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by Levina Yustitianingtyas

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Bankruptcy Boedel Execution Practices in Indonesia

Arnoldi Wachid¹, Levina Yustitiani²

¹Universitas Muhammadiyah Surabaya Faculty of Law, East Java, Indonesia

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Abstract

The ASEAN economic community is one of the pillars of the agreement to form ASEAN. As the integrated economic identity of Southeast Asia, MEA aims to create a single market and production base marked by the free flow of goods, services and investment. A bankruptcy issue crosses national borders arises, when debtors in Indonesia have bankrupt assets abroad. Where the bankruptcy execution process is hampered by existing rules in the country itself, especially in ASEAN, one of the international organizations in the regional level which is one of Indonesia's members, does not yet have regulations that bind its members to the problem of bankruptcy boedel. 1967 UN model law "UNCITRAL cross border insolvency" which aims to be a reference for the resolution of the bankruptcy problem in ASEAN. UNCITRAL is a flexible legal product and can be used as a harmonization of bankruptcy law in ASEAN. The purpose of this paper is to describe about bankruptcy Boedel execution practices.

Keywords: ASEAN; Bankruptcy Boedel; Harmonization; UNCITRAL

INTRODUCTION

Bankruptcy is a property of a body or someone who has been declared bankrupt by a bankrupt estate. The current era is the era of free trade, where trade is not carried out in a country alone, trade in this era can be done outside the region and it is also possible to do it outside the country. In the loan-lending agreement, there are times when the debtor cannot repay the debt so that it can be bankrupt by the creditor. Moreover, the debtor has assets abroad that result in the occurrence of Transnational Bankruptcy.¹

Cross-border bankruptcy does not only occur in Indonesia, in the continents of Asia, Europe, Africa or America, it is also a hot issue. In implementing bankruptcy decisions, there are often differences in state regulations. "Jurisdictional conflict" (differences in the application of laws between one country and another). In cross-border bankruptcy many are found where the Debtor has assets of more than one country, so the place of bankruptcy assets is in a different country than the country where the bankruptcy decision was set. This is often a legal problem when the execution of bankruptcy by the curator, because it is related to the sovereignty of a country to recognize foreign bankruptcy regarding the execution of the bankrupt assets.²

Article 1 of Law Number 37 Year 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations that Bankruptcy covers all the assets of the Debtor at the time the verdict is declared as well

1 Hardjaloka, L. (2015) Kepailitan Lintas Batas Perspektif Hukum Internasional. Yuridika. <https://doi.org/10.20473/ydk.v30i3.1952>

2 Sukiharta, A. (2019). Kewenangan Pengadilan Niaga Dalam Eksekusi Kepailitan. Kertha semaya: jurnal ilmu hukum. <https://doi.org/10.24843/km.2019.v07.i08.p0>

* E-mail : arnold.iseng@gmail.com
Address : Jl. Raya Sutorejo No.59, Sutorejo, Mulyorejo, Surabaya
East Java, 60113, Indonesia

as everything obtained during the Bankruptcy. (see Article 21 of Law Number 37 Year 2004 concerning KPKPU).

From this provision, materially, bankruptcy decisions include all debtor assets both inside and outside Indonesia. Thus the debtor's assets outside Indonesia adhere to the principle of universality.

The state can execute bankruptcy decisions when there is a bilateral or multilateral agreement from that country which makes a legal umbrella. For example, Singapore and Malaysia, where both countries have bilateral agreements regarding bankruptcy, where the two countries regulate bankruptcy across national borders, so that bankruptcy decisions can be executed in Singapore and Malaysia. Multilateral agreements on bankruptcy have also been established in the European Union, so that bankruptcy decisions in EU countries can be directly executed because of the existence of multilateral agreements.³

Overcoming the differences in rules from one country to another, then in the case of bankruptcy across borders there are breakthroughs that are used such as the Model Law issued in the form of UNCITRAL Cross-Border Insolvency, which was used in the European Union and in several countries from 1997.

AFTA (ASEAN free trade area) is a form of freedom of business at the ASEAN level. Foreign entrepreneurs can also do economic business in Indonesia, and vice versa. Sanat business opportunities are especially tight for profit and in the near future can become a business dispute and therefore the need for a legal umbrella.⁴

1. At the ASEAN level, the mechanism and procedure regarding bankruptcy are not yet accommodated. The Bankruptcy and Delay Liability Liability Payment law currently only has three clauses regulating cross-border:
2. Article 212 which regulates the actions of creditors after the bankruptcy decision to take all or part of the receivables from objects and including those outside the territory of Indonesia.
3. Article 213 regulates the actions of creditors that transfer all or part of the receivables to third parties.
4. Article 214 regulates the actions of every person who transfers all or part of the receivables to third parties so that assets are collected overseas.⁵

In running a business, international companies can experience financial problems or can be said bankrupt. For in Indonesia - Asean itself has not yet been set up in the form of rules or regulations what if the bankruptcy case has a foreign element (the debtor or creditor is in 2 or more different countries) in it. There is an issue of international relations law regarding bankruptcy, here the author will explain how the concept of the UNCITRAL cross border insolvency model law can be used in ASEAN, how the regulation of domestic and foreign curators in cooperation in executing bankruptcy loans abroad.

RESEARCH METHODS

Normative juridical research methods, using the statute approach and case approach with the aim of describing the efforts of curators to execute Debtor assets outside the ASEAN region. Problems across national borders are also the point of view in the preparation of this study.⁶

The source of legal material used in this paper is primary legal material (secondary law), secondary legal material (secondary law) and tertiary legal material. The primary legal material used in this study is in the form of laws and international agreements relating to bankruptcy issues. In addition, secondary legal materials such as books related to bankruptcy and research reports on bankruptcy are also used. And also using tertiary legal materials, materials that provide an explanation of primary legal materials and secondary legal materials, such as a dictionary used to define some of the notions related to the subject matter discussed in this study.⁷

3 Wirjono Prodjodikoro, *Asas Hukum Perdata Internasional*, (Jakarta: N.V.VanDorp&Co.,1954), page 140

4 Sutan Remy Sjahdeni, 2016, *Sejarah, Asas dan Teori Hukum Kepailitan*, Premadamedia Group, Jakarta, page 522.

5 Article 212, Jo Article 213, Jo Article 214 UU KPKPU

6 Marzuki Mahmud, Peter, 2016, *Penelitian Hukum*, cet. XII, Kencana, Jakarta.

7 Anwar, K. (2014). Peranan Filsafat Dalam Ilmu Hukum. *Justicia*. <https://doi.org/10.25041/fiatjustisia.v7no3.139>

RESULTS AND DISCUSSIONS

Uncitral Concept

Every business transaction conducted between business actors is inseparable from the regulation of the country. Because of that there needs to be modernization of legal certainty about business rules, especially regarding bankruptcy.⁸

The principle adopted in many countries, the court's decision of a case, especially the bankruptcy problem cannot be implemented in different countries. Refusal of the implementation of the court against the decision, based on Article 264 (1) Bankruptcy law: the enactment of civil procedural law in the commercial court, furthermore Article 436 Rv that foreign court decisions cannot be recognized and cannot be executed in Indonesian courts.⁹

The Uncitral Cross Border Insolvency Model Law was formed by Uncitral (the highest institution of the United Nations which is responsible for modernizing international business regulations). Consisting of 32 Articles which provided guidelines for international bankruptcy in 1997.

In 2017, Singapore amended the Companies Act so that Singapore's bankruptcy law recognizes international bankruptcy with the Uncitral Cross Border Insolvency Model Law. Why Indonesia - ASEAN does not, if indeed this law model provides legal certainty and smooth international business.

In opening this Uncitral Cross Border Insolvency Model Law, in general, had the concept of cooperation between foreign courts and national courts with the authority to engage in bankruptcy, including:

1. There is legal certainty for the trading and investment business networks.
2. The concept of a fair and efficient law, for the benefit of cross-border creditors and debtors.
3. Protection and maximization of debtor assets. Phallalizing rescue of businesses / businesses that have financial problems, thereby protecting investment and preserving employment. (Opening of UNCITRAL Model law)

This legal breakthrough is to encourage cooperation between courts of 2 or more countries, and respect differences between national laws themselves.¹⁰

Admitted the Bankruptcy Process in ASEAN

Different state curators can submit to the national courts of other countries to acknowledge the bankruptcy proceedings in which they are appointed. It is explained in chapter III Article 15 (1) Uncitral concerning the concept of recognition of foreign court proceedings which states that "foreign representatives can submit applications to the court to obtain recognition of the foreign process where the foreign representative is appointed".

Parties to international bankruptcy can be divided into several groups, the debtor as the first party, the creditor as the second party and the court authorized to become the third party.

Delegation between the foreign curator to the third party who resolves the dispute, makes further rules on the problem of bankruptcy itself, in other words this can also be referred to as the delegation from the foreign court to the national court.

- a. Requests for foreign executions also need to fulfill the requirements given by national courts. These requirements are taken into consideration when accepting or rejecting requests for recognition of foreign bankruptcy decisions:
- b. Official copies of court decisions and the appointment of foreign representatives (curators).
- c. A statement describing the court process and the appointment of representatives (curators / management)
- d. If there is no 2 evidence, it can include other evidence that can be accepted and recognized by the court concerned.¹¹

This request also includes a statement explaining the identification of the bankruptcy process that

⁸ Hikmahanto Juwana, Bunga Rampai Hukum Ekonomi dan Hukum Internasional, Jakarta: Lentera Hati, page 291.

⁹ Article 264 (1), Act Number 37 of 2004 concerning Bankruptcy and PKPU

¹⁰ Hardjaloka, L. (2015). Kepailitan Lintas Batas Perspektif Hukum Internasional dan Perbandingannya Dengan Hukum Nasional di Beberapa Negara. Yuridika, 30(3), page 492.

¹¹ UNCITRAL Model Law on Cross-Border Insolvency Opening section.

has been translated into the language of the country concerned. Furthermore, the state has the right to reject recognition of the process of foreign bankruptcy if it is contrary to national law in force in that country.

Since the request for recognition until the request is decided, in an urgent and urgently needed state court a country can ask the foreign representative to protect the assets or interests of the debtor for a while. This can be done if it is in a condition where the debtor's assets because they are urgent / endangering harm the parties concerned.

The Authority to Execute the Bankruptcy Loan

¹⁹ Law number 37 of 2004 concerning Bankruptcy and Delaying Obligations for Debt Payments has 10 principles of bankruptcy, among others.

1. Creditorium parity means that separatist, preferred or concurrent ³ creditors have the same rights without regard to all assets. If the debtor cannot pay, the debt is the target of the creditor.
2. Pari passu prorata parte defines joint collateral assets, and the results are divided proportionally according to the law.
3. Structured prorata means three creditor positions between separatists, preferred and concurrent.
4. The principle of debt which means that the debt of achievement arises as a result of an agreement or as an order of the law and there is a minimum limit of the amount that can be made a request for bankruptcy.
5. Debt collection means liquidation of bankrupt assets which are then distributed to creditors.
6. Debt pooling defines how bankruptcy should be divided among creditors.
7. Debt forgiveness defines bankruptcy as a legal institution, a tool to ease the burden borne by the debtor.
8. Universal principle defines bankruptcy ²² of all the assets of bankrupt debtors, both domestic and foreign.
9. The territorial principle defines a foreign bankruptcy ruling only applies in a country where the ruling of a bankruptcy is handed down and that the ruling of a bankruptcy is not enforced abroad.
10. Commercial exit from financial distress means that the debtor's condition does not have the ability to pay debts due to financial conditions due to a decline in company performance.

Bankruptcy uses the "principle of territoriality" whereby the circumstances of a bankruptcy decision in a foreign court termination have no legal consequences in the national court. Following this principle, a person who has been declared bankrupt abroad cannot be declared bankrupt again in Indonesia, this also means that the verdict of bankruptcy that has been pronounced in Indonesia only has a legal effect on objects in his own territory.¹²

Case example in 2002 Central Jakarta PN Niaga Verdict Number 30 / PAILIT / 2002 / PN.NIAGA / JKT / PST. Decisions of a foreign country can be implemented in a foreign country itself and cannot be implemented at the national level. Indonesia also states that foreign court decisions cannot be directly executed within Indonesia. It also has an impact on foreign bankruptcy decisions.

Article 3 (7) Bankruptcy laws, Foreign Debtors but conducting business in Indonesia, the court that has the authority to decide is a court whose jurisdiction covers the domicile or headquarters of the debtor to conduct his business in Indonesia. What if the foreign debtor does not do his business and or has no assets in the territory of Indonesia? "Chapter I Article 2 Uncitral", the process of foreign court proceedings, namely the court that carries out the process of filing a request for a statement of bankruptcy until the execution of bankrupt assets. This court is determined by the main location or economic activity and location of the majority of debtor assets. The inter-state court of interest will coordinate and then appoint a court that will oversee the process.

Article 4 uncitral "that the court is authorized in bankruptcy across national borders by not limiting the jurisdiction of other courts at the request of a foreign representative".¹³

A state court can execute a debtor bankruptcy bankruptcy in their country even though they have recognized a foreign court process. With this, the law model does not eliminate the authority to execute

¹² Hardjaloka, L. (2015). Kepailitan Lintas Batas Perspektif Hukum Internasional dan Perbandingannya Dengan Instrumen Nasional di Beberapa Negara. Yuridika, 30(3), page 489.

¹³ Article 4 Uncitral Cross Border Insolvency Model Law

debtors' assets in the country. To encourage coordinated decisions, suitable for bankruptcy settlement itself. Thus the creditor and debtor are free to choose which court can execute the bankruptcy case.

The Concept of Bankruptcy

Although there are a number of Asean countries such as Malaysia - Singapore that have signed bilateral agreements on bankruptcy, in practice Asean itself has no regulations governing the procedure for bankruptcy proceedings. There are several articles on UNCITRAL Cross Border Insolvency Model Law that can be taken for the basis of procedural law such as articles 26 (1), 26 (2) and also cooperation between foreign and national courts in article 26:

Article 26 (1) and (2) UNCITRAL concerning foreign courts and or curators:

- a. Curators or administrators are subject to court supervision and collaboration with foreign courts.
- b. Foreign curators / managers who carry out their functions, supervised by the court, have the right to communicate directly with foreign courts or representatives.

Cooperation referred to in article 26 can be implemented:

- a. Appointment of parties to act on behalf of the court.
- b. Communication regarding information deemed important by the court.
- c. Coordination regarding the administration and supervision of assets and the interests of creditors.
- d. Coordination in the process of approval and implementation by the court regarding the trial process.
- e. The country concerned can add cooperation points to a mutual agreement.

The principle of active coordination in Chapter V article 29 UNCITRAL, that the start of a local court process does not prevent or stop the process of a foreign bankruptcy court, but the process of national bankruptcy is given priority status. Among others:

- a. All forms of cooperation assistance must be adjusted and not interfere with the process of local bankruptcy.
- b. If it interferes then the assistance must be reviewed, modified or stopped to maintain the existence of the process of the national bankruptcy court.¹⁴

Provide guidance on cases where creditors are subject to national and foreign court proceedings at the same time, and both courts must carry out active coordination in accordance with Chapter V of Article 9 of the UNCITRAL that the commencement of local litigation does not prevent foreign litigation.

Bankruptcy Banker Executions

After the recognition of foreign bankruptcy and inter-state coordination of inter-court coordination are listed in Chapter V article 9, then the execution of the Boedel outside the country:

- a. Chapter V Article 31 UNCITRAL "Decisions of bankruptcy of foreign courts can be used as evidence that creditors are in a state of bankruptcy". In this case the Court has a strong legal basis for implementing the bankruptcy proceedings.
- b. The party authorized to liquidate the bankruptcy loan is given the authority to act in another country / foreign country.

To solve the problem especially in assets that are abroad provide space for foreign representatives (curators) from abroad where the debtor's assets are located to perform their duties, explained in Chapter II article 12.¹⁵

This article explains when foreign bankruptcy proceedings are recognized, foreign curators can participate in the bankruptcy process and the execution of the bankruptcy loan. So that foreign curators are given procedural or legitimacy to make requests, for example protection, realization and distribution of debt assets and cooperation with foreign parties.

Chapter II Article 13 (1) provides certainty of the legal status of creditors, the law model also guarantees that all foreign and local creditors have the same rights regarding participation in the bankruptcy process.

ASEAN Bankruptcy Law, especially Malaysia and Singapore can overcome bankruptcy issues

¹⁴ Chapter I, article 27 UNCITRAL Cross Border Insolvency Model Law

¹⁵ Chapter II UNCITRAL Cross Border Insolvency Model Law

across borders by making bilateral agreements that are substantially the same as what is offered by the uncitral model law. Uncitral offers a mechanism for resolving cross-border bankruptcy that is modified according to state needs.

Bankruptcy decisions sentenced by foreign courts to be executed in other countries, generally the state will not allow its court to execute foreign court sentences. The rejection is related to the principle of state sovereignty.¹⁶

However, the principle of territoriality can be done through good relations based on the principle of reciprocity (reciprocity). Related to reciprocity, in criminal cases there are already legal rules contained in Law Number 1 of 2006 concerning Reciprocal Legal Aid, but in civil matters including bankruptcy there is no regulation yet.

In this case the Indonesian government should make a law on mutual legal assistance in the case of bankruptcy, this aims to support the process of foreign bankruptcy and also create legal certainty about foreign bankruptcy. If the government makes this regulation, the Indonesian government can easily execute foreign bankruptcy bailouts.

CONCLUSIONS

The Bankruptcy Law in force in Indonesia has three articles governing aspects of international bankruptcy, articles 212, 213 and 214. All three articles talk about the transfer of bankruptcy Boedel in bankrupt assets abroad and the transfer of part or all of the debts owed to third parties. But this law does not regulate the mechanism and procedure of execution if the bankruptcy of bankruptcy is abroad, cooperation across countries and recognition of foreign bankruptcy decisions.

The principle of UNCITRAL's flexibility can make it easier for Indonesia in modifying bankruptcy laws such as Article 15 of UNCITRAL on the recognition of processes and foreign representation. Article 25, 26, 27 UNCITRAL concerning the cooperation of courts and foreign representatives with local courts to formulate a modern ASEAN bankruptcy law.

The principle of reciprocity can apply in Indonesian civil law, by making the legal basis for the application of UNCITRAL. UNCITRAL is also flexible, which means that countries do not have to adopt a law model to request approval or submit an application and moreover, the law model can be modified according to state needs.

There are things that need to be revised of the Indonesia - ASEAN Bankruptcy Law in harmonizing the Uncitral Model Law, by adopting:

- a. Add Article 2 of UNCITRAL concerning the main proceedings of foreign and / or foreign processes.
- b. Article 15 UNCITRAL concerning recognition of processes and representatives of foreign curators. And also about cooperation between foreign courts and national courts.
- c. Article 25, 26, 27 UNCITRAL can be the basis for coordination, execution of bankruptcy bailouts in one country by involving local courts.

There must be legal certainty governing bankruptcy across national borders. So that creditors and debtors are financially sound and guarantee economic activities.

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