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COMPARISON OF LAWS FOR SETTLING DEBT REMAINING BANKRUPTCY BETWEEN INDONESIAN AND DUTCH COUNTRIES

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Abstract

Legal products applied in Indonesia are legal products of Dutch heritage. Many of these legal products are no longer able to accommodate the legal needs of today's society. Therefore, it is necessary to reform the law, one of which is in the field of bankruptcy law. In the Netherlands, bankruptcy law has undergone a development of one regarding the settlement of debtor's remaining debts. The aims of this research is to know the legal differences in the settlement of debtor debts between Indonesia and the Netherlands, a legal comparison is needed. The method of research is legal comparison carried out by means of descriptive analysis by using a statue approach, comparative approach, conceptual approach, and historical approach. The difference in settlement of remaining debt applied in Indonesia and in the Netherlands is influenced by differences in normalized principles in bankruptcy laws in each country. Indonesia which normalizes the debt collection principle has the consequence that the remaining debt will continue to follow the bankrupt debtor until the debt is paid in full. This is different from the settlement of the remaining debt in the Netherlands that normalizes the principle of debt forgiveness, which in this principle of debt forgiveness, which in this principle the payment of the remaining debtor debt is given a maximum period of 5 years. In that period the debtor is still not able to pay off the remaining debt, the debtor can be terminated by a judge so that the debtor will be free from the remaining debts.

Keywords: Bankruptcy; legal comparison; principle; the completion of the residual debt

1. INTRODUCTION

Bankruptcy is inseparable from the inability of the debtor to fulfill its obligations to pay off the remaining debts to creditors. Bankruptcy law is a legal product that is made to provide a way out for a debtor who is experiencing financial difficulties (financial distress) so that creditors do not continue to be billed, and at the same time give creditors access to the remaining debtor assets as repayment of the debt even though it is not fully repaid (Retnaningsih, 2017). The main purpose of bankruptcy is to divide the debtor's assets to his creditors by the curator after the bankruptcy decision (Retnaningsih, 2017). Efforts that can be made by creditors to recover their receivables, can be done through a bankruptcy process by using the agency's forced efforts to resolve bankruptcy decisions issued by the commercial court (Sihotang, Atmadja, & Sukihana, 2018).

In resolving bankruptcy in a country, of course it varies, this is influenced by the legal system adopted by the country. Like the Indonesian state that embraced the civil law system, which still applies the law, many still use laws that are a legacy of the Dutch colonial era. In the development of law in Indonesia, it also cannot be separated from the influence of Dutch laws, one of which is in the case of bankruptcy law.

Indonesia has Law Number 37 of 2004 concerning Bankruptcy and Postponement of Obligations of Debt Payments, State Gazette of the Republic of Indonesia of 2004 Number 131, Supplement to the State Gazette of the Republic of Indonesia Number 4443 (hereinafter referred to as Law Number 37 of 2004) which regulates bankruptcy issues. Bankruptcy is defined in Article 1 number 1 of Law Number 37 of 2004 as, "Bankruptcy is the general seizure of all the assets of Bankrupt Debtors whose management and settlement is carried out by the Curator under the supervision of the Supervisory Judge as stipulated in this Law". A debtor will only be said to be bankrupt if he has been decided bankrupt by the commercial court (Makmur, 2016). The legal consequence of a person being declared bankrupt is that the debtor's assets are placed under the general stay (automatic stay) which causes the debtor to be unable to control his assets (Assalmani, Asyhar, & Priyono, 2018). Bankruptcy law in force in Indonesia is a form of further implementation of the principle of parity creditorium and the pari passu prorate parte principle in the legal regime of wealth (vermogentsrechts).

The principle of creditorium parity is a form of equality of position of the creditors, which determines that the creditors have the same rights to all debtor property. If the debtor cannot pay the debt, the debtor's assets are targeted by creditors (Shubhan, 2012). Whereas what is meant by the principle of pari passu prorate parte is that wealth is a joint guarantee for creditors and the proceeds must be distributed proportionally between them, except if there are those creditors who according to the law must take precedence in accepting their bill payments (Shubhan, 2012). The principle adopted in the PKPU UUK is a reflection of the principles contained in Article 1131 and Article 1132 of the Civil Code (here in after referred to as KUHPdt). The principle of creditorium parity is reflected in Article 1131 KUHPdt, while Article 1132 KUHPdt reflects the principle of pari passu prorate parte. The use of these principles is in accordance with the general explanation on PKPU UUK, which states that bankruptcy will not release a person declared bankrupt from the obligation to pay his debts. So that means, the debt held by the bankrupt debtor will continue to follow until it is possible for the debtor to be bankrupt more than once.

The application of this principle in PKPU UUK certainly has its own legal consequences, because the debtor will be forever followed by the debt until the debt is paid off and there is no clear time period until the debt will follow even though the debtor really does not have the ability to pay his debt. As a country which is a legal reference country for Indonesia, the Netherlands has experienced legal developments, especially regarding bankruptcy. Initially the Netherlands used the Code de Commerce as a legal regulation governing bankruptcy issues, but for the bankruptcy law several times have changed and now the Netherlands uses the Netherlands Bankruptcy Act/ Faillissement or generally known as the Dutch Bankruptcy Act. In the development of this legal rule, of course, it will change some of the previous rules including the settlement of the payment of the remaining debt if the bankruptcy decision has ended. Seeing the development of the law in the Netherlands, especially regarding bankruptcy, there will be a difference in the settlement of the remaining debt if the bankruptcy decision has ended. With the similarity of the legal system adopted between Indonesia and the Netherlands, differences in principles in the law, especially the legal rules regarding bankruptcy, of course have their advantages and disadvantages. Based on the comparison of the development of bankruptcy law, it will be more emphasized on the provisions of bankruptcy requirements in Indonesia and in the Netherlands and the differences in the remaining settlement of bankrupt debtors in Indonesia and the Netherlands.

2. METHOD

This research will be conducted using a type of normative juridical research, which means that research is carried out by examining existing literature such as legislation, related books, and dictionaries or encyclopedias (Soekanto & Mamudji. S, 2009). This approach was carried out with the intention that researchers get information from various aspects of the issue being tried to find answers (Marzuki, 2013). From several approaches, in this study the type of approach that will be used is the regulatory approach, comparative approach, historical approach and conceptual approach. In conducting this research using 3 (three) sources of legal material, namely, primary legal materials, secondary legal materials, and tertiary legal materials. The source of primary legal material is legal material that is binding in nature such as legislation. The sources of primary legal material in this study include: Civil Code; Law Number 37 of 2004 concerning Bankruptcy and Delay of Obligation to Pay Debt, State Gazette of the Republic of Indonesia of 2004 Number 131, Supplement to the State Gazette of the Republic of Indonesia Number 4443; and The Netherlands Bankruptcy Act/Faillissement Swet/Ducth Bankruptcy Act. Whereas secondary legal material is supporting legal material from primary legal materials such as books, scientific works, internet articles and expert opinions that are assembled with a comparison of applicable laws between applicable laws in Indonesia and those prevailing in the Netherlands specifically regarding remnants bankrupt debt debtor. As well as tertiary legal material which is a material that can provide instructions and/ or an explanation of primary legal materials and also secondary legal materials such as legal dictionaries and encyclopedias. The legal material collection techniques used in this study by systematically recording material that supports the comparison of applicable laws between applicable laws in Indonesia and those prevailing in the Netherlands, especially regarding the settlement of debts of bankrupt debtors obtained through literature studies. The legal material analysis techniques used are description, systematization, interpretation, and argumentation.

3. RESULT AND DISCUSSION

Provisions on Bankruptcy Requirements in Indonesia and in the Netherlands

History of the Development of Bankruptcy Law in Indonesia and in the Netherlands

The regulation on bankruptcy prevailing in Indonesia has existed since the time of the Dutch East Indies Government which has been stipulated in Verordening op. Faillissement en de Surseance van Betaling de Europeanen di Nederlands Indie (Faillisements Verordening/FV) applicable based on Staatsblad Nomor 217 Tahun 1905 juncto Staatsblad Nomor 348 Tahun 1906. At the time before Indonesian independence, Faillisements Verordening only applies to Europeans, this was because at that time the principle of legal discrimination applied by the Dutch Government was in charge at that time. After Indonesia's independence, there were no changes in legal regulations specifically regarding bankruptcy because Indonesia adopted laws that were inherited from the Dutch.

The development of bankruptcy law in Indonesia was initially encouraged due to the monetary crisis in 1998 which resulted in disruption of national monetary stability. This monetary crisis has had a bad influence on the national economy, thus causing major problems for the business community in resolving their debt obligations to continue their activities and have a detrimental impact on the Indonesian people (Sinaga & Sulisrudatin, 2016). Business actors who act as debtors are hampered in carrying out their obligations to creditors in the case of payment of debts that are due (Kurniawan, 2018). As a result of this crisis situation, International Monetary Fund

(IMF) urging the Indonesian government to make changes to bankruptcy law as a means of resolving bankruptcy problems that surround national and multinational companies in Indonesia. The IMF felt that the bankruptcy regulations used by Indonesia at that time, which were a legacy of Dutch government, were inadequate and could not meet the demands of the times (Khair, 2018).

Until finally the Indonesian government in power at that time revoked the implementation of Verordening Faillisements because it was deemed no longer in line with the needs and development of community law regarding the settlement of accounts payable and later issued a Government Regulation in Lieu of Law No. 1 of 1998 concerning Amendments to Laws. Law concerning Bankruptcy, State Gazette of the Republic of Indonesia Number 87 of 1998 (hereinafter referred to as PERPU Number 1 Year 1998), which subsequently by the House of Representatives (DPR) was ratified and ratified into Law of the Republic of Indonesia Number 4 of 1998 concerning Substitution of Government Regulations Law Number 1 of 1998 concerning Amendments to the Law on Bankruptcy into Law, State Gazette of the Republic of Indonesia of 1998 Number 7 (hereinafter referred to as Law Number 4 of 1998).

The enactment of Law No. 4 of 1998 turns out to have weaknesses in its implementation, it is seen that this law does not provide a definite definition of the concept of debt which causes a multiple interpretation of the definition of debt, debtors, and creditors. This uncertainty in the law will of course result in legal uncertainty in practice. This condition prompted the government to carry out legal reform specifically regarding bankruptcy settlement, so that on October 18, 2004 Law No. 37 of 2004 was born concerning Bankruptcy and Delay of Obligation to Pay Debt. The birth of Law Number 37 Year 2004 realized 2 (two) important articles concerning guarantees in the KUHPdt namely Article 1131 and Article 1132. Changes to PKPU UUK were carried out by repairing, adding to and eliminating provisions which were deemed not in accordance with needs and developments law in society (Kapero, 2018).

As with Indonesia, the Netherlands has already had bankruptcy regulations that had been in force since 1811. At first the Dutch bankruptcy law was regulated in Kode de Commerce, which in this rule of law distinguishes status between traders and non-traders. Bankruptcy law first changed which one in 1838 Kode de Commerce switch to Wetboek van Koophandel Nederland. Furthermore, the rule of law was replaced with Faillissementswet 1893 which was the Dutch bankruptcy law and entered into force on 1 September 1896. Faillissementswet 1893 no longer distinguish between traders and not traders, and this rule applies to everyone without exception. To date Faillissementswet is still used in resolving bankruptcy issues in the Netherlands, but the Dutch bankruptcy law which is currently generally known as Dutch Bankruptcy Act has undergone various changes but in essence remains the same. Dutch Bankruptcy Act consists of three (3) chapters governing bankruptcy procedures and applies to individuals and legal entities.

Provisions on Bankruptcy Requirements in Indonesia

The requirement that a debtor be bankrupt has been determined in Article 2 Paragraph (1) of Law Number 37 of 2004. Bankruptcy requirements are one form of benchmark for the court that will determine the bankruptcy of the debtor, which this condition will determine whether the application submitted by this debtor or creditor has fulfilled the requirements to determine the bankrupt debtor. Seeing based on the provisions of Article 2 Paragraph (1) of Law Number 37 Year 2004, it can be concluded that the

requirement for a bankruptcy statement against a debtor in the filing is (Sjahdeini, 2016):

The debtor for whom the applicant is submitted must have at least two creditors, or in other words must have more than one creditor.

The debtor does not pay off at least one debt to one of his creditors.

Unpaid debt must be due and has been collected (*due and payable*).

The provisions in Article 2 Paragraph (1) are one of the results of changes in bankruptcy law from the specific provisions concerning bankruptcy requirements stipulated in Article 1 Paragraph (1) *Faillisments Verordeing*. Pasal 1 Ayat (1) *Faillisments Verordening* menentukan, "*De schuldenaar, die in den toestand verkeert dat hij heeft opgehouden te betalen, wordt, hetzij op eigen aangifte, hetzij op verzoek van een of meer zijner schuldeischers, bij rechterlijk vonnis in staat van faillisment verklaard*". It can be interpreted, "any debtor who is unable to pay his debt who is in a state of repaying the debt, either at his own request or at the request of a creditor or several creditors, can be made a decision by the judge stating that the debtor concerned in bankruptcy" (Sjahdeini, 2016).

When comparing the sound of Article 2 Paragraph (1) of Law Number 37 Year 2004 with the sound of Article 1 Ayat (1) *Faillisments Verordening* dapat there is a difference in the condition that a debtor can be filed bankrupt. According to Article 1 Paragraph (1) *Faillisments Verordening,* a debtor can be declared bankrupt in a situation where the debtor is unable to pay his debt and is in a state of paying off debt. This article does not specify clearly whether the debtor must have more than one creditor to be declared bankrupt such as Article 2 Paragraph (1) of Law Number 37 of 2004. Based on Article 1 Paragraph (1) *Faillisments Verordening* even though a debtor has only one creditor, the debtor can already be declared bankrupt by the court either based on the application submitted by the debtor himself or by the debtor as long as the debtor is unable to pay his debt (*financially unable to repay his/her debts*) and has been in a condition to stop paying its debt (*insolvent*).

Provisions for Bankruptcy Requirements in the Netherlands

According to Chapter I Article 1 *Dutch Bankruptcy Act* (Dutch bankruptcy law) a person is declared bankrupt at the time, "*A debtor who is in a situation where he has stopped to pay his due and demandable debts shall be declared bankrupt by court order, rendered either upon his own request or upon the request of one or more of his creditors"*. Continued in Article 2 *Dutch Bankruptcy Act* mention that, "*The bankruptcy order may also be rendered for reasons of public interest or upon the request of the Public Prosecution Service*". If freely translated, it can be interpreted as a debtor who in his condition has stopped paying debt which should and must be declared bankrupt by a court decision, given at his own request or at the request of one or more creditors. Bankruptcy decisions can also be given for reasons of public interest or at the request of the Public Prosecutor.

According to the in depth description *Dutch Bankruptcy Act,* if a debtor wants to file a bankruptcy application against himself, then he must provide a reasonable reason that he is no longer able to pay off his debt. This also happens if the creditor submits the request, so he must be able to prove the same thing. In the event that a creditor submits a bankruptcy application to his debtor, he cannot simply submit the fact that the debtor has failed to pay the debt to him once that is due. So the creditor must look for other creditors whose debts also fail to be paid in time, this will be supporting evidence for the judge before deciding a debtor is declared bankrupt.

In order for a debtor to be declared bankrupt, there are several formal requirements that must be met as stated in Article 4 *Dutch Bankruptcy Act*. Article 4

regulates concerning *formal requirements for a request for a bankruptcy order*. Based on the provisions of article 4 *Dutch Bankruptcy Act* it can be seen that there are a number of formal requirements that are met for individuals, people who have been bound by marriage and those who are bound to a registered business entity. Fulfillment of the above conditions, and the reasons submitted are reasonable reasons, it is possible for a debtor to be declared bankrupt by the judge. The bankrupt decision given by the judge will have legal consequences for all property owned by the bankrupt debtor.

Difference in Debt Settlement for Bankrupt Debtors in Indonesia and in the Netherlands

Settlement of Remaining Debt for Bankrupt Debtors under Indonesian Law

PKPU UUK which is used as a guideline in debt receivable settlement is one of the legal products that adheres to several principles of bankruptcy. The principle of bankruptcy which is formulated in the PKPU Law is the principle *paritas creditorium,* priciple of *pari passu prorata parte,* principle of *structured prorata (*principle of *structured creditors*)*,* principle of *debt collection,* and territorial principles and universal principles. According to principle *paritas creditorium* (equality of position of creditors) determine that each creditor has the same rights to all property owned by the debtor, if the debtor is no longer able to pay the remaining debt, the assets owned by the debtor will be the repayment of the debtor's remaining debt. In essence the principle *paritas creditorium* this implies that all assets owned by the debtor in the form of movable or immovable objects or assets that have existed or will be in the future will be bound to the settlement of debtor obligations (Sjahdeini, 2016).

The principle of *pari passu prorata parte* means that the assets of the debtor are a form of mutual guarantee for creditors, where the results must be distributed proportionally, except among those creditors who according to the law must take precedence in accepting payment of the bill (Sjahdeini, 2016). The principle of *structured prorata* is a complementary principle of the principle of *parity creditorium* and the principle of *pari passu prorata parte*. The principle of *structured prorata* or the principle of structured creditors is a principle that classifies and groups various types of creditors according to their respective classes. Especially in bankruptcy, creditors are classified into three namely separatist creditors, preferred creditors, and concurrent creditors (Sjahdeini, 2016). These three principles are intertwined in accordance with the philosophy of the bankruptcy law, namely as the institution in terms of liquidating the wealth of bankrupt debtors who have more than one creditor, so that their creditors do not fight each other either legally or illegally so that creditors to get their rights in the form of repayment of their receivables. This philosophy is also reflected in the general explanation of PKPU UUK which determines that with the decision of a bankrupt statement it is expected that the debtor's bankruptcy assets can be used to repay all debtor debts fairly and evenly and equally.

In addition to the principles described above, there is one principle that binds the bankrupt debtor to the remaining debt until the debt is paid in full, namely the debt collection principle. The previous Dutch bankruptcy law system strongly emphasized this principle, which is the bankruptcy law adopted by Indonesia so that the bankruptcy law prevailing in Indonesia contains the principle of debt collection. Basically, this principle has the meaning as a form of revenge on creditors against bankrupt debtors by collecting claims against debtors for debtors' assets (Sjahdeini, 2016). This debt collection principle is a principle that emphasizes the mechanism of distribution of debtor property carried out by the curator (Rahayu & Pemayun, 2018). This principle

emphasizes that debts from debtors must be paid with assets owned by the debtor as soon as possible to avoid the bad faith of the debtor by hiding and infusing all of his property which is actually a general guarantee for his creditors (Shubhan, 2012). The implementation of this principle can be seen clearly in the explanation of PKPU UUK which determines that bankruptcy will not free someone who has been declared bankrupt from the obligation to pay the debt. Then it can be seen that the bankruptcy process in accordance with PKPU UUK will not free the debtor's remaining debts even though all debtor assets have been used as repayment, which means the remaining debt will become debts to be paid and will continue to follow the bankrupt debtor until paid in full.

Remaining Settlement of Debt Bankrupt Debtors According to Dutch Law

The Dutch Bankruptcy Act which is currently used by the Netherlands as a legal rule in resolving bankruptcy problems has developed. The principle of parity creditorium and the *pari passu prorata parte* principle are still used in Dutch bankruptcy law. The principle of debt collection which was once contained in the Dutch Bankruptcy Act, is now no longer used and prioritizes the principle of debt forgiveness. The debt collection principle is not normalized anymore because it is considered unfair to the bankrupt debtor, in which the debtor is completely unable to pay his debt.

The previous Dutch Bankruptcy Act strongly emphasized the principle of debt collection, this can be seen from the bankruptcy process carried out by collateral *(conservatoir beslaglegging)* and the application for bankruptcy statements is a form of unusual collection procedure *(oneigenlijke incassoprocedures)*. This legal effort is said to be unusual because this effort is used as a means of pressure *(pressie middel)* to force fulfillment of obligations by debtors (Shubhan, 2012). It can be said that this principle in Dutch bankruptcy law is used as a means to force the realization of the rights of creditors through a process of liquidation of the debtor's assets. The development of the idea that the Dutch Bankruptcy Act only considers the interests of creditors without protecting the interests of debtors, then the principle of debt collection begins to be abandoned and shifts to the principle of debt forgiveness.

The principle of debt forgiveness implies bankruptcy is not an institution of defamation to bankrupt debtors or is a means to suppress, but can also be used as a tool to alleviate the burden borne by debtors who are in financial difficulties that can not afford to carry out the remaining debt with an initial agreement and can even give forgiveness to the remaining debts so that the remaining debt will be deleted (Shubhan, 2012). The principle of debt forgiveness has been fixed on the Dutch Bankruptcy Act which can be seen in the provisions of the Title III Debt Repayment Scheme for Natural Persons (Chapter III Debt Payment Scheme for People) in Article 349a Paragraph (2).

Based on the provisions in the article, it is seen that in the debtor's bankruptcy settlement is given a period of 3 (three) years since the decision to order the implementation of the debt repayment scheme is granted, but can be extended to 5 (five) years for the entire debt repayment process. If within 5 (five) years the remaining debt remains, the payment process can be stopped based on a court decision. In Article 350 Paragraph (3) letter g, it is determined that, "A term is referred to as paragraph 1 may be ordered if: . the debtor makes it seem that it is not able to comply with the debt repayment Scheme ". In the event that the debtor is truly unable to pay his debt after payment of 5 (five) years, the repayment process for the bankrupt debtor's debt can be stopped. The judge will decide that the bankruptcy process has ended and the debtor has gone bankrupt declared bankrupt so that the remaining debts of the debtor will be forgiven and the debtor

will no longer have the obligation to pay the remaining debts.

Comparison of Remaining Settlement of Debt Bankrupt Debtors under Indonesian Law with Dutch Law

Indonesia is a country with many national laws adopting Dutch heritage laws. One of the products of the Dutch heritage law that is still used by Indonesia is KUHPdt, besides that Indonesian bankruptcy law is also a Dutch heritage law but has undergone several changes. The development of law in Indonesia is not as advanced as the development of law in the Netherlands, many legal products in the Netherlands have developed according to the legal needs of their communities. Especially for bankruptcy law, the Netherlands used the *de Commerce Code*, which was later replaced by Wetboek van Koophandel Netherlands. After that, it changed again with the birth of Faillissementswet 1893.

Faillissementswet 1893 was the first bankruptcy arrangement owned by Indonesia adopted from the Netherlands. After Faillissementswet 1893 was deemed incapable of accommodating the needs of the Indonesian people for bankruptcy law, then Indonesia made a number of changes to date, the one that applies in Indonesia is PKPU UUK. The development of bankruptcy law in Indonesia did not in fact leave the principles of inheritance Faillissementswet 1893. The principle of creditorium parity, the principle of pari passu prorata parte, the principle of structured prorata (principle of structured creditors), the principle of debt collection, and territorial principles and universal principles are still reflected in PKPU. Another case is the development of bankruptcy law in the Netherlands, where the principle of debt collection has been abandoned and begins to normalize the debt forgiveness principle.

The difference in principle in PKPU Law and the Bankruptcy Act has different legal consequences, especially in settling the remaining debts of bankrupt debtors. PKPU UUK which regulates the debt collection principle has a legal consequence that the debts of the bankrupt debtor will continue and there is no clear time period until the debtor's debt is paid in full to the creditors. It is different from the Ducth Bankruptcy Act which normalizes the debt forgiveness principle which if within 3 (three) years and a maximum of 5 (five) years the debtor is completely unable to pay the remaining debt, the bankruptcy process can be deemed based on the judge's decision. The termination of the bankruptcy process will free the bankrupt debtor for the remaining debts, so that after being declared bankrupt by the judge the debtor will be able to restart his life (fresh starting).

4. CONCLUSION

Based on the discussion previously described, it can be concluded that Based on the PKPU Law, a debtor can be declared bankrupt if the debtor has more than one creditor who does not pay off at least one debt that is due and can be collected. According to the Ducth Bankruptcy Act, a debtor can be filed bankrupt if the debtor has debts to more than one creditor who does not pay off at least one debt that has matured and in bankruptcy filing must be included with a reasonable reason that he is no longer able to pay off his debt. As well as the comparison of the legal settlement of debts of bankrupt debtors in Indonesia and in the Netherlands, it can be seen from the period of debt settlement. In accordance with PKPU UUK, the remaining debts of the bankrupt debtor will continue to follow the debtor until he is able to pay off all of his debts and there is no clear time limit for the debtor how long the debt settlement process will end if he has truly been unable to pay his debt. Another case in the Netherlands, in accordance with the Dutch Bankruptcy Act which determines if it exceeds 5 (five) years, the bankruptcy process can be stopped with a court decision accompanied by logical reasons why the debtor is unable to pay his debt.

After the process, the debtor will be declared bankrupt and he will be free from the remaining debt he should pay.

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