Legal Protection against Creditors Third-Party Property Guarantee Holders in Insolvency

KMS Herman[1], Heri Subagyo[2]
kemas_herman@yahoo.com[1], soebagyo_herr@yahoo.com[2]

Universitas Borobudur[1, 2]

Abstract. The provisions of Article 55 paragraph (1) of Law Number 37 of 2004 concerning Bankruptcy and PKPU state that Creditors of Property Guarantee Holders can exercise their rights as if bankruptcy had not occurred. Based on the provisions of the article, creditors holding material guarantees have a privileged position, namely being included in the group of separatist creditors (secure creditors*) and, secondly, getting the fulfilment of rights that take precedence* (preference) over *other creditors*, as stipulated in the provisions of Article 1132 of the Civil Code. Property rights provide certainty and legal protection for material security holders as creditors to make repayments for the sale of goods pledged against receivables that occur when the debtor at any time cannot fulfil obligations following the agreed commitment. The special position is valid and can be fully enjoyed by the Creditor; the material guarantee is owned and given by the Debtors. This article uses normative research methods by examining legislation, principles, and doctrines related to legal protection for creditors holding third-party property guarantees in the partnership. It can be concluded that to protect creditors holding material guarantees, the Bankruptcy Act and PKPU are amended so that the position of creditors is not ambiguous.

Keywords: Legal Protection, Material Guarantees, Bankruptcy.

1 Introduction

One of the key aspects of legal protection is safeguarding against the risk of debtor customers not repaying their loans. To mitigate the potential losses stemming from these non-performing loans, virtually all banks require borrowers to provide tangible assets as collateral. These assets can include real estate, valuable items like machinery, vehicles, or securities, whether they belong to the debtor themselves or third parties with legal obligations. The primary reasons for requesting these material guarantees include assessing the commitment and trustworthiness, as well as offering a sense of security and legal assurance to banks. This reassures the banks that, in the event of a borrower's default or failure to meet their financial obligations, they will have assets to recoup their full loan amount.[1]

This guarantee law can be divided into two, namely, general guarantee law and special guarantees. General guarantees are regulated by the provisions of Article 1131 of the Civil Code, which states:

> "All movable and immovable property belonging to the debtor, whether existing or future, shall be collateral for the debtor's engagements."

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The article does not specify the creditors' positions or priorities, whether they are considered preferential or concurrent creditors. Consequently, all creditors are treated equally under the law. They share the same entitlement to receive payment and the assets, including both existing assets and those that may come into existence in the future, until the outstanding debts are entirely repaid. This principle aligns with the guidelines set forth in Article 1132 of the Civil Code, which states that:

> "The property includes a joint security for all who owe it. The proceeds from the sale of such property shall be divided according to the balance, that is, according to the size of each receivable, unless among the debtors there are valid reasons for being accrued."

Excluding debtors, there are legitimate reasons for establishing precedence, such as those outlined in specialized guarantee laws, including Law No. 4 of 1996, governing Dependent Rights, Law No. 42 of 1999, addressing Fiduciary Guarantees, and Articles 1150 to 1160 of the Revised Code, which governs Liens. The provision of such guarantees is not limited to debtors alone; it is also regulated by Articles 1820 to 1830 of the Civil Code, dealing with Underwriting. Under this framework, third parties commit to fulfilling the borrower's obligations on behalf of the lender Creditor the event of borrower default.

However, as per Article 1822 of the Civil Code, the guarantor (Borg) cannot assume responsibilities greater than those of the debtor. This aligns with the principle that the debtor bears the ultimate responsibility for their debt, so in the event of default, the full liability for the Debtors'sdebt falls on the third party acting as the guarantor

Nevertheless, in accordance with Article 1822 of the Civil Code, the guarantor (Borg) is restricted from assuming obligations that surpass the Owner's interests. This principle is in line with the idea that the Debtor is primarily responsible for their debt. Consequently, if the debtor defaults, the entire responsibility for the Debtors'sdebt falls upon the third party acting as the guarantor.

In simpler terms, a guarantee agreement or surety agreement is considered an ancillary agreement, its existence dependent on the primary agreement. Wherever the principal agreement goes, the ancillary agreement automatically follows. Similarly, when the primary agreement is terminated, the guarantee agreement ceases to have effect.[2]

The execution of assets guaranteed by the party receiving the guarantee is only permitted when the Debtors, who have debts or obligations as per the primary agreement, default or breach their commitments. However, the right to execute or liquidate collateral provided by the party offering the guarantee, whether it's assets owned by the Debtors as the borrower of the debt or assets of the guarantor from a third party, cannot be executed in a standard manner when a bankruptcy event occurs. In such cases, whether it affects the debtor or a third-party guarantor of the debt, bankruptcy law takes precedence as a specialized legal framework that must be adhered to, and it supersedes general execution procedures. Therefore, all execution actions must conform to and follow the procedural laws specified in bankruptcy legislation.

As a legal consequence of a bankruptcy declaration, it immediately seizes all assets of the bankrupt Debtors, including assets acquired during the bankruptcy process. This is known as Public Attachment. The management and settlement of these bankruptcy assets are overseen by one or more Curators appointed by the court. In some cases, they may be appointed from Balai Harta Warisan (BHP) as state curators. These curators carry out their responsibilities under the

supervision of the Supervisory Judge, who is typically appointed at the same time as the bankruptcy judgment is pronounced.

Bankruptcy involves the comprehensive seizure of all assets owned by the insolvent Debtors, both current and future, as determined by the decision of the Commercial Court. The primary objective is to utilize the proceeds from the sale of these assets to fairly settle the Debtor's obligations to all creditors in proportion (Paripasu Prorata Parte). The distribution of assets follows the ranking or priority of creditors based on their registered claims.

In the context of bankruptcy, creditors are categorized into three distinct groups: separatist creditors, preferred creditors, and concurrent creditors. This differs from the classification in general civil law, which typically only distinguishes between preferred and concurrent creditors.[3]

1) Separatist Creditors are those whose claims are secured and tied to tangible assets through means such as Liens, Mortgages, Pledges, and Fiduciaries.
2) Preferred Creditors enjoy specific privileges established by statutory provisions, such as those outlined in Article 1139 of the Civil Code (creditors whose claims take precedence over the proceeds from the sale of certain objects) and Article 1149 of the Civil Code (creditors whose claims take precedence over the proceeds from the sale of all assets of the insolvent Debtors.
3) Concurrent Creditors are those who do not fall into the categories of separatist or preferred creditors.

This discussion is particularly intriguing for the author, especially when considering it from the perspective of a creditor. When the bankrupt party is a third party who provided material guarantees, the author raises questions about the position of the Bank as a separatist creditor that receives the guarantee. This is particularly relevant when the Bank is not a direct creditor of the third party. Additionally, there is a need to address the status of assets pledged to banks as separatist creditors within the framework of insolvency. Despite the general confiscation of the bankrupt Debtors, irrespective of their location, ownership, or encumbrances, all assets become part of the bankrupt estate as a logical consequence of applying the principle of universal confiscation to an individual declared bankrupt. Consequently, the author argues for the necessity of legal norms and regulations that offer protection to third-party creditors in such scenarios.

2 Research Method

Normative legal research is a process of finding legal rules, legal principles, and doctrines of the law to address the legal issues at hand. The results of the study of law are the argument, theory, or the new concept as a prescription for solving problems faced the problem.[4] That the legal research doctrinal (thus themed Soetandyo normative legal research) is research on laws drafted and developed on the basis of the doctrine adopted by the developers. The doctrinal legal research finds the correct answer in the proof of truth is sought or the legal prescriptions written in the books of the law or book or book religion (depending on her faith), following doctrine. The study aims to provide normative legal prescriptions that what should be in accordance with the jurisprudence that has characters as a science that is prescriptive and applied.[5]

3 Discussion

3.1 Position of Creditors of Third-Party Property Security Holders in Bankruptcy

Law Number 37 of 2004, which deals with bankruptcy and Suspension of Debt Payment Obligations, is categorized as a special law. Consequently, it should be considered as a unique legal framework that takes precedence over general laws and regulations. This means that if a specific matter is addressed in other general laws or regulations, the legal provisions of the Bankruptcy Law and PKPU will prevail as long as they offer specific regulations for that matter. However, it's essential to note that not all legal provisions within general laws become invalid; only those areas explicitly covered by the special law are affected. For issues not addressed by the special law, the general law still applies and can be enforced.

Law Number 37 of 2004, governing bankruptcy and PKPU, contains numerous regulations that may overlap with provisions found in other general laws, encompassing both substantive and procedural aspects of the law. This overlap is by design, as the Bankruptcy Law and PKPU are created for a distinct purpose: to handle debt-related disputes using a fast, secure, transparent, equitable, and proportionate process

In the context of Indonesian law, there are instances where the Property Guarantee Law is regulated under general laws, including Law No. 4 of 1996, which addresses Dependent Rights, Law No. 42 of 1999, which pertains to Fiduciary Guarantees, Article 1154 of the Civil Code, covering Liens, and Article 1178 of the Civil Code, dealing with Mortgages. While these laws establish preferential or preferred rights that are legally protected, particularly concerning the right to execute and receive payment of receivables, it's important to note that when a bankruptcy event occurs, these rights cannot automatically be applied. Instead, they must adhere to the mechanisms outlined in the Bankruptcy Law and PKPU as a legal consequence of the enactment of these specific laws. [6]

With the introduction of bankruptcy law in Indonesia, specifically Law No. 37 of 2004, dealing with Bankruptcy and PKPU as positive laws in the civil sector, the principle of "Lex Specialis Derogat Legi generalis" comes into play. This principle essentially means that the special law takes precedence over the general law, and it has legal implications for creditors who hold property rights guarantees. These implications result in restrictions on the rights and authority of these creditors in the management and settlement of bankruptcy assets. When a debtor with debt owed to a creditor faces bankruptcy, several circumstances impact the crCreditor'sosition as the holder of property security in bankruptcy. These include the initiation of public confiscation, the existence of a suspension period, and the transfer of collateral assets to the Curator appointed by the court. Next, the author will discuss the Position of Creditors Holding Third Party Property Guarantees in Bankruptcy. This is different from the previous description because the previous description discussed is related to the collateral belonging to the Main Debtor. In contrast, in this description, the goods used as Property Collateral belong to a Third Party. Based on the provisions in Law No. 37 of 2004 concerning Bankruptcy and PKPU, as well as other related laws and regulations.

According to the provision in Article 1, point (2), it defines a creditor as "a person who has receivables due to agreements or laws that can be collected in court." Referring to this definition, it's clear that a Separatist Creditor qualifies as a creditor when the primary debtor becomes insolvent. Therefore, the Separatist Creditor can register their claim with the Curator,

as stipulated in Article 27 of Law No. 37 of 2004, concerning Bankruptcy and PKPU. This law allows all parties who believe they have claims against the Debtor to seek fulfilment of their obligations from the bankruptcy estate by registering their claims with the Curator.

It's crucial to understand that the assets of the insolvent debtors are the property of the debtors and do not belong to anyone else. In the case of the bankruptcy of the primary Debtors, the author concludes that the goods pledged to the Separatist Creditor do not belong to the bankruptcy debtor but rather to a third party. Consequently, the property collateral pledged to the Separatist Creditor should not be considered part of the bankruptcy estate.

As these assets are not part of the bankruptcy estate, any sale or execution of the property collateral should not be subject to the mechanisms and provisions outlined in the Bankruptcy Law and PKPU. Instead, it should follow the execution of sales based on the specific legal positions of the collateral, whether they are subject to a lien, fiduciary guarantee, dependent rights, or mortgage, as regulated in the respective laws, such as Article 1156 of the Civil Code (Lien), Article 1178 of the Civil Code (Mortgage), Article 29 of Law No. 42 of 1996 (Fiduciary), and Article 6 and Article 20 of Law No. 4 of 1996 (Dependent Rights). The sale options can include Parate Execution, Fiat Execution, and Underhand Sales with the Approval of the Guarantor, depending on the nature of the collateral and the specific provisions applicable. Suppose the sale of Property Collateral items belonging to the Third Party is found to have not been able to cover or meet the payment of the receivables registered by the Separatist Creditor. In that case, the Separatist Creditor, in accordance with the provisions of Article 138 of the UUK and PKPU, can ask the Curator to be granted the rights owned by the Concurrent Creditor to jointly obtain pro-tara part fulfilment of the remaining bills that have not been repaid from the sale of goods collateral belonging to such Third Party. The provisions of Article 138 of UUK and PKPU are:

> "Creditors whose receivables are secured by liens, Fiduciary Guarantees, Liens, Mortgages, collateral rights over other objects, or who have privileged rights to a particular object in the bankruptcy estate and can prove that some of the receivables are unlikely to be repaid from the proceeds of the sale of the objects that become collateral, may request to be granted the rights that the Concurrent Creditors have over that part of the receivables, without prejudice to the right of precedence over the thing which is collateral for its receivables".

In the event of bankruptcy proceedings against the Main Debtor, a Separatist Creditor can seek payment for their receivables from two different legal regimes. Firstly, they can act as Separatist Creditors, following general provisions outside the Bankruptcy Law and PKPU, which entitle them to specific rights and privileges regarding the assets used as property guarantees. Secondly, they can also register as Concurrent Creditors within the bankruptcy regime, particularly for any outstanding receivables that have not been satisfied from the sale of Property Guarantees provided by third parties.

When discussing bankruptcy proceedings involving a Third Party who serves as a Debt Guarantor to a Separatist Creditor, it's important to consider their legal positions. The relationship between the Separatist Creditor and the insolvent Third Party is based on a form of "material guarantee" or "property security," where the Third Party offers their property as collateral to secure a debt agreement made by the Main Debtor. This differs from the concept

of individual guarantee or personal guarantor, where the guarantor personally vouches for the Main Debtor's debt.

Because the Third Party is not personally bound but only materially bound, the Separatist Creditor cannot be treated as a direct creditor in the event of insolvency experienced by the Third Party. Their legal relationship is based on material collateral, with the primary interest being to obtain repayment from the sale of the collateral designated as Material Collateral. Following the Debt Collection Principle, the Separatist Creditor can request clarification and confirmation from the Curator regarding the implementation of the guarantee agreement to settle the debt obligations from the Main Debtor. This is guided by Article 36, paragraph (1) of Law No. 37 of 2004, concerning Bankruptcy and PKPU.

In cases where there is no mutual agreement between the Separatist Creditor and the Curator, the concerned party can seek a Determination from the Supervising Judge, as stipulated in Article 36, paragraph (2) of the Bankruptcy Law and PKPU. If the time frame set by the Supervising Judge is ignored or not implemented by the Curator, the Separatist Creditor can file a claim for "compensation" and will be regarded as a Concurrent Creditor. These provisions are outlined in Article 36 of Law No. 37 of 2004 concerning Bankruptcy and PKPU:

> (1). "In the event that at the time the judgment of the bankruptcy declaration is pronounced there is a reciprocal agreement that has not been or has only been partially fulfilled, the party agreeing with the Debtor may request the Curator to provide certainty about the continuation of the implementation of the agreement within the period agreed by the Curator and the Party".
> (2). "In the event that an agreement on the period referred to in sub-article (1) is not reached, the Supervising Judge shall fix the period".
> (3). If within the period referred to in paragraph (1) and paragraph (2), the Curator does not give an answer or is unwilling to continue the implementation of the agreement, the agreement ends, and the party referred to in paragraph (1) may claim compensation. It will be treated as a concurrent creditor".

The position of Separatist Creditors remains legally protected, even if they may be relegated to the status of Concurrent Creditors. While they may have to share their standing with other Concurrent Creditors, the right to receive payment for their receivables remains intact, albeit in accordance with the Pari Passu Prorata Parte Principle. This principle dictates that payments are distributed based on the size of each credit, ensuring a fair and proportional allocation of funds among all creditors. As for the collateral assets used as Property Collateral for Separatist Creditors, the key question is whether these assets can be considered part of the Bankruptcy Assets for the insolvency of a third party or if they must be excluded from the bankruptcy estate. According to Article 1, paragraph (1) of Law Number 37 of 2004, concerning Bankruptcy and PKPU, bankruptcy entails a general confiscation of all assets belonging to the insolvent Debtors with management and settlement conducted by the Curator under the supervision of the Supervisory Judge. In cases where a third party becomes insolvent, the third party assumes the status of a Bankruptcy Debtor. The assets pledged to Separatist Creditors belong to this third party.

Consequently, these assets can be legally regarded as part of the Bankruptcy Assets in the insolvency proceedings of the third party. Therefore, the Curator must include these collateral assets in the list of Bankruptcy Assets, as stipulated in Article 100, paragraphs (1) and (2) of

Law No. 37 of 2004, concerning Bankruptcy and PKPU. This inclusion ensures that these assets are properly accounted for and managed within the bankruptcy proceedings:

> (1). "The Curator must make a record of the bankruptcy property, no later than 2 (two) days after receiving the decision letter of his appointment as Curator."
> (2). The recording of the insolvent property may be made under the hands of the Curator with the approval of the Supervising Judge".

Furthermore, in Article 102 of Law No. 37 of 2004, concerning Bankruptcy and PKPU, it is stated:

> "As soon as the recording of the insolvent property is made, the Curator shall make a register stating the nature, amount of receivables and debts of the insolvent property, the name and residence of the Creditors along with the amount of receivables of each Creditor".

Recording of bankruptcy assets, control of all bankruptcy assets, storage, and management of all bankruptcy assets is the main task that the Curator must carry out. It is the most important part carrying out the task of securing bankruptcy assets that must be carried out with all efforts so that no one harms the bankrupt assets for the benefit of bankruptcy itself because the essence of bankruptcy is to collect all debtor assets to be paid as much as possible for the benefit of creditors. The provisions of Article 98 of Law Number 37 of 2004 concerning Bankruptcy and PKPU are as follows:

> "Since his appointment, the Curator shall make all efforts to secure the insolvent estate and keep all letters, documents, money, jewellery, securities and other securities by giving receipts".

The provisions in the article provide encouragement and a legal basis for the Curator to be able to work as much as possible in any way to secure the bankruptcy property. Because it is in the hands of a Curator that many hopes are pinned for the fulfilment of the interests of the creditors who register their receivables in order to get the maximum payment.

4 Conclusion

The concerns raised about the position of creditors under Bankruptcy Law and PKPU in Indonesia highlight the complexities and potential conflicts that can arise in insolvency proceedings. While these laws offer a balance between the rights and interests of debtors and creditors, it's essential to recognize that legal provisions can sometimes be ambiguous or open to interpretation. In many bankruptcy systems, there is an inherent tension between the rights of creditors and the need to ensure a fair and orderly process for resolving insolvency. The imposition of waiting periods, short sales periods, and the prioritization of certain creditor claims are measures aimed at managing the distribution of assets in a way that is equitable and efficient. The concerns you've raised point to the importance of robust legal frameworks and clear regulations to protect the interests of all parties involved in bankruptcy proceedings. Legal systems often evolve to address these issues, striking a balance that provides adequate protection to both debtors and creditors while ensuring the fair and transparent administration of insolvency cases. If there are ambiguities or shortcomings in the existing legal framework, it may be a matter for legal reform and legislative updates to address. It's important for legal experts, practitioners, and policymakers to continually evaluate and refine these laws to achieve a fair and just resolution of insolvency cases.

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