payment Obligations/restructuring will not be simple. However, in Indonesia itself there are still differences in interpretation in practice regarding the provisions of Article 254 of the Bankruptcy Law and Suspension of Debt Payment Obligations, PKPU Case Decision No. 146/Pdt.Sus-PKPU/2017/PN. Niaga. Jkt. Pst. namely PT. Mimi Kids Garmindo as the main debtor has an individual guarantee (bail) as collateral for repayment of his debts, namely Wiharja Setiawan to his creditor PT. Bank Nusantara Parahyangan, Tbk. In the case of Postponement of Debt Payment Obligations, the applicant placed Wiharja Setiawan as the respondent for Postponement of Debt Payment Obligations II and his wife Paula Yusuf as respondents for Postponement of Debt Payment Obligations III together with PT. Mimi Kids Garmindo as the main debtor/respondent for Postponement of Debt Payment Obligations I. In contrast to Decision 212, the Commercial Judges Panel granted the case for Decision 146 even though there was a personal guarantee in the process of Postponing Debt Payment Obligations. The ratio decidendi on which the decision was based was still granted because according to the Commercial Judges Panel, Wiharja Setiawan firmly stated that he had waived his privileges as guarantor. Therefore, it has been proven that he has a debt to the applicant, as well as to Paula Yusuf who is also responsible for the debt from Wiharja Setiawan because of the joint assets and he has agreed to the Deed of Declaration as Guarantor.

The difference in interpretation of the two decisions above regarding whether or not a personal guarantee can be applied for Postponement of Debt Payment Obligations at the same time as the main debtor then creates uncertainty for the position of the guarantor (bail) in the process of Suspension of Debt Payment Obligations which is requested simultaneously with the main debtor. Based on these things, the author wrote a journal regarding the Legal Certainty of Individual Guarantors (bail) in the application for Postponement of Debt Payment Obligations. This author's research examines the theory, doctrine, and legal principles regarding individual guarantees (bail) in the process of Postponing Debt Payment Obligations, as well as concern the main focus of this research is legal certainty regarding the formulation of norms in the Bankruptcy Law and Suspension of Debt Payment Obligations which are integrated with provisions related to guarantees in the Civil Code.

Thus, in the author's opinion, it is appropriate for legal practitioners to understand the interpretation and meaning of Article 254 of the Law on Bankruptcy and Suspension of Debt Payment Obligations, as well as making legal norms in determining legal position as well as legal certainty for personal guarantors (Bail) which is applied for simultaneously with the main debtor, or even Article 254 of the Law on Bankruptcy and Suspension of Debt Payment Obligations can be reformulated and the formula will not cause uncertainty (uncertainty) which in the end will cause the lack of strictness of the law itself. Based on the problem, the author raised the writing of a dissertation with the title

"Reconstruction of Individual Guarantor Regulations in Requests for Postponement of Debt Payment Obligations Based on Justice Values".

Based on the background above, the formulation of the problem in this study is:

1. What are the weaknesses in individual guarantor regulations in requests for postponement of debt payment obligations at this time?
2. How is the reconstruction of individual guarantor regulations in applications for postponing debt payment obligations based on justice values?

Method of research

The research type used in writing this paper is qualitative research. Writing aims to describe a society or a certain group of people or a description of a symptom or between two or more symptoms.

The approach method used in this research is Empirical-Juridical (Ibrahim, 2005)^[9], which is based on the norms of law and the theory of the existing legal enforceability of a law viewpoint as interpretation.

The sources of research used in this study are:

1. Primary Data is data obtained from information and information from respondents directly obtained through interviews and literature studies.
2. Secondary Data is an indirect source that can provide additional and reinforcement of research data. Sources of secondary data in the form of Primary Legal Material and Secondary Legal Materials and Tertiary Legal Material.

In this study, the author uses data collection techniques, namely literature study, interviews, and documentation where the researcher is the key instrument which is the researcher himself who plans, collects, and interprets the data (Moleong, 2002)^[10].

The method used to analyze the problems in this research is by elaborating on legal materials (secondary data) with reinforcement from primary data obtained by researchers from interviews with selected sources. Primary data collection was carried out using field research, both interviews and observations (Sakundiana, 2023)^[11].

The specification of this legal research is in the form of analytical descriptive research. Descriptive means that the researcher in analyzing wants to provide an overview or explanation of the object of his research. Primary data collection was carried out by observation (direct observation) and interviews with several informants in this study. In terms of observation observation is an activity carried out by researchers in the context of collecting data by observing the phenomenon of a certain community at a certain time as well. This primary data is also through interviews with several sources. Deep interview (interview) is the process of obtaining information for research purposes using question and answer while face to face between interviewers and informants or interviewees, with or without using guidelines (guide) interviews, where interviewers and

informants are involved in social life for a relatively long time (Widodo et al, 2023)^[12].

Research result and discussion

1. Weaknesses of Individual Guarantor Regulations in Requests for Postponement of Debt Payment Obligations

The weaknesses in individual guarantor regulations in requests for postponement of debt payment obligations are currently divided into 3 (three) parts, namely substance, structure, and legal culture. These three components are based on Legal System Theory (Lawrence M. Friedman), namely:

a. Weaknesses of Legal Substance

1. Multiple interpretations of Article 254 of Law No. 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations.

This aspect of legal substance is related to the multiple interpretations of Article 254 of Law No. 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations. The provisions of Article 254 of the Bankruptcy Law and Suspension of Debt Payment Obligations explain that individual guarantors (borscht) are not permitted to apply together with the main debtor as respondents for Postponement of Debt Payment Obligations, because in the process of Suspension of Debt Payment Obligations, there has not been confiscation of the debtor's assets.

It was also explained according to Hadi Subhan, that in general principle, the aim of postponing debt payment obligations is restructuring to achieve peace, while bankruptcy aims at settlement or confiscation so that the legal consequence of bankruptcy is general confiscation while postponing debt payment obligations is not yet included in the realm of settlement or general confiscation. General confiscation is referred to in Article 1131 of the Civil Code, which regulates that all the debtor's property, both movable and immovable, both existing and new, will be borne by all individual obligations.

1. There are no legal norms that regulate legal protection for banks with individual guarantors

To obtain just legal certainty, the harmony and interrelationship between one sub-system and another is a link in a single chain. Every problem in one subsystem will have an impact on other subsystems. Likewise, reactions that arise as a result of errors in one sub-system will have repercussions on other sub-systems.

Based on the research results, it can also be seen that as the guarantor, borg cannot be tied to material guarantees, for example, mortgage rights over one's property. Based on the provisions of Article 1820-1821 of the Civil Code, the characteristics of a guarantee agreement are additional agreements that accompany the main agreement. The basic agreement made by the guaranteed, in this case, the debtor and the recipient of the guarantee (bank as a creditor) is the basis for making a bank guarantee. The rights that arise from a guarantee are contractual and not material rights. So

the position of the creditor in this case is preferential, the guarantor cannot be presumed and the guarantor is the target after the debtor.

While the debtor breaches the promise, the Guarantor who has bound himself is obliged to pay the debtor's debt to the Creditor. Creditors directly charge the Guarantor to fulfill their obligations as a Guarantor. The creditor can charge directly to the Guarantor if in the Guaranty agreement (bail) The guarantor has resolutely relinquished the special right in the form of the right to demand that the debtor's assets be confiscated and auctioned first.

b. Weaknesses of Legal Structure

1. Judge

The judge's passive authority and lack of understanding in applying the principle of balance in providing legal protection to individual guarantors, which is reflected in differences in legal interpretation

2. Lawyer

In principle, an advocate's job is to provide advice and defense in the broadest sense according to the law to his client, however, in carrying out his role, not all avocados understand the substance of submitting a request for Postponement of Debt Payment Obligations which results in the request for Postponement of Debt Payment Obligations being rejected.

3. Bank (Creditor)

It is misguided to request a Postponement of Debt Payment Obligations by Banks/creditors, indeed creditors are allowed to apply for a Postponement of Debt Payment Obligations, but usually, the party requesting a postponement of paying debts is the debtor. It becomes funny if the person who owes the debt asks if the receivable is not paid immediately. Moreover, debtors know their financial condition better than creditors.

c. Weaknesses of Legal Culture

1. Banks do not apply the principle of prudence in analyzing collateral as security for banking credit agreements.
2. The debtor's bad faith in paying the debt.
3. There is no database based on electronic technology information regarding which companies have applied for Postponement of Debt Payment Obligations and bankruptcy.

2. Reconstruction of Individual Guarantor Regulations in Requests for Postponement of Debt Payment Obligations based on Fair Value

The reformulation of the value of justice in Bankruptcy Law and Postponement of Debt Payment Obligations has a wider scope, both in terms of norms, material scope, and the process of settling debts. The reformulation of the value of justice offered by the author is the creation of a balance of justice rights between stakeholders, namely debtors, guarantors, creditors, and the public, through Article 254 of Law No. 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations, namely the confirmation of the status Guarantor who has waived his privileges resulting in him becoming the same as the Debtor or only being included in the phrase confiscation of assets.

So that the guarantee agreement can also be carried out with certainty and the guarantor can also be protected from losses caused by Debtors and Creditors. By ensuring that the basic understanding of the Guarantor is certain, differences in legal interpretation will be avoided among practitioners, experts, and judges.

Before being reconstructed, Article 254 of Law No. 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations explained that "Postponement of debt payment obligations does not apply to the benefit of fellow Debtors and guarantors." The weakness of Article 254 is that when referring to Article 254 Law Number 37 of 2004 regarding Bankruptcy and Postponement of Debt Payment Obligations, it is indeed stated that Postponement of Debt Payment Obligations does not apply to the benefits of fellow Debtors and guarantors. The question is, is it true that Article A quo intends to strictly limit personal/corporate guarantees that cannot be drawn in the Postponement of Debt Payment Obligations? On the one hand, there are a lot of verdicts Postponement of Debt Payment Obligations who have decided on personal guarantees and corporate guarantees entered as respondents in the Postponement of Debt Payment Obligations. So what are all the verdicts? Postponement of Debt Payment Obligations which involves personal guarantee dan corporate guarantees considered contrary to the Bankruptcy Law and Postponement of Debt Payment Obligations. Can the judge's narrow discretion play a role in interpreting the provisions of Article 254? After reconstruction, it became: "Article 254 (1) Postponement of debt payment obligations does not apply to the benefit of fellow Debtors and guarantors; (2) The insurer as intended in paragraph (1) does not apply to insurers who have waived their privileges.

The implication is that there is a norm of difference between guarantors that can be drawn upon in requests for postponing debt payment obligations to ensure that there is no misinterpretation by law enforcers. Article 254 strictly limits the guarantee criteria that can be used to postpone debt payment obligations.

Before it was reconstructed, the explanation of Article 254 was quite clear, but the weaknesses were not explained regarding the position of the guarantor, so it needed to be reconstructed with "Explanation of Article 254. The special rights given by law to the role of individual guarantors, namely: 1. The right to sue first; 2. The right to share debts; 3. The right to file a lawsuit; and 4. The right to be dismissed from coverage.

With the release of the special rights, the guarantor is made as legal reasoning to submit a legal action requesting the Postponement of Debt Payment Obligations to the commercial court.

Conclusion

Based on the discussion of the problems above, it can be concluded that:

1. Weaknesses in the regulation of individual guarantors in applications for postponement of debt payment obligations consist of first, weaknesses in legal substance where there are multiple interpretations of Article 254 of Law Number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations, there is no legal protection for banks with individual guarantors, secondly, Weaknesses in Structure The law consists of differences in legal

interpretation by judges regarding the legal classification of individual guarantors who can apply for Postponement of Debt Payment Obligations. Not all avocados understand the substance of submitting a request for Postponement of Debt Payment Obligations which results in the request for Postponement of Debt Payment Obligations being rejected. Banks/creditors misunderstand the request for Postponement of Debt Payment Obligations. Third, the weaknesses of legal culture include banking not implementing the principle of prudence in analyzing collateral as security for bank credit agreements, bad faith by debtors in paying debts, the absence of a database based on electronic technology information regarding which companies have applied for Postponement of Debt Payment Obligations and bankruptcy.

2. Reconstruction of individual guarantor regulations in requests for postponing debt payment obligations based on justice values, namely first, reformulation of justice values in the Bankruptcy Law and Suspension of Debt Payment Obligations which has a wider scope, both in terms of norms, material scope, as well as the process of settling debts and receivables, reformulation The value of justice offered by the author is the creation of a balance of justice rights between stakeholders, namely debtors, guarantors, creditors and the public, through Article 254 of Law No. 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations, namely the confirmation of the status of Guarantor who has waived his privileges. resulting in him becoming the same as the Debtor or only being included in the phrase confiscation of assets. So that the guarantee agreement can also be carried out with certainty and the guarantor can also be protected from losses caused by Debtors and Creditors. By ensuring that the basic understanding of the Guarantor is certain, differences in legal interpretation will be avoided among practitioners, experts, and judges. Second, the reconstruction of norms was carried out on Article 254 along with its explanation in Law Number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations, so that Article 254 became 2 paragraphs, namely (1) Postponement of debt payment obligations does not apply to the benefit of fellow Debtors and guarantors. (2) The insurer as intended in paragraph (1) does not apply to insurers who have waived their privileges. Explanation of Article 254, namely the special rights granted by law to the role of individual guarantors, namely: 1. The right to sue first; 2. The right to share debts; 3. The right to file a lawsuit; and 4. The right to be dismissed from coverage.

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