



# JURIDICAL ANALYSIS OF NOVASI IN SETTLING DEBTS OF DEBTORS WHO EXPERIENCE INSOLVENCY IN INDONESIA

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## ABSTRACT

Insolvency is a state of the debtor's inability to fulfill its debt payment obligations which is normatively the basis of the bankruptcy mechanism in Indonesia. In the midst of the dominance of settlement through bankruptcy and Suspension of Debt Payment Obligations (PKPU), Indonesian civil law actually provides another alternative through the novation mechanism as stipulated in Article 1413 of the Civil Code. This study aims to analyze the position of novation as a mechanism for settling debts of debtors who experience insolvency and identify juridical obstacles in its application according to positive Indonesian law. This research is normative legal research with a legal and conceptual approach. The results of the study show that novation has legitimacy as a legitimate debt settlement mechanism outside of bankruptcy and PKPU, and can function preventively by removing old debts and replacing them with new engagements so as to prevent debtors from fulfilling the element of "due and collectible debts" as referred to in Article 2 of the UUKPKPU. However, the implementation of novation faces internal obstacles in the form of the legal terms of the agreement, the risk of loss of collateral, the ability of the debtor, and the potential for the cancellation of the novation due to defects in the old agreement. External barriers were also found in the form of the risk of cancellation through *actio pauliana*, as well as the absence of explicit provisions regarding novation in the UUKPKPU. Thus, although juridically novation has a legitimate position as a debt settlement mechanism, the effectiveness of its application to insolvent debtors is still limited by Indonesia's bankruptcy legal structure.

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## 1. INTRODUCTION

As a developing country, Indonesia has an active role in developing various aspects of life, including in building the nation's economy. This cannot be separated from the role of the community that has contributed to improving the economy in Indonesia through various business and business activities. In running this business or business, business actors need large capital to meet their operational needs so they need financial assistance from other parties or financial institutions.

It is undeniable that creditors have an important role in financing activities and the provision of funds, especially for business actors. However, often debtors neglect to fulfill their obligations according to the agreed time, causing losses for creditors.

The inability of the debtor to pay off all of his debts is called insolvency. From an economic perspective, insolvency is a situation when the amount of a debtor's obligations exceeds the value of all the assets he owns. Based on Article 57 paragraph (1) of Law Number 37 of 2004 concerning the Law on Bankruptcy and

Suspension of Debt Payment Obligations (hereinafter referred to as the UUKPKPU), what is meant by insolvency is the state of inability to pay. Such inability to pay includes a condition where the debtor has made payments once or several times, but has not paid all his obligations, or has paid the principal of his debt but has not paid the interest that is part of it.

The condition of inability to pay the entire debt or state of insolvency is essentially the heart of bankruptcy. Debtors who are in a state of insolvency can be declared bankrupt if the authorized party files an application for a declaration of bankruptcy, which subsequently has an impact on the liquidation of all of the debtor's assets.

The Indonesian legal system provides a mechanism for bankruptcy and Suspension of Debt Payment Obligations (PKPU) through Law Number 37 of 2004. Bankruptcy is basically a general confiscation of all debtors' assets which are then divided under the supervision of the commercial court with the aim of providing legal certainty for creditors and ensuring that debt settlement is carried out fairly and proportionately. Meanwhile, PKPU provides an opportunity for debtors to submit a peace plan in the form of debt restructuring, which can allow debtors to continue their business activities.

However, in practice, the bankruptcy process is often the more dominant path, while PKPU often ends in failure if the peace plan is not approved by the majority of creditors. This condition raises questions about the extent to which positive law in Indonesia really provides space for other alternative mechanisms in debt settlement.

On the other hand, Indonesian civil law recognizes a concept called novation. Based on Article 1413 of the Civil Code (KUHPdata), the engagement can be deleted due to debt renewal (novation). Novation is a new agreement between debtors and creditors that replaces an old agreement. With the occurrence of novation, the old alliance is abolished and replaced by a new alliance agreed upon by the parties.

When associated with bankruptcy, novation has the potential to be an alternative debt settlement that allows debtors and creditors to renew debt agreements without having to go through a lengthy litigation process in commercial court. Through novation, debtors can avoid bankruptcy status by making new agreements that are more realistic and in accordance with their financial capabilities, while still obtaining legal certainty. The urgency of this research lies in the importance of reviewing the relevance of novation as an alternative to debt settlement in the midst of increasing cases of default and bankruptcy in Indonesia. Based on the description above, the author feels it is important to examine in depth the position of novation in the settlement of insolvent debtors' debts. The title chosen was "Juridical Analysis of Novasi in Settling Debts of Insolvent Debtors in Indonesia".

### **Problem Formulation**

- a. What is the position of novation as a mechanism for settling debts of debtors who experience insolvency according to positive law in Indonesia?
- b. What are the juridical obstacles in the implementation of novation as an alternative to settling debts of debtors who are insolvent?

## **2. RESEARCH METHODS**

This research includes normative legal research by examining secondary legal materials such as laws and regulations, legal literature, expert doctrine, and court decisions. This research is descriptive because it aims to provide an overview of the application of the concept of novation in the settlement of debtors who experience insolvency. The approach in this study includes a statute approach used to examine the rules of law and regulations that govern novation and insolvency in the Indonesian legal system. The research data sources consist of primary legal materials such as the Civil Code and Law No. 37 of 2004, secondary legal materials such as books and journals, and tertiary legal materials. Data collection was carried out through literature studies and internet media searches. All data are analyzed qualitatively to draw relevant conclusions.

## **3. RESULT AND ANALYSIS**

### **The Position of Novasi as a Mechanism for Settling Debts of Insolvent Debtors According to Positive Law in Indonesia.**

In Indonesia's positive legal framework, the position of novation is in the general civil jurisdiction sourced from the Civil Code, so this mechanism can basically be used by debtors who experience insolvency as long as there is no bankruptcy judgment. This is because before the debtor was declared bankrupt by the commercial court decision, the legal relationship between the debtor and the creditor was still completely in the private realm so that the parties remained free to renew the agreement through novation.

In the context of the UUKPKPU, the bankruptcy requirements as stipulated in Article 2 paragraph (1) affirm that the debtor is declared bankrupt if it has two or more creditors and does not pay at least one debt that has matured and can be collected. Novation has the potential to eliminate the element of "debt that is due and collectible" because the old covenant is considered to have been removed and replaced with a new covenant that contains different maturity terms. Therefore, normatively novation can function as a preventive mechanism that delays or even prevents the fall of debtors into bankruptcy. This places novation as an agreement-based debt

restructuring instrument that remains valid to be used outside the PKPU and bankruptcy mechanisms, as long as it does not conflict with the provisions regarding the protection of creditors and does not harm third parties.

Novation is one of the legal instruments that functions to delete or terminate an agreement by creating a new agreement that replaces the old one. In the context of civil law, novation is also referred to as debt renewal, which is a legal process in which the old agreement is abolished because it is replaced with a new agreement agreed upon by the parties.

Based on Article 1414 of the Civil Code, it is stated that "Debt renewal can only be carried out between persons who are capable of entering into alliances." This provision emphasizes that novation is only valid if it is carried out by parties who have legal ability to act in an agreement. So if the person who does the novation is not capable of making an alliance, then the novation can be canceled.

According to the Civil Code, the implementation of novation can be carried out in three ways, namely:

a. Objective novation

Objective novation occurs when an existing alliance is replaced with a new one. Objective forms of novation can be carried out through:

- 1) Replacement or change of the content of the agreement, which is when the debtor's obligations to a certain achievement are replaced by other achievements. For example, the obligation to pay a certain amount of money is replaced by the obligation to hand over certain goods.
- 2) Changing the cause of the alliance. For example, compensation on the basis of unlawful acts is converted into debts and receivables.

b. Subjective-passive novation

In passive subjective novation, the debtor is replaced by another debtor. The replacement can occur in two ways, namely:

- 1) *Expromissie*, which is the replacement of an old debtor by a new debtor without the help or involvement of the original debtor.
- 2) *Delegatie*, which is a replacement made on the basis of an agreement between the old debtor, creditor, and new debtor. In this case, without the consent of the creditor, the change of the debtor cannot be carried out.

c. Subjective-active novation

In active subjective novation, the creditor is replaced by another creditor. The change is always based on the agreement of three parties (tripartite), because the debtor must declare his willingness to be bound by the new creditor.

The legal conditions for novation follow the general provisions regarding the validity of an agreement as stipulated in Article 1320 of the Civil Code, namely:

- a. Agree with those who bind themselves.
- b. The ability to make an alliance.
- c. A certain thing.
- d. A halal cause.

By meeting these requirements, novation gains legitimacy as a legitimate legal act in Indonesia's positive legal system. Based on Indonesia's positive legal system, novation has a position as a debt settlement mechanism outside of the bankruptcy mechanism because it allows debtors and creditors to renew their engagements without the need to go through lengthy commercial court proceedings.

This concept is in line with the principle of freedom of contract as stipulated in Article 1338 of the Civil Code which affirms that all legally made agreements are valid as laws for the parties. This means that debtors and creditors can freely agree on debt renewal as long as they meet the legal requirements of the agreement. Munir Fuady stated that "out-of-court debt settlement is a valid form of restructuring as long as it is carried out based on an agreement and does not harm third parties."

Thus, the application of the concept of novation in the context of insolvency can be an alternative legal solution that is relevant and efficient for debt settlement in Indonesia.

### **Juridical Obstacles in the Implementation of Novasi as an Alternative to Debt Settlement of Insolvent Debtors**

In the context of civil law, there is the concept of novation as a form of abolition of engagement. Based on Article 1413 of the Civil Code (KUHPerdata), the engagement can be deleted due to debt renewal (novation). Novation is a new agreement between debtors and creditors that replaces an old agreement. With the occurrence of novation, the old alliance is abolished and replaced by a new alliance agreed upon by the parties.

This mechanism basically offers flexibility in settling debts amicably without going through a lengthy litigation process, but its application as an alternative to settling debts of insolvent debtors faces various juridical obstacles. The obstacles in the implementation of novation as an effort to settle debts of debtors who experience insolvency are as follows:

a. Internal barriers

Obstacles to the implementation of novation arise mainly from the subjective and formal requirements inherent in the nature of novation as a new agreement that must meet the standards of a valid agreement according to Article 1320 of the Civil Code. The implementation of the novation requires the existence of a new debtor or creditor who has sufficient credibility, legal ability, and financial capacity and is willing to voluntarily take over the obligations in the engagement, which in practice is often difficult to fulfill. Additionally, novation documentation requires a notarized deed or authentic form to ensure validity, which is time-consuming and expensive. Novation can be a juridical obstacle in settling debts of debtors who experience insolvency because in essence novation removes the old agreement and replaces it with a new one, both objectively and subjectively, thus potentially eliminating the basis for collection and weakening the legal position of the creditor. In addition, in passive subjective novation, creditors lose the right to sue the old debtor if the new debtor, then goes bankrupt or is legally incompetent, unless expressly agreed, which poses a legal risk to the creditor. The validity of the novation also depends very much on the validity of the re-alliance, so that if the old alliance is null and void or can be canceled, the novation has the potential to be nullified or disputed, creating legal uncertainty.

b. External barriers

Externally, the implementation of the novation requires the firm approval of all creditors, which in practice is rarely achieved due to the potential conflict of interest between them. In addition, novations carried out during the insolvency period are at risk of being canceled by the curator through *actio pauliana* if it is considered detrimental to other creditors, in accordance with the provisions of Articles 41-42 of the UUKPKPU. The absence of explicit provisions regarding novation in the UUKPKPU further strengthens legal uncertainty regarding the effectiveness of novation as a debt settlement mechanism for debtors who experience insolvency.

#### 4. CONCLUSION

Novasi has a legitimate position as a debt settlement mechanism according to the Civil Code and can be used before the debtor is declared bankrupt. Through the principle of freedom of contract, novation allows the replacement of old contracts with new ones so that it can prevent the fulfillment of the element of "debt matures and can be collected" in Article 2 paragraph (1) of the UUKPKPU. Therefore, novation functions as an instrument for debt restructuring outside PKPU and bankruptcy as long as it does not harm creditors.

The application of novation faces internal and external obstacles. Internal obstacles include the legal terms of the agreement, the inability of the insolvent debtor to meet new achievements, the risk of loss of collateral, and the potential for the cancellation of the novation if the old agreement is legally flawed. External obstacles come from the bankruptcy regime, such as the risk of cancellation through *actio pauliana*, the principle of *pari passu pro rata parte*, simple proof that accelerates the bankruptcy process, and the absence of explicit provisions on novation in the UUKPKPU. These factors limit the effectiveness of novation for insolvent debtors.

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