



## **LEGAL POSITION OF SEPARATED CREDITORS IN SETTLEMENT AND SETTLEMENT OF BANKRUPT ESTATE**

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### **Abstract:**

*Many people and legal entities need debt as one of the unavoidable options. Based on provisions of Article 1 number 6 in Law No. 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations (hereinafter abbreviated as the Bankruptcy Law), what is meant by debt is an obligation stated in an amount of money, either Indonesian or foreign currency, either directly or arising in the future, which arises due to an agreement or due to law and which must be fulfilled by the debtor and if not fulfilled gives the creditor the right to be able to fulfill it from debtor's assets. This research uses normative juridical research.*

### **Keywords:**

Creditor, Debtor, Legal

### **1. Introduction**

Many people and legal entities need debt as one of the unavoidable options. Based on provisions of Article 1 number 6 in Law No. 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations (hereinafter abbreviated as the Bankruptcy Law), what is meant by debt is an obligation stated in an amount of money, either Indonesian or foreign currency, either directly or arising in the future, which arises due to an agreement or due to law and which must be fulfilled by the debtor and if not fulfilled gives the creditor the right to be able to fulfill it from debtor's assets. Basically, the nature of debt is an obligation that must be fulfilled by debtor.[1]

Debt fulfillment is an obligation of debtor that must be fulfilled, but debtors often fail to fulfill their debt obligations.[2] The state of stopping paying debts can occur due to being unable to pay or unwilling to pay. Whatever the reason, if the debtor is unable to pay or unwilling to pay, the creditor will lose because they do not receive payment. Disputes between debtors and creditors will definitely occur if the debtor's obligations to the creditor are not fulfilled. The method of resolving bankruptcy disputes is one way to resolve them legally and has the potential to solve the problem.[3]

The interests of parties, namely is debtor and creditor, are expected to provide security if resolved through the Bankruptcy Institution. Separatist creditors in terms of resolving debt disputes, are less able to fully feel in terms of guaranteeing their interests, even through the bankruptcy institution.[4] This is because there are regulations regarding restrictions on the rights of separatist creditors, which do not protect the position of separatist creditors.

The provisions governing the rights of separatist creditors are regulated in Article 55, Article 56, and Article 59 of the Bankruptcy Law.

Article 55 paragraph (1) of the Bankruptcy Law stipulates that: "With due regard to Article 56, Article 57, and Article 58, every creditor holding a fiduciary guarantee, mortgage, security right, or collateral right on other property, may exercise his rights as if there had been no bankruptcy." The provisions of Article 55 paragraph (1) cannot be immediately implemented by separatist creditors because there are provisions in Article 56 which stipulate the following :

1. The creditor's right of execution as referred to in Article 55 paragraph (1) and the right of third parties to claim their assets which are under the control in bankrupt debtor or curator, are suspended for a period of 90 (ninety) days from the date bankruptcy declaration decision is pronounced.
2. The suspension as referred to in paragraph (1) does not apply to creditors' claims guaranteed by cash and the creditor's right to set off debts..
3. During the suspension period as referred to in paragraph (1), the Curator may use the bankrupt's assets in the form of immovable or movable property under the Curator's control for the purpose of continuing the Debtor's business, in the event that reasonable protection has been provided for the interests of creditors or third parties as referred to in paragraph (1).

The provisions of Article 56 paragraph (1) regarding the suspension of execution rights of separatist creditors are considered inconsistent and contradictory to provisions of Article 55 paragraph (1). The provisions of Article 56 paragraph (3) are considered not to provide/do not provide sufficient legal certainty for the implementation of the execution of separatist creditors. This is because the explanation in article states that bankrupt assets that can be sold by curator include movable goods that are subject to collateral rights on property. The formulation of problem is how the legal protection for separatist creditors related to the existence regulations by regarding suspension of execution collateral objects?

## 2. Methodology

This research uses normative juridical research.[5]

### 2.1. Guarantees that Give Birth to Priority Rights:

Legal protection for debtors in debt-credit relationships is regulated through the provisions of Article 1131 of the Civil Code which stipulates: "All objects of the debtor, both movable and immovable, both existing and new in the future, become collateral for all his obligations". This provision means that all of the debtor's assets become collateral for all his debts. This provision is further explained in Article 1132 of the Civil Code as follows: "The objects become joint collateral for all those who lend to him; the income from sale of these objects is divided according to balance, namely according to size of each receivable, unless among the creditors there are legitimate reasons for priority."

The provisions of Article 1132 Civil Code stipulate the principle of equality creditors. The position of creditors, among fellow creditors towards the debtor, this same. They are called concurrent creditors and receive general guarantees. Furthermore, creditors who are not satisfied with their position as concurrent creditors are given the opportunity to promise collateral rights or personal guarantees as special guarantees. In special guarantees, creditors are prioritized over other creditors in taking payment of results by execution certain objects belonging to debtor. Such creditors are called preferred creditors. The following are collateral that give rise to a preferential position for creditors, namely pawns, fiduciary guarantees, mortgages and mortgages.

- a. A Pawn
- b. Fiduciary Guarantee
- c. Liability
- d. Mortgage

### 2.2. Bankruptcy and its Requirements

According to Article 1 point 1 of the Bankruptcy Law, bankruptcy is defined as a general seizure of all assets of a bankrupt debtor, the management and settlement of which is carried out by a curator under the supervision of a Supervisory Judge as regulated in this Law. Based on this understanding, bankruptcy is essentially a general seizure of

all assets of the debtor. This is to distinguish it from the term special seizure such as revindikator beslag, conservator beslag, and executor beslag, which are carried out on certain objects. As a general seizure, bankruptcy covers all assets the debtor at the time of bankruptcy decision and all subsequent income.

A debtor must meet certain requirements in order to be declared bankrupt. These requirements are stipulated in Article 2 paragraph (1) of the Bankruptcy Law which stipulates that: "A debtor who has 2 (two) or more creditors and does not pay in full at least one debt that has matured and is collectible, is declared bankrupt by court decision, either at his own request or at the request of one or more of his creditors". By taking these provisions into account, the requirements for being declared bankrupt by court decision are if: (1) the debtor has two or more creditors; and (2) the debtor does not pay in full at least one debt that has matured and is collectible.

The term creditor in the Bankruptcy Law refers to a person who has a receivable, due to an agreement or law that can be collected in court. The creditor itself can be a concurrent creditor, a separatist creditor, or a preferred creditor.[6]

Submission if the bankruptcy application is submitted by a creditor, then he must be able to prove that besides himself there are other creditors of the debtor. The requirement for the existence of other creditors is the fulfillment of the principle of concursus creditorum in bankruptcy.

### **2.3. Legal Protection for Separatist Creditors**

The Bankruptcy Law does not provide any limitations regarding who is meant by a separatist creditor, except as regulated in Article 55 paragraph (1) of the Bankruptcy Law which states that: "With due regard to Article 56, Article 57, and Article 58, every creditor holding a pledge, fiduciary guarantee, security interest, mortgage, or other collateral rights over property, may exercise his rights as if there had been no bankruptcy". Based on these provisions, what is meant by a separatist creditor is a creditor who can exercise his rights as if there had been no bankruptcy or as if the creditor's claims were outside of bankruptcy, outside in general encumbrances.

Based on definition of separatist creditors above, it can be emphasized that separatist creditors are creditors who can sell their own goods that are collateral for debts that are under their control, as if there was no bankruptcy. The proceeds from the sale of these goods are then taken to pay off their receivables, and if there is a remainder, it is deposited with the curator as part of the bankruptcy estate. On the other hand, if the proceeds from the sale of these collateral goods are not sufficient to pay off their receivables, then these creditors can act as concurrent creditors for unpaid bills.

In relation to the priority execution rights of the secured creditors, there are provisions in the Bankruptcy Law that are considered as provisions that limit the execution rights of secured creditors so that they are considered to provide less protection to them. This is evident in the provisions of Article 56 of the Bankruptcy Law which stipulates as follows:

1. The creditor's right of execution as referred to in Article 55 paragraph (1) and the right of third parties to claim their assets which are under the control of the bankrupt debtor or curator, are suspended for a period of 90 (ninety) days from the date the bankruptcy declaration decision is pronounced.
2. The suspension as referred to in paragraph (1) does not apply to creditors' claims guaranteed by cash and the creditor's right to set off debts.
3. During the suspension period as referred to in paragraph (1), the Curator may use the bankrupt's assets in the form of immovable property or movable property under the Curator's control for the purpose of continuing the debtor's business, in the event that reasonable protection has been provided for the interests of creditors or third parties as referred to in paragraph (1)..

In relation to the suspension as regulated in Article 56 paragraph (1), the suspension is not a problem when the maturity date itself has not yet occurred, however, if at the time of the debtor's bankruptcy declaration it coincides with the maturity date of the debt guaranteed by the separatist, then the suspension will clearly limit of execution rights the separatist creditor to immediately obtain payment of his receivables. The explanation of Article 56 paragraph (1) in Bankruptcy Law confirms that the suspension referred to in this provision aims, among other things: (1) to increase the possibility of achieving peace; or (2) to increase the possibility of optimizing the bankrupt's assets; or (3) to enable the Curator to carry out his duties optimally.

Based on the explanation above, the purpose of suspension to increase the possibility achieving peace is actually not very appropriate. Bankruptcy itself is intended for concurrent creditors, so the issue of peace is also associated with concurrent creditors and not for separatist creditors.[7] Thus, if it consistently positions the holder of the collateral

rights as a separatist creditor, then he is not bound by the issue of peace intended for concurrent creditors. Meanwhile, that purpose of suspension is for increase the possibility optimizing the bankruptcy estate means that's special collateral objects are part of the bankruptcy estate. Such an interpretation certainly violates the provisions of the guarantee law and the bankruptcy law itself which gives priority to the holder of the collateral rights to execute the collateral as if there was no bankruptcy, thus the collateral objects are outside the bankruptcy estate. Furthermore, that the purpose of the suspension is to allow the curator to carry out his duties optimally is also not very appropriate. If it is consistent with the understanding that the collateral objects are outside the bankrupt's assets, of course the Curator does not have the authority to control them, unless there is a justifiable reason, for example the separatist creditor himself relinquishes his position as a separatist creditor.

Article 56 paragraph (3) stipulates that during the suspension period as referred to in paragraph (1), the curator may use the bankrupt's assets in the form of immovable or movable objects under the curator's control for the purpose of continuing the debtor's business, in the event that reasonable protection has been provided for the interests of creditors or third parties as referred to in paragraph (1). The explanation of this paragraph emphasizes that the bankrupt's assets that may be sold by the curator are limited to inventory and/or movable objects (current assets), even though the bankrupt's assets are burdened with collateral rights over the goods.

Another provision that limits the rights of secured creditors is Article 59 of the Bankruptcy Law which stipulates:

1. While still paying attention to Article 56, Article 57 and Article 58, creditors holding rights as referred to in Article 55 paragraph (1) must exercise their rights within a maximum period of 2 (two) months after the start of the state of insolvency as referred to in Article 178 paragraph (1).

2. After the time period as referred to in paragraph (1) has passed, the Curator must demand that the collateral be handed over to be sold in accordance with the method referred to in Article 185, without reducing the rights of the creditor holding the rights to proceeds from sale of collateral.

3. At any time the Curator may release the collateral by paying the smaller amount between the market price of the collateral and the amount of the debt guaranteed by the collateral to creditor concerned.

The provisions of Article 59 paragraph (2) emphasize that after expiration on period as referred to in paragraph (1), the curator must demand are surrender of collateral object to be sold in accordance with the method referred to Article 185, without reducing the rights of the creditor holding right to the proceeds by sale of collateral. This provision is considered to burden by position separatist creditor as the holder execution right who must be given priority. A period of 2 months is a relatively short period of time to carry out a good sales transaction, especially for collateral with a fairly high value, because it is necessary to find a prospective buyer who can really be expected to provide a price offer that is profitable not only for the holder of the collateral right but also for the debtor himself. If period of time passes and the curator demands the surrender of collateral object, this means reducing the rights of separatist creditor to exercise his own execution right.[8]

Article 59 paragraph (2) shows conflict between bankruptcy law and collateral law and this is consistent with Article 59 paragraph (1). This means that application in Article 59 paragraph (1) and paragraph (2) of the Bankruptcy Law can conflict with collateral law which gives the collateral holder the freedom to execute collateral without time limits. If the specified time period has expired, the curator is obliged to take the object of collateral based on bankruptcy law. Takeover by the curator in bankruptcy process does not protect the rights of the separatist creditor, although the right to proceeds from sale of collateral remains. The sale of collateral by the curator has legal consequences in form of a reduction in the proceeds from sale to pay the curator's fees. The reduction in the curator's fees from the proceeds from sale will only affect the rights of the separatist creditor if the proceeds from the sale are insufficient to pay off receivables. Although they can file a claim for a shortage of receivables, the separatist creditor who originally had special rights, now has the same position as other creditors as a concurrent creditor.

Which provisions will be applied if in its implementation there is a discrepancy between the separated creditors and the curator. If the principle of *lex specialis derogate legi generali* is used, it is necessary to emphasize which provisions are considered general provisions and which are considered special provisions. If observed, the provisions on material guarantees are a special implementation of general guarantee principle in Articles 1131 and 1132 of the Civil Code. Meanwhile, the Bankruptcy Law is a further application by provisions in Articles 1131 and 1132 of the Civil Code. Based on this understanding, the provisions on material guarantees must be prioritized if a conflict occurs because they are more specific than the bankruptcy provisions.[9]

### 3. Conclusion

Based on provisions of the guarantee law and bankruptcy law, separatist creditors who hold collateral rights have a more important position than other creditors. In the event of bankruptcy, separatist creditors can execute collateral as if there was no bankruptcy. However, the existence of less clear regulations in Bankruptcy Law can trigger a conflict between separatist creditors and curators, namely between the provisions of Article 55 paragraph (1) on the one hand and the provisions of Article 56 and Article 59 on the other hand. Based on such conditions, it is necessary to make an adjustment between these articles either through a revision of the law or with a Government Regulation, it is necessary to make an adjustment so that it can provide legal certainty regarding the existence or absence of separatist creditor execution rights that can provide a sense of justice.

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