LEGAL CERTAINTY OF BANKRUPTCY ESTATE EXECUTION IN TRANSNATIONAL BANKRUPTCY

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Abstract: Transnational *insolvency* (*Cross-Border Insolvency*) is a situation where a bankruptcy case crosses the territorial boundaries of a country, in which there are foreign elements, namely creditors and their wealth. In accordance with the times, transnational bankruptcy (*Cross-Border Insolvency*) often occurs in Indonesia, but in Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations, the provisions regarding transnational bankruptcy have not provided a clear definition of cross-border bankruptcy settlement. The issue of transnational *insolvency* (*Cross-Border Insolvency*) is closely related to international civil law in relation to foreign elements across national borders. Related to the issue of transnational bankruptcy (*Cross-Border Insolvency*), the bankruptcy law has included provisions regarding the procedures for implementing the decisions of Indonesian courts and foreign court decisions. However, these provisions are considered to be contrary to the territorial principle of a country, and in the end, the administration of bankruptcy assets in transnational bankruptcy cases (*Cross-Border Insolvency*) will be difficult to achieve. This situation will certainly cause concern for business actors in running their business, due to the absence of legal certainty regarding the settlement of transnational bankruptcy (*Cross-Border Insolvency*) in Indonesia

Keywords: Certainty, Execution, Bankruptcy Estate, Transnational.

Introduction

Bankruptcy law dates back to Roman times. the word "*bankrupt*", in English "*Bangkrupt"*, comes from the Italian statute *banca nipta*. Meanwhile, in medieval Europe there was a practice of bankruptcy in which it was practiced to destroy the benches of bankers or merchants who fled secretly with the property of creditors (Usman, 2004).

At present, trade activities are not only limited to within the country, but have denied national boundaries, even one business actor from a country often invests in several countries. Companies that invest in many countries are called multinational *companies* (*multinational companies*) have subsidiaries in several countries that produce components to be assembled in different countries. The same is true for franchising businesses, which today have penetrated into various parts of the country to exploit the world market (Juwana, 2002).

The Association of *Southeast* Asian Nations *(ASEAN)* is a geopolitical and economic organization consisting of all countries in the Southeast Asian region which was founded on August 8, 1967 in Bangkok Thailand, establishing an agreement with the signing of the *ASEAN Declaration* (Bangkok *Declaration*). The *ASEAN* Member States include Indonesia, Malaysia, Singapore, Thailand, the Philippines, Brunei Darussalam, Vietnam, Laos, Myanmar, Cambodia.

The ASEAN Economic Community (AEC) is one of the supporting agreements for the formation of the *ASEAN Community*. As an economic unit in the Southeast Asian region, the ASEAN Economic Community (AEC) was formed with the aim of organizing a common market and basic production, as evidenced by the free movement of goods, services, investment,

and quality labor levels as well as the very free movement of capital goods. Therefore, all issues related to the flow of trade, capital and human resources will be very easily distributed throughout the ASEAN region, business activities such as buying and selling goods, services or even investments are often carried out transnationally.

Transactions between commercial entities across national borders are better known as "*international business transactions*". The issues covered in international commercial transactions are essentially related to international civil law issues relating to commercial activities. Business actors conducting international trade transactions will use the rule of law in accordance with the national laws of two or more countries. One of the areas related to international business transactions is *insolvency*.

The importance of transnational bankruptcy regulations as a solution to various problems of transnational bankruptcy law (*Cross-Border Insolvency*), which ultimately makes most countries strive to form international agreements, especially transnational bankruptcy regulations, including regional organizations, especially the *Association of Southeast Asian Nations (ASEAN)*.

Indonesia, as one of the most influential members of ASEAN, does not yet have a law that can accommodate this cross-border bankruptcy issue. In fact, Article 21 of Law No. 37/2004 on Bankruptcy and Suspension of Debt Payment Obligations (UU-KPKPU) stipulates that bankruptcy covers all assets of the bankrupt debtor and all assets acquired during bankruptcy. Indonesian Bankruptcy Law does not regulate cross-border bankruptcy in detail, either regarding the mechanism or procedure. In UU-KPKPU there are only 3 (three) articles that regulate cross-border bankruptcy as contained in Chapter II, Section Tenth on International Law provisions (Sinaga, 2012).

Regarding the issue of transnational bankruptcy *(Cross-Border Insolvency)*, which in the Law on KPKPU has contained arrangements regarding the enforcement of foreign court decisions and domestic court decisions in handling transnational bankruptcy cases, but the regulation is clearly contrary to the territorial principle of a country, so that in practice it will be difficult to execute assets in the occurrence of transnational bankruptcy. This will certainly create legal uncertainty for business actors regarding transnational bankruptcy *(Cross-Border Insolvency)* in Indonesia.

Literature Review

Bankruptcy is a situation where the debtor is unable to pay the debts of its creditors. Bankruptcy is principally caused because the debtor's business is experiencing *financial distress* related to the business run by the debtor which has experienced setbacks. Bankruptcy is a court decision that results in *public* seizure *(public attachment, gerechtelijke beslag)* of all assets of the bankrupt debtor, both present and future, whose management and repayment are guaranteed by the curator under the supervision of a supervisory judge with the main purpose of using the proceeds from the sale of the bankrupt property to pay off all debts of the bankrupt debtor *pro rata parte*.

Along with the rapid development of the world economy and as a result of the impact of globalization, a business actor, both individuals and legal entities, in conducting business interactions or investments not only within a country's territorial area, but also interacts with business actors in other countries who have different nationalities (across national borders) or in other words involves *foreign* elements. The activities of business actors described as such are included in international business transactions (Rahmawati, 2019).

Transnational *insolvency (cross-border insolvency)* can arise if there is a foreign element in the bankruptcy case, be it a partnership or a legal entity. Basically, transnational *insolvency* (*Cross-Border Insolvency*) occurs if the debtor's assets or debts are located in more than one

country or if the debtor is under the jurisdiction of the courts of two or more countries. In simple terms, cross-border insolvency can be interpreted as one of the insolvency problems in which it crosses the territorial boundaries of a country (Fhadillah et al., 2023).

In the case of transnational bankruptcy (*Cross-Border Insolvency*), the respondent is a party referred to as a debtor who has debts and has fulfilled the conditions as determined by law to be able to file for bankruptcy or PKPU in the Commercial Court, namely there are 2 (two) or more creditors and there are one or more debts that have fallen due and collectible, in this case the debtor can be a local or foreign legal subject (Haq et al., 2023).

The scope of court decisions to be executed in other countries is limited because it clashes with the jurisdiction and territoriality principles applied in the legal systems of various countries. Therefore, the development of international business transactions in various countries is hampered and in the end many international business transaction actors feel that their rights are not guaranteed (Haq et al., 2023).

Regarding the general confiscation of bankruptcy assets due to the occurrence of transnational bankruptcy (*Cross-Border Insolvency*), the UU-KPKPU recognizes the existence of general confiscation of all assets of bankrupt debtors located outside the territory of the Republic of Indonesia. This is in accordance with the provisions in Article 212 which reads; "Creditors who after the bankruptcy declaration is pronounced, take repayment of all or part of their debts from objects included in the bankruptcy property located outside the territory of the Republic of Indonesia, which are not bonded to them with the right to precedence, must reimburse the bankruptcy estate for everything they get". However, in practice, in conducting general confiscation or execution of bankruptcy assets located outside the jurisdiction of Indonesia is not binding.

Furthermore, the provisions of Article 213 paragraph (1) determine that the applicability of Article 212 has legal consequences, namely the obligation to replace the assets of the bankrupt debtor, namely in accordance with the repayment obtained by the creditor as the recipient of the transfer of receivables from assets owned by the debtor located abroad at the time of the bankruptcy decision. The applicability of this article can be implemented if the debtor is declared bankrupt by the commercial court, there is a subrogation of creditors, the party who obtains the repayment is a new creditor, where the repayment is based on the proceeds from the sale or auction of the property located abroad, and the repayment with the debtor's property located abroad is a separate process from the implementation of bankruptcy law in Indonesia so that it is not carried out by the curator (Hutama & Rudy, 2020).

The existence of UU-KPKPU does not explicitly regulate transnational bankruptcy, both materially and formally (settlement, implementation, and recognition of foreign court decisions). In general, the procedural law used in bankruptcy cases as stipulated in Article 229 of the Bankruptcy Law uses the civil procedural law stipulated *in the Herzien Inlandsch Reglement (HIR)*. The provisions in Article 436 *of* the *Herzien Inlandsch Reglement (HIR)* expressly state that foreign court decisions in Indonesia cannot be enforced.

Until now Indonesia does not have an agreement with any country regarding transnational bankruptcy (*Cross-Border Insolvency*), therefore the application of civil procedural law to bankruptcy decisions of foreign courts can only be executed by *relitigation*. *Relitigation* or a lawsuit to resubmit a case that has been decided in a foreign court, then requested and decided again by a court in Indonesia (Larose et al., 2023).

Research Methods

The nature of this research is descriptive analytical. The type of research used is normative juridical. Normative juridical research is research that is aimed at and carried out using a study of laws and regulations and other written legal materials related to this writing (Sunggono, 2002).

In normative legal research methods, namely legal research conducted by examining library materials or secondary materials, the type of data for this research is secondary data (Soekanto & Mamuji, 1985). Secondary data is data obtained from literature studies, consisting of: primary legal materials, secondary legal materials and tertiary legal materials.

To obtain research results that are objective and can be proven correct and can be accounted for the results, the research will use data collection tools. In this study, to obtain the necessary data, data collection tools are used through documentation studies, namely by studying regulations related to research.

After all secondary data is obtained, it will then be sorted out so as to obtain legal materials that regulate then the data obtained will be analyzed inductively-deductively. The choice of this method is so that the normative symptoms that are considered can be analyzed from various aspects in depth and integrated between one aspect and another (Yusrizal, 2017).

Result and Discussion

As for bankruptcy judgments rendered by foreign courts and to be enforced in a country, in principle the question will arise whether the foreign court judgment can be enforced in another country or not. In general, it can be said that most legal systems adopted by many countries do not involve their own courts in enforcing foreign court decisions. This tendency does not only apply to countries that follow the *common law* system.

Bankruptcy law is a national law that only applies in the territory of the legal state concerned, so that the bankruptcy law of a country cannot reach bankruptcy that occurs in other countries. Meanwhile, bankruptcy itself is a court decision that results in general confiscation of all the assets of the bankrupt debtor, both existing and future (Nugroho, 2018).

The refusal to enforce foreign judgments is closely linked to the concept of state sovereignty. A sovereign state will not recognize a higher institution or organization. Unless the state submits voluntarily, considering the court as a tool that exists in a state, it is normal for the court not to enforce foreign court decisions.

The general principles outlined above also apply to bankruptcy judgments of foreign courts. A foreign court's bankruptcy judgment will not be recognized and therefore cannot be enforced by the courts of another country. For example, in Malaysia, bankruptcy judgments of foreign courts will not be recognized and cannot be enforced by courts in Malaysia. The same is true in Indonesia, although the bankruptcy law does not expressly regulate whether or not bankruptcy judgments issued by foreign courts will be enforceable.

Under Indonesian bankruptcy law, it is understood that the commercial court will not enforce bankruptcy decisions of foreign courts. This is because the decisions of the commercial court and the supreme court in handling bankruptcy cases clearly reflect the inconsistent application of the bankruptcy law, which in turn creates legal uncertainty. To date, the commercial court has not gone so far as to impose enforcement actions on parties who do not comply with court decisions, so many debtors have managed to escape bankruptcy.

According to the Indonesian international civil law system, the principle of territoriality is applied in relation to bankruptcy decisions, so that a bankruptcy decision made by a foreign court has no legal effect in the country. Therefore, by applying the principle of territoriality, a person who has been declared bankrupt abroad can be declared bankrupt again in Indonesia.

This also means that bankruptcy verdicts that have been pronounced in Indonesia, only have effects on objects found within the territory of the country itself (Hardjaloka, 2015).

The legal provisions related to transnational bankruptcy regulated in Article 212, Article 213, and Article 214 of the Law on KPKPU adhere to the universal principle, where the application of Indonesian commercial court decisions can be enforced in countries outside Indonesia. However, the universal principle has a weakness, where the implementation of court decisions outside the territory of Indonesia cannot be executed because it is limited by the jurisdiction of each country. Therefore, the provisions regarding the application of the universal principle adopted in these articles contradict the territorial principle adopted in international civil law, which emphasizes that the power of a state is limited by the jurisdiction of each state.

This fact is also due to the fact that there are still many countries that have a very conservative view in implementing foreign court decisions, especially in bankruptcy cases. This is because the principle of territoriality adopted in international civil law emphasizes that the power of a state is limited by the jurisdiction of each state. This situation will ultimately result in the obstruction of international business transactions, which will cause business actors to feel there is a *dead lock* fighting for their rights.

In theory, international civil law is all legal rules and decisions that indicate which legal system applies or what constitutes law, if relations or events between citizens at a certain time show points of connection with the legal systems and rules of two or more different countries in the sphere of power, place, person, and matter (Gautama, 1987). International Civil Law always contains national and transnational elements and the main problems it faces are always transnational (Hardjiwahono, 2006).

In general, the territorial principle has the disadvantage that a plurality of claims must be made to deal with transnational insolvency so that bankruptcy claims must be made in each country where assets or wealth are located. In addition, the territorial principle takes a more pessimistic view that creditors will not ultimately receive their *fair* share (Sjahdeni, 2016).

In some countries a system applies that considers the judgment of the state's own judges in some matters to be universally applicable and conversely foreign court decisions in some matters are limited to certain areas. Some countries that adhere to the principle of *universality* include Germany and Switzerland, while for the United Kingdom the principle of *universality* is adopted only for certain matters outside of foreign judicial decisions, while for immovable property located in the United Kingdom, the principle of *territoriality* applies (Suryana, 2007).

Therefore, to overcome the deadlock that occurred, the *United Nations Commission on International Trade Law (UNCITRAL)* made a breakthrough that allowed a country to recognize and be able to execute bankruptcy decisions issued by foreign courts. This breakthrough is in the form of recognizing a *model law* that allows bankruptcy decisions issued by foreign courts to be executed by the courts of a country. The *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment* is a model law designed to address cross-border ins*olvency* problems that occur in the world and was passed in 1997.

The existence of the *UNCITRAL Model Law* provides important guidance in the preparation of bankruptcy regulations involving several countries. As more countries adopt this legal framework, there will be consistency in the handling of cross-border insolvency cases at the international level. This will certainly have a positive impact on the efficiency of the bankruptcy process involving various countries. Indonesia will also benefit from the application of the *UNCITRAL Model Law* in resolving cross-border insolvency cases (Amalia, 2019).

Given that there are still very few countries that adhere to foreign court bankruptcy decisions to be implemented in their own countries, as an alternative to overcoming these problems, efforts are made to reach agreements between countries. In fact, international

agreements governing the enforcement of foreign court decisions have long been known as the convention *on Juricdiction and Enforcement of Judgements in Civil and Commercial Matters*. By signing the Convention on the Enforcement of Judgments, courts in countries that are signatories to the convention will be able to enforce judgments from other countries.

However, Article 1 of the Convention on the Enforcement of Judgments clearly states that the Convention does not apply to bankruptcy. The provision in Article 1 means that if a country has signed the Convention on the Enforcement of Judgments, it is not obliged to enforce bankruptcy judgments originating from foreign courts.

Recognizing the weaknesses of the Convention on the Implementation of Court Judgments, which ultimately led many countries to want to sign an international treaty that specifically regulates transnational *insolvency* (*Cross-Border Insolvency*). To date, there is no international treaty that specifically regulates cross-border insolvency that can be complied with by any country (universal).

Conclusion

International business transactions have raised complicated legal issues in relation to bankruptcy. Related to transnational *insolvency* (*Cross-Border Insolvency)* regulated in the Law-KPKPU adheres to the universal principle, where the provisions allow Indonesian commercial court decisions to be enforced in countries outside Indonesia. However, in practice, the execution of Indonesian commercial court decisions cannot be carried out because they are limited by the jurisdiction OF each country, which applies vice versa, where foreign court decisions cannot be enforced because they are limited by the jurisdiction of the Indonesian state. The existence of the universal principle adopted in UU-KPKPU is considered contrary to the territorial principle adopted in international civil law, which emphasizes that the power of a state is limited by the jurisdiction of each state. This situation will ultimately result in the obstruction of international business transactions, because business actors feel that there is no legal certainty in the occurrence of bankruptcy in Indonesia.

Bibliography

Amalia, J. (2019). The Urgency of Implementing the UNCITRAL Model Law on Cross-Border Insolvency in Indonesia: Comparative Study of Indonesian and Singaporean Cross-Border Insolvency Law. *Bonum Commune Journal of Business Law*, *2*(2), 170.

Fhadillah, Z., Cholil, N. M. Y. A. A. M., Alfan, M. A., & Aliefia, M. (2023). Problems of Transnational Bankruptcy towards the Management and Disposal of Assets of Bankrupt Debtors. *Jurnal Notaire*, *6*(2), 314.

Gautama, S. (1987). *Introduction to Indonesian International Civil Law*. Binacipta.

Haq, M. H. M., Parmono, B., & Hidayati, R. (2023). Model Law on Cross Border Insolvency in the Ratification of Cross Border Insolvency Legal Arrangements in Indonesia. *Journal of State and Justice*, *12*(2), 126.

Hardjaloka, L. (2015). Cross-Border Insolvency from the Perspective of International Law and Its Comparison with National Instruments in Several Countries. *Jurnal Yuridika*, *30*(3), 487.

Hardjiwahono, B. S. (2006). *Basics of International Civil Law*. Citra Aditya Bakti.

Hutama, I. D. M. A., & Rudy, D. G. (2020). Settlement of Bankruptcy Cases with Bankruptcy Assets Located Overseas. *Acta Comitas: Journal of Kenotariatan Law*, *5*(2), 356–357.

Juwana, H. (2002). *Anthology of economic law and international law*. Lentera hati.

Larose, A., Mahmudah, S., Musyafa, A. A., & Ardani, M. N. (2023). Comparative Juridical Analysis of Transnational Bankruptcy Settlements in Singapore and Malaysia with Settlements in Indonesia. *Law, Development & Justice Review*, *6*(3), 286.

Nugroho, S. A. (2018). *Bankruptcy Law in Indonesia*. Prenadamedia Group.
Rahmawati, R. (2019). Execution of Overseas Debtor Assets in the Resolution of Bankruptcy Disputes. *SASI Journal*, *25*(2), 122.
Sinaga, S. M. (2012). *Indonesian Bankruptcy Law*. Tatanusa.
Sjahdeni, S. R. (2016). *Sutan Remy Sjahdeni, History, Principles and Theory of Bankruptcy Law*. Prenadamedia Group.
Soekanto, S., & Mamuji, S. (1985). *Normative Legal Research (A Brief Overview)*. Rajawali Press.
Sunggono, B. (2002). *Legal Research Methodology (An Introduction)*. Raja Grafindo Persada.
Suryana, D. (2007). *Bankruptcy Law: Bankruptcy of Foreign Business Entities by the Indonesian Commercial Court*. Gramedia Pustaka Utama.
Usman, R. (2004). *Legal Dimensions of Bankruptcy in Indonesia*. Gramedia Pustaka.
Yusrizal, M. (2017). Legal Protection of Land Rights Holders in Land Acquisition for Public Interest. *De Lega Lata Journal*, *2*(1), 117.