



Legal Framework and Creditor Rights in Bankruptcy: Analyzing Property Collateral Protection

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ABSTRACT

*Bankruptcy is a legal process to settle the debts of debtors who are unable to pay their debts. In this process, the rights of creditors holding collateral may be affected. Uncertainty occurs because creditors do not control whether they can execute the collateral themselves or have to wait for the curator's decision. In bankruptcy, property secured creditors face substantial risk of recovering their receivables. Property collateral, such as land and buildings, is often the main collateral to protect creditors' rights. However, complex insolvency procedures and lack of legal clarity often put creditors in a vulnerable position. This research analyzes the existing legal framework and how it protects the rights of secured creditors. Clearer and stronger protections are needed to create legal certainty and maintain financial system stability. This research uses a normative legal approach with statutory and conceptual methods. The results indicated that creditors holding collateral have the right to execute collateral through *parate executie* (direct execution), but are limited by the stay provisions in the Bankruptcy and PKPU Law. The curator can also execute the collateral with the approval of the supervisory judge and creditors. Both creditors and the curator can auction the collateral. In bankruptcy, creditors holding collateral have the priority right to execute the collateral. If the proceeds from the execution are not enough to pay off the debt, the creditor can submit the remaining bills as a concurrent creditor to the curator.*

Keywords: *Bankruptcy, Collateral Objects in the Bank, Separate Creditors*

INTRODUCTION

National legal development must support economic growth in order to achieve fair public welfare in accordance with Pancasila and the 1945 Constitution. Economic growth without appropriate laws can lead to imbalances, so the business world needs legal certainty to support economic development (Asikin, 2018). The bank must be sure that the prospective borrower is able to repay before granting a loan. The bank will evaluate the character, ability, capital, collateral, and business prospects of the prospective borrower. Collateral assessment is very important to anticipate the risk if the borrower fails to fulfill his obligations (Rasjidi & Rasjidi, 2019).

When a bank extends credit to a debtor, it faces business risk. This risk is caused by the possibility that the debtor may not be able to fulfill the installments or repay the loan due to certain undesirable reasons. The longer the credit repayment period, the greater the risk that must be covered by the bank (Marsidah, 2019). The existence of collateral in bank credit agreements is very important to provide legal protection for banks in reducing risk. Collateral ensures that the debtor customer will repay the loan. According to Article 8 of Law No. 10/1998, confidence in the customer's ability to repay its obligations is an important factor for banks. Before granting credit, banks assess collateral with the precautionary principle to reduce the risk of default (Menteri Negara Sekretaris Negara Republik Indonesia, 1998).

Collateral provides certainty to the creditor that the credit granted will be returned. In Indonesia, collateral is regulated by several laws, such as Law No. 4/1996 on Mortgage Rights and Law No. 37/2004 on Bankruptcy. Mortgage rights cannot be separated from the debt they guarantee and remain attached to the object of collateral until the debt is paid off, providing legal certainty for creditors and debtors. In a bankruptcy situation, the creditor holding the mortgage has the right to obtain debt repayment from the sale of the security object. Parate execution allows the creditor to sell the object of the mortgage without having to go through the court. However, when the debtor fails to repay its obligations, this creditor right can be confronted with the bankruptcy process which gives the curator the authority to manage the assets of the bankrupt debtor. According to the Bankruptcy and PKPU Law, bankruptcy is a public seizure of all the debtor's assets managed by the curator. The principles of *paritas creditorium* and *pari passu prorata parte* ensure that the debtor's assets become joint security for all creditors (Hindrawan et al., 2023). Article 59 of the Bankruptcy Law allows creditors two months to execute their rights to the collateral. Instead, the curator has the right to take over and sell the assets, although creditors are still entitled to the proceeds of the sale.

Sometimes there is a conflict between the Bankruptcy Law and UUHT, as seen in Supreme Court Decision No. 782 K/Pdt.Sus-Bankruptcy/2017. In this

case, Bank Mandiri as a separatist creditor did not get priority payment from the sale of the bankrupt debtor's assets, even though they owned a mortgage. The Supreme Court rejected Bank Mandiri's objection because the Bankruptcy Law gives the curator the right to execute assets in the bankruptcy process, creating uncertainty for secured creditors. In the research conducted by Widjaja & Soemartono (2023) showed that the implementation of the Consumer Protection Law in protecting property consumers with Sales and Purchase Agreements is still weak and not firm because it does not explicitly explain protection in the compensation of losses for property consumers. The implementation of the Labor Law is in accordance with the laws and regulations, although it is impossible to avoid that the bankruptcy of the developer has an impact on consumers holding PPJB, where consumers holding PPJB are included in the status of concurrent creditors. Meanwhile, the research of Munah & Deni (2024) explained that legal protection for wives in cases of husband's bankruptcy without a marriage agreement. The results showed that without a marriage agreement, joint property becomes joint responsibility in bankruptcy cases, which has the potential to disadvantage the wife. Then, the research of Azzalea et al (2021) described that in Indonesia, there are disputes related to the filing of bankruptcy by creditors because debtors do not fulfill their debts properly. Creditors who hold mortgages, i.e. lenders who have collateral over the debtor's property, are troubled when their bankruptcy petition is rejected by the commercial court. The government has a critical role to ensure fairness and legal protection for creditors through a clear and effective legal framework. This research is expected to provide theoretical and practical contributions in resolving bankruptcy and security issues in Indonesia. This research aims to find a legal solution to overcome the conflict between Article 59 of the Bankruptcy and PKPU Law and Article 21 of the UUHT, thus providing better legal certainty for creditors of mortgage holders in the bankruptcy process.

LITERATURE REVIEW

Principle of *Paritas Creditorium*

The principle of *paritas creditorium* is a legal principle that ensures all creditors are treated equally in the distribution of the debtor's assets in bankruptcy, in accordance with Articles 1112 and 1113 of the Civil Code. This principle aims to provide justice for all creditors, where no one is privileged unless there are certain legal reasons. However, exceptions apply to creditors with security rights who have priority in receiving payments from secured assets and preferred creditors, such as government agencies, which are considered more important even without security rights (Disemadi & Gomes, 2021).

In bankruptcy cases, secured creditors have *in rem* rights over the debtor's assets, which allows them to sell the assets to settle their debts. Meanwhile, preferred creditors get priority in payment without having *in rem* rights because

the law considers their debts more important than unsecured creditors. The *pari passu* principle means that all creditors are treated equally, except for secured and preferred creditors who have preferential rights in receiving payments (Wright, 2014).

Principle of Droit de Preference

In Indonesian law, certain creditors have priority rights over the debtor's assets as mentioned in Article 1333 of the Civil Code. This privilege is given to creditors who are considered to have more important receivables, such as tax authorities and employees, so they take first priority in payment. In addition, fiduciary security holders and mortgage holders also have priority rights to sell collateral assets if the debtor fails to pay its debts, even if the proceeds of the sale are insufficient to pay off all creditors (Irmayanti et al., 2024). *Droit de preference*, the French term for priority rights, allows a creditor with an earlier security right to be paid first in the event of the debtor's bankruptcy or insolvency (Khisni & Hanim, 2017). If two creditors have security over the same property, the creditor with the earlier security right has priority. This principle ensures that the creditor with the earlier security gets paid from the sale of the debtor's property before other creditors.

The principle of *droit de preference* is also regulated in Articles 6 and 20 Paragraph (1) b of the Law on Mortgage Rights (UUHT). The first Mortgagee has the right to sell the security object through a public auction without the debtor's consent in default (Siregar & Putra, 2022). They can take debt repayment from the sale proceeds before other creditors. This right gives a special advantage to the first Mortgagee holder, while the rest of the sale proceeds will be given to the debtor.

Bankruptcy

Bankruptcy is a legal process carried out when a debtor is unable to pay its debts. In the Bankruptcy and PKPU Law, bankruptcy means the seizure of all assets of the debtor managed by a curator under the supervision of a judge. The main requirement for bankruptcy is that the debtor must have two or more creditors and be unable to pay the debts due. The Bankruptcy Law aims to prevent the seizure of debtors' assets by creditors, protect creditors with security rights, and avoid fraudulent actions from both creditors and debtors.

The Bankruptcy Law also aims to ensure the equitable distribution of the debtor's assets among creditors, in accordance with the priority of payment provided for in the law. Creditors are divided into two groups, which are preferred creditors and unsecured creditors. Preferred creditors, such as lienholders or privileged creditors such as employees and the government, have priority to be paid first before unsecured creditors. This process ensures that all parties receive

an appropriate share of the proceeds from the sale of the debtor's assets (Saputra, 2020).

The distribution of a bankrupt debtor's assets is supervised by a curator, who is responsible for the distribution of assets in accordance with the rules of law. Before assets can be distributed, the court must first declare the debtor bankrupt. After that, all assets of the debtor are seized and distributed to creditors according to the order of priority (Saija, 2024). Law No. 4/1996 on Mortgage Rights and Law No. 42/1999 on Fiduciary Guarantees also provide higher legal standing to secured creditors as compared to concurrent creditors.

Collateral

The term collateral comes from the Dutch "zekerheid" or "cautie," which refers to the creditor's efforts to ensure the fulfillment of its claims in addition to the debtor's general liability for its goods (Kaliey et al., 2023). According to HS (2015), security law regulates the relationship between the collateral giver and receiver regarding the imposition of collateral to obtain credit facilities. Security law includes written rules in the law and unwritten rules that exist in the community, such as oral pawning of land. Collateral can be both material, such as movable or immovable objects, and immaterial. The aim is to obtain a credit facility from a financial institution that believes in the debtor's ability to repay the loan.

Collateral is regulated in various laws, including the Civil Code, KUHD, and other laws such as the Mortgage Law and the Fiduciary Guarantee Law. Collateral can be general, covering all of the debtor's assets for the benefit of all creditors, or specific, targeting specific assets as collateral for debts to specific creditors. In a general collateral, all of the debtor's assets become collateral, while in a specific collateral, certain assets are pledged by agreement between the debtor and the creditor. This form of collateral can be in the form of a personal or material (zakelijk) collateral, which gives the creditor precedence rights over the pledged assets.

Property collateral, such as pawn and fiduciary, applies to movable objects, while hypothecs and mortgages apply to immovable objects. Personal guarantees, such as *borgtocht* (personal guarantee) and corporate guarantee, rely on guarantees by third parties or business entities. A chattel guarantee grants direct power over the pledged asset, while a personal guarantee only grants the right of collection to the party involved in the agreement. A property right is enforceable against any offender, while a personal right is only enforceable against certain parties.

Collateral Agreement

A collateral agreement is an additional agreement (accessoir) that occurs as a result of a basic agreement, such as a credit or loan agreement. This agreement provides safety and certainty for the creditor in ensuring debt repayment by the debtor. Due to its accessoir character, a collateral agreement cannot exist on its own and is always related to the main agreement.

Collateral in agreements is divided into two types which are material guarantee and personal guarantee. Material guarantees give the creditor absolute rights over the object of the guarantee, which can be used to settle the debt if the debtor defaults. This right has the advantages of the right of precedence (droit de preference) in debt repayment and the right to execute the collateral separately from the debtor's other assets. Therefore, material security, such as mortgage on land, is often chosen by creditors because it provides a sense of security and legal certainty.

In banking practice, the use of land as an object of collateral is considered the safest due to its high economic value and easy identification. Popular property security institutions, such as mortgage, fiduciary, and pledge, have their own advantages. However, mortgage on land is often considered the most effective to protect the creditor's interest in bank loans, mainly because land has a stable value and high legal security.

RESEARCH METHODOLOGY

This research uses a juridical normative method that focuses on the application of rules in positive law. This research focuses on the rules in the Civil Code and regulations related to bank guarantees in bankruptcy cases. The first approach used is the statutory approach, which identifies relevant laws and regulations. The second approach is conceptual, which refers to legal principles without relying on existing regulations. The third approach is the case approach, used to analyze court decisions related to bankruptcy. The combination of these three approaches helps to comprehensively understand legal issues. The results can be used for law reform and policy making. This research divides the sources of legal materials into two types, namely primary and secondary legal materials. Primary legal materials include the 1945 Constitution, Civil Code, Mortgage Law, Banking Law, Fiduciary Guarantee Law, Bankruptcy Law, Limited Liability Company Law, and Minister of Finance Regulation on Auctions. Secondary legal materials include legal textbooks, journals, and encyclopedias that do not have direct legal authority. Primary legal materials were used to identify relevant rules and laws. Secondary legal materials provided background information, explained, and analyzed the law. Both materials were used to obtain a comprehensive understanding of the legal issues studied. Analysis of secondary legal materials complements the understanding of the application of primary legal materials.

RESULT AND DISCUSSION

Execution of Collateral Objects Secured by Separate Creditors

Execution of Secured Objects by Separate Creditors

Execution is the execution of a legal judgment that can be carried out by force if the losing party does not want to carry it out voluntarily. This process is the last step after voluntary efforts and parate executie. The legal basis for execution lies in a court decision stating that the debtor is in default and has an obligation to pay off the debt. The separatist creditor has the right to execute the security object according to procedures aimed at protecting the rights of all parties. If the debtor is unwilling to pay off the debt, the secessionist creditor can submit a request for execution to the court. After an examination, the court will issue an execution order which is executed by a bailiff. The secessionist creditor can also sell the security object through an auction to settle the debt. Parate executie allows the creditor to execute the security object without court intervention if the debtor defaults. In bankruptcy cases, the right of a separatist creditor to separate collateral objects and take precedence in debt repayment is regulated in the Bankruptcy Law. The execution of collateral objects by a secessionist creditor lasts up to two months after bankruptcy, after which, the right of sale passes to the curator.

Auction of Secured Objects by Separate Creditors

In bankruptcy, a secessionist creditor may exercise its parate executie rights over the collateral through several means, such as public sale (auction) independently or by court order. The sale can also be conducted under hand by agreement, in accordance with the Fiduciary Guarantee Law. The auction process is generally conducted by a third party, such as the State Wealth and Auction Service Office (KPKNL) or a licensed auction house. The auction can be either execution or non-execution, with the objects that can be auctioned include assets encumbered by the mortgage. Although separatist creditors have special rights, the exercise of these rights is suspended during the stay period after the debtor is declared bankrupt, which aims to protect the interests of all creditors. Separatist creditors are required to register their receivables with the curator and follow debt verification procedures. In the event of insolvency, the debtor's assets will be sold to pay debts, and the proceeds will be distributed to creditors. Although the right of parate executie can be exercised as if there was no insolvency, there are restrictions to prevent actions that harm other creditors. Lastly, setting a two-month grace period for the sale of collateral by secessionist creditors is considered unrealistic in business practice, especially in the midst of a complex insolvency situation.

Distinction between Execution and Auction of Secured Objects by Separate Creditors

Settlement of debts of debtors with collateral objects to separatist creditors can be done through execution or auction. Execution is based on a court decision that has permanent legal force, while the auction is based on mortgage rights and is carried out by the auction hall. Executions are executed by court bailiffs, while auctions are conducted by auction houses appointed by creditors or curators. In an execution, the secured creditor retains the privilege of precedence in payment, but in an auction, especially when managed by a curator, the privilege may be lost. Execution procedures follow civil procedural law, while auctions follow the statutory rules on auctions. If the debtor is declared bankrupt, the secured creditor may have to share the proceeds of the auction with other creditors according to the bankruptcy rules.

Collateral Objects that are Executable and Non-Executable by the Curator

The objects of mortgage rights according to Article 4 of the Mortgage Rights Law include property rights, business use rights, building use rights, use rights on registered state land, use rights on property rights, and land rights along with buildings and plants. The curator can execute all types of mortgage objects to pay off creditors' debts in the bankruptcy process. However, donated land and land for worship cannot be used as objects of mortgage rights and cannot be executed (Ginting, 2022). In addition, there are assets of the debtor that are not included in the bankruptcy assets such as objects needed by the debtor, income, and maintenance money, which cannot be executed by the curator. The rights of workers due to layoffs caused by the bankrupt company are also not directly related to the collateral object, but these rights take precedence in the order of receivables. In some cases, the curator may need to use the security object to continue the operation of the bankrupt company.

Legal Consequences of Companies Declared Bankrupt against Collateral Objects Secured at the Bank

General Confiscation Object of Bankruptcy

General bankruptcy confiscation covers all of the debtor's assets, including movable, immovable, and intangible assets such as intellectual property rights and collection rights. This confiscation applies to assets owned by the debtor when declared bankrupt and the assets acquired afterwards, such as inheritance. According to Article 1 point 1 of the Bankruptcy and PKPU Law, all assets of a bankrupt debtor are under the supervision of a curator who is tasked with managing and settling the debtor's debts. General confiscation ensures that all of the debtor's assets can be used to pay off debts to creditors. It also aims to prevent the debtor from hiding or diverting their assets. All of the debtor's assets are

automatically seized by law once a declaration of bankruptcy is issued (Prof. Dr. Sutan, 2016).

Collateral Objects in Banks Included in Bankruptcy Assets

Collateral objects in banks are included in bankruptcy general confiscation, but the bank's separatist security rights are still recognized and the bank is entitled to precedence in the repayment of its debts from the proceeds of the sale of these objects. If the bank does not sell the collateral within two months, the curators are entitled by law to proceed. Article 34 of the Bankruptcy and PKPU Law confirms that collateral objects can be seized by the curator, although the bank's rights as a separatist creditor still take precedence. The curator also has the role of securing bankruptcy assets, including collateral objects, to protect their value and prevent misuse. The curator's actions often increase the costs charged to the bankruptcy assets, which can reduce the value of collateral objects. These curatorial costs can ultimately reduce the proceeds from the sale of collateral objects used to settle bank receivables.

Legal Consequences of Companies Declared Bankrupt against Collateral Objects in Banks

When the company is bankrupted, the collateral object secured at the bank is still included in the bankruptcy property, but the bank as a separatist creditor has the right to prioritize the repayment of its debts. The bank can sell the collateral object independently or through the curator, in accordance with Article 1133 of the Civil Code which states that the holder of a security right has the right to precedence in debt repayment. Although the collateral object becomes part of the bankruptcy estate, Article 60 of the Bankruptcy Law gives the separatist creditor the right to execute the collateral. After selling the collateral, the secessionist creditor is obliged to hand over the remaining proceeds to the curator after the receivables are settled. The contradiction between the Bankruptcy Law and the Mortgage Rights Law may cause legal uncertainty in the execution of collateral by the secessionist creditor. Article 6 of the Mortgage Rights Law stipulates that creditors can sell objects of mortgage rights through public auctions, but this often clashes with the provisions in the Bankruptcy Law.

Banks have the right to sell collateral objects independently under Article 6 of the Mortgage Rights Law, but in a bankruptcy situation, this right is limited by the authority of the curator who manages bankruptcy assets, including collateral objects. Judges have an important role in balancing the rights of receivers and secured creditors, determining the mechanism for selling collateral, and ensuring fair distribution of proceeds in accordance with bankruptcy law. The principle of *lex posterior derogate legi priori* is applied in bankruptcy cases, where judges use the newer Bankruptcy and PKPU Law to resolve norm conflicts with the Mortgage Rights Law. Therefore, the collateral object of the bankrupt company is controlled by the curator, and creditors with mortgage rights have preferential

rights to receive payment from the sale of collateral according to the latest legal provisions.

The Bankruptcy and PKPU Law focuses more on protecting debtors by providing opportunities for debt restructuring and avoiding abuse of power, while the Mortgage Law is more concerned with the interests of creditors. The main objective of the Bankruptcy and PKPU Law is to create legal certainty, protect all parties, and facilitate debtors to recover from financial difficulties. The imbalance between the bank's security rights and the provisions of the Bankruptcy and PKPU Law regarding the execution of collateral objects of bankrupt companies causes losses for Bank Mandiri, especially due to the two-month time limit for executing collateral. In addition, receivership fees and a decline in collateral value during the bankruptcy process may reduce the proceeds from the sale of collateral and delay loan repayments, increasing the risk of financial loss for the bank.

Bankruptcy Assets Fail to Cover the Receivables of Separate Creditors

If the proceeds from the sale of the collateral are insufficient to settle the receivables, the secessionist creditor can become a concurrent creditor for the shortfall in payment as per Article 138 of the Bankruptcy and PKPU Law. Separatist creditors must submit a deficiency claim to the curator, and if accepted, they will compete with other concurrent creditors for payment from the remaining bankruptcy assets proportionally (Nugroho, 2018). A Limited Liability Company (PT) determines capital through shares, with shareholders' liability limited to the nominal value of the shares they own. If the company goes bankrupt, shareholders do not bear the shortfall in debt, so the greater risk is incurred by creditors, especially separatist creditors.

In a limited liability company, shareholders, directors, and commissioners are only liable for the company's debts to the amount of the value of their shares or according to their legal obligations, unless there is an infringement. Separatist creditors have preferential rights to the proceeds from the sale of collateral, but if the value is insufficient, the remaining debt becomes concurrent receivables that are divided proportionally (Kansil, 1996). The Limited Liability Company Law stipulates that if bankruptcy occurs due to the fault or negligence of the board of directors, and the bankruptcy assets are insufficient to pay off the debts, each member of the board of directors is jointly and severally liable for the obligation (Is, 2016). Article 102 Paragraph (2) of the Limited Liability Company Law confirms the personal liability of directors in this situation.

Article 104 Paragraph (2) of the Limited Liability Company Law allows secessionist creditors to pursue the personal liability of directors if the bankruptcy assets are insufficient to settle debts, notably if the directors are proven to be negligent. This provision provides additional protection for creditors by giving them the option to pursue their remaining receivables from the directors personally. Meanwhile, Article 104 Paragraphs (2) and (3) of the Limited

Liability Company Law regulates the personal liability of directors for losses suffered by the company due to their errors or omissions, including directors who have served up to 5 years before the bankruptcy verdict. Under this rule, creditors have a greater opportunity to claim compensation if the bankruptcy assets are insufficient, provided that it can be proven that the directors were at fault.

CONCLUSION AND SUGGESTION

Conclusion

Separatist creditors have the right to execute the security granted to them, even if the debtor is declared bankrupt, through parate executie. This execution can be conducted by the creditors or the curator, with the consent of the supervisory judge and the secured creditors. In the process, the curator must follow the rules in the Bankruptcy and PKPU Law. One of the ways of execution is by auctioning the collateral object, where the proceeds of the auction are used to pay off debts to separatist creditors. However, some collateral cannot be executed, such as waqf land and land for worship.

When a company is declared bankrupt, all of its assets, including collateral objects in the bank, are included in the seizure process. Collateral objects still belong to the debtor, but are managed by the curator during bankruptcy. These objects can be disposed of by the curator to pay debts to creditors. Creditors who have rights over the security object (separatist creditors) have priority to receive payment from the sale proceeds. After their debts are repaid, the remaining bankruptcy assets are used to pay other creditors (concurrent creditors). If the bankruptcy assets are not enough to pay the debts of the secured creditors, the remaining debt will be considered as ordinary debt, and they can file a claim for the remaining debt in the receivables verification meeting.

Suggestion

Clearer and firmer rules on the mechanism of direct execution and temporary suspension of the separatist creditors' rights are needed, with attention to the balance between the rights of separatist creditors and the interests of other creditors in the bankruptcy process. It is also important to improve justice and legal certainty for separatist creditors, such as updating the bankruptcy court system and strengthening the protection of the rights of separatist creditors.

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