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REFORMATION OF INDONESIAN INSOLVENCY REGULATION ON EXECUTION OF CROSS-BORDER ASSETS BASED ON THE EUROPEAN UNION

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Abstract

The current possibility of hassle-free negotiations and transactions across countries allows international trade to be a significant source of profit for businesses in Indonesia. In the process, businesses are often exposed to risks of insolvency for being unable to repay debts. An insolvent debtor owning assets in other countries shifts the case to a cross-border insolvency case. As there is currently an absence of cross-border insolvency regulation in Indonesia, this paper therefore aims to reform Indonesian insolvency regulation through analyzing and applying learning points from the European Union's success in managing cross-border insolvency. This paper identifies as legal normative research and is done through prescriptive analysis. The data used is secondary data obtained through a literature review, which includes primary and secondary sources. This paper uses the statute approach and will be analyzed qualitatively. Through the discussion, it is suggested that Indonesia adopt several relevant aspects of the EU regulation. To ease implementation, Indonesia should consider moving towards the reformation as a part of ASEAN. Alternatively, Indonesia can also independently engage in bilateral or multilateral treaties. To add on, Indonesia should advance from the idea of absolute territorialism or absolute universalism and instead seek to implement modified universalism in its cross-border insolvency regulation.

Keywords: Cross-Border Insolvency; Execution of Asset; Legal Reformation.

Introduction

At present, the world economy is experiencing rapid development, allowing for the possibility of hassle-free negotiations and transactions across countries. The practice of international trade, which was previously considered a complicated process, is now deemed an ordinary part of everyday life. International trade is a significant source of profit for businesses in Indonesia which oftentimes deals with matters of differences in laws and borders, as well as accounts payable (Aminah, 2019). When dealing with accounts payable, an agreement containing terms, conditions, rights, and responsibilities of creditor and debtor is usually made. The presence of such an agreement creates the possibility of the debtor being unable to repay the debt, and hence, risks of insolvency.

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According to Article 1(1) of Law of the Republic of Indonesia Number 37 of 2004 on Insolvency and Suspension of Debt Payments Obligation ("Law 37/2004"):

> *"Insolvency is general confiscation of insolvent debtor's every asset and is managed by the curator under the supervision of a supervisory judge as regulated in this constitution."*

To explain further, insolvency is when the court issues a decision to declare a debtor insolvent for being unable to repay a debt to the creditor (Asnil, 2018). Following the issuance of a decision, the court then moves to the appointment of a curator to execute the debtor's assets. However, this execution of debtor's assets is often faced with problems as the insolvent debtor may also own assets overseas. When a debtor has assets in other countries, its execution is no longer simple as it now involves two or more jurisdictions where each of them abides by their law. Such a case is known as cross-border insolvency.

In cross-border insolvency, jurisdiction holds an important role as each country possesses rights to sovereignty, which should not be intervened by other countries' laws (Dewi, 2021). Even a small act of intervention can be considered a breach of a country's sovereignty (Sefriani, 2021). Generally, there are two views when it comes to jurisdiction, namely territorialism and universalism.

According to territorialism, an insolvency decision does not apply and does not have the power to execute beyond a single country (Rahman et al., 2023). On the other hand, universalism states that an insolvency decision should apply to an insolvent debtor's entire assets, regardless of their location (Puspitasari et al., 2021). The opposing opinions between these two views result in a clash and make them impractical to practice simultaneously.

Seeing that it is extremely difficult to practice territorialism and universalism to the maximum, adjustment was made to allow their simultaneous practice, creating the modified universalism theory. Modified universalism was created to address problems relating to cross-border insolvency cases and ease their management. It was created based on universalism as universalism was recognized as the theoretical long-term solution to cross-border insolvency (Westbrook, 2000).

Despite that, however, modified universalism also incorporates territorialism. Modified universalism allows for the amplification of merits of universalism, and at the same time, maintains the aspect of local sovereignty as practiced in territorialism (Westbrook, 1991). As such, territorialism and universalism can then be practiced together in cross-border insolvency matters (Aristeus, 2018).

Despite the many attempts to create better solutions to cross-border insolvency, Indonesia has not regulated cross-border insolvency in its regulations. This absence of specific regulation on cross-border insolvency will potentially lead to difficulties in handling cross-border insolvency cases in the future (Juniata et al., 2019). The current law's incapability to handle cross-border insolvency cases poses a threat to the future of the economy and law enforcement in Indonesia, creating an urgent need for Indonesia to reform its cross-border insolvency regulation accordingly.

In terms of cross-border insolvency regulation, one that is deemed successful and is ahead of Indonesia is the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (recast) ("EU Regulation") (Anggriawan, 2020). This regulation was formulated and implemented by the European Union, a supranational union consisting of 27 member states in Europe (Wallace et al., 2020) created for unity amongst its members (Wiener et al., 2019).

Through its insolvency regulation and its cross-border insolvency practice, the European Union demonstrated that it is possible for different countries with different interests to collectively strive towards a common goal. The European Union's experience in regulating the jurisdiction of foreign courts in the execution process of cross-border assets amongst the member states should be made a reference and a learning point. That being said, this paper will therefore discuss the learning points from the European Union's management of cross-border insolvency and propose its use for the reformation of Indonesian insolvency regulation.

Based on the above introduction, this paper will discuss the following question: regarding the European Union, how should the Indonesian insolvency regulation on the execution of cross-border assets be reformed?

Research Method

This paper identifies legal normative research, which is explained by Marzuki as a procedure for finding legal principles, norms, and regulations to achieve a conclusion to the issue in question (Marzuki, 2019). It is done through prescriptive analysis involving systematized and unbiased research on legal circumstances. This is to gain an explanation and comprehension of different aspects of the law.

This paper uses secondary data, which includes primary and secondary sources. Primary sources consist of written data that is authoritative (Marzuki, 2019), such as constitutions and policies. Secondary sources comprise publications that give guidance and ideas to the author during the research (Marzuki, 2019), such as books and journals. The said data is obtained through a literature review process which involves identification, collection, evaluation, and conclusion of the research based on the data.

The approach used in this paper is the statute approach. This approach involves examining related constitutions and policies to come up with a solution to the issue being discussed (Marzuki, 2019). The technique used is qualitative, which includes collecting, interpreting, evaluating, and discussing relevant legal principles, norms, and sources, to answer the question being researched.

Result and Discussion

In handling cross-border insolvency, Indonesia mostly uses the Indonesian Civil Code and Law 37/2004 as the legal basis of its current law enforcement. Indonesia has not engaged in any international cooperation agreement, such as bilateral and multilateral treaties discussing cross-border insolvency. In terms of practice, there is still confusion

on whether Indonesia adopts territorialism, universalism, or even modified universalism. Thus far, Indonesia is observed to strongly adopt territorialism.

Despite that, however, Article 1131 of the Indonesian Civil Code and Articles 212, 213, and 214 of Law 37/2004 contradict the practice of territorialism and indicate the practice of universalism. Article 1131 of the Indonesian Civil Code states that: *"A debtor's every asset, both movable and immovable, both owned in the present or will be owned in the future, becomes a collateral for all his/her agreement."*

According to this article, a debtor's every asset is automatically considered as collateral for all his/her debts. This article affects all the debtor's assets, without exception, and about the location. This goes to prove that the assets are not bound by the territorial boundaries of a country, which contradicts the idea of territorialism and reflects the practice of universalism.

Subsequently, the presence of Articles 212, 213, and 214 of Law 37/2004 officially proves the inclusion and acknowledgment of assets located outside of Indonesia as a form of debt payment in insolvency. This means that Indonesia permits the execution of assets situated outside of Indonesia, which contradicts its belief in territorialism and indicates the practice of universalism. This confusion in Indonesia's practice poses difficulties and challenges to curators in performing and completing their occupational responsibilities.

Presently, Indonesia has neither the regulation nor the arrangement that allows cross-border assets to be executed immediately. To finally execute cross-border assets, curators have to undergo a rather complicated and time-consuming process as they need to request a re-trial at the court where the assets are located. An example is the execution process of Commercial Court of Central Jakarta District Court Decision Number 138/ Pdt.Sus-PKPU/2016/ PN.Niaga.Jkt.Pst dated 22 February 2017, where the debtors own several assets in Singapore in the form of savings and property.

In this case, the curator had to first submit a request to the Singapore High Court for an acknowledgment of the debtor's insolvency. Together with this request, the curator attached the relevant official documents, such as the court decision and its supporting documents, which include the debtors' declaration as insolvent and the curator's appointment as the foreign representative in charge.

In response to this request, Singapore through the Singapore High Court Number 216 of 2019 dated 18 September 2019 granted authority to execute the debtors' assets, except moving them out of Singapore, as well as the authority to search and obtain information on the debtors' financial assets in the bank. Although this method is feasible and functional, the whole process of obtaining permission to execute the said assets took almost two years and seven months. This is an extensively long delay, which creates doubts and legal uncertainty for the parties involved. As a solution to that, Indonesia should therefore work towards lessening the time taken in the execution of cross-border assets.

A way to allow a more efficient process is through a reformation of Indonesian insolvency regulation, such as engagement in bilateral or multilateral treaties. If we look

at the European Union, it consists of 27 countries choosing to sacrifice a part of their sovereignty for the greater good. Through this, they were able to address problems they commonly experience and collaborate to find solutions that would benefit all the participating countries. One particularly useful element in the EU regulation is the use of the Centre of Main Interest ("COMI") as the deciding factor in choosing which law and jurisdiction should preside over a cross-border insolvency case.

About that, Recital 23 of the EU regulation states: *"This Regulation enables the main insolvency proceedings to be opened in the Member State where the debtor has the center of its main interests. Those proceedings have universal scope and are aimed at encompassing all the debtor's assets. To protect the diversity of interests, this Regulation permits secondary insolvency proceedings to be opened to run in parallel with the main insolvency proceedings. Secondary insolvency proceedings may be opened in the Member State where the debtor has an establishment. The effects of secondary insolvency proceedings are limited to the assets located in that State. Mandatory rules of coordination with the main insolvency proceedings satisfy the need for unity in the Union."*

According to the above recital, COMI serves as the main criterion in determining which court is competent and should be given the power to preside over the main proceeding of a cross-border insolvency case (van Calster, 2015). It further states that there are two kinds of insolvency proceedings, namely main insolvency proceedings and secondary insolvency proceedings. The scope of main insolvency proceedings is universal and they apply to the debtor's every asset in the European Union countries. On the other hand, secondary insolvency proceedings only encompass assets situated in that particular European Union country (Satrio, 2021).

It can only be opened in the country where the debtor owns the establishment. Establishment is defined in Article 2(10) of the EU Regulation as the following: *"Any place of operations where a debtor carries out or has carried out in the 3 months before the request to open main insolvency proceedings a non-transitory economic activity with human means and assets."*

The availability of secondary insolvency proceedings serves to address the sovereignty and the differing interests of the countries. Furthermore, through the mention of terms such as *"universal scope"* in Recital 23 and *"territorial insolvency proceedings*" in Article 3.4, the EU regulation portrays the practice of both territorialism and universalism. This shows that the EU regulation allows for the simultaneous practice of territorialism and universalism and is therefore an example of successful implementation of modified universalism.

Referring to the above discussion, the Indonesian insolvency regulation on the execution of cross-border assets should be reformed by adapting several relevant aspects from the EU regulation, such as the idea of COMI as well as the availability of main and secondary insolvency proceedings in its cross-border insolvency management. Through the European Union's engagement in a multilateral treaty, the EU Regulation was

produced, allowing for an effective and almost immediate take on cross-border insolvency cases in the European Union countries.

However, in the comparison between Indonesia and the European Union, it is known that Indonesia is a single country whereas the European Union is a union of many countries. This difference hinders the direct implementation of the relevant practice of the EU regulation into Indonesian insolvency regulation. In line with the aforementioned, Indonesia should consider moving towards the reformation as a part of the Association of Southeast Asian Nations ("ASEAN").

ASEAN is a regional economic and political cooperation formed in August 1967 (Ishikawa, 2021), currently comprising 10 countries, namely Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam. At present, cross-border insolvency is also a cause for concern within ASEAN as law enforcement still lacks consistency and coordination (Anggriawan, 2020).

Considering that Indonesia as a member country should propose and urge ASEAN to follow in the footsteps of the European Union in creating regulations on the management of cross-border insolvency cases arising amongst ASEAN member countries. Such creation of cross-border insolvency regulation within ASEAN will surely contribute to a more efficient cross-border assets execution process between Indonesia and fellow ASEAN member countries.

Alternatively, Indonesia can also independently engage in bilateral or multilateral treaties with other countries of choice to improve its cross-border insolvency regulation. The presence of specific arrangements between Indonesia and one or more countries will contribute towards a more efficient cross-border assets execution process. This approach, however, will require a higher frequency of political outreach as Indonesia will need to propose the idea of engaging in treaties on the execution of cross-border assets to other countries and negotiate its terms as well as conditions.

Additionally, to address the current inconsistency in Indonesian insolvency regulation, the author believes that Indonesia should advance from the idea of absolute territorialism or absolute universalism and instead seek to implement modified universalism in its management of cross-border insolvency cases. As proved by the European Union, the practice of modified universalism brings about positive impacts and outcomes in the management of cross-border insolvency cases. In the long run, a successful adaptation of modified universalism will greatly ease the execution of cross-border assets as it is a win-win solution that allows an insolvency decision to have a universal effect while still granting countries their rights to sovereignty.

Conclusion

The Indonesian insolvency regulation on the execution of cross-border assets should be reformed by adopting the European Union's practice of using COMI as a deciding factor as well as the availability of main and secondary insolvency proceedings in its cross-border insolvency management. However, as Indonesia is a single country

and the European Union is a union of many countries, it is difficult to directly implement the relevant practice of the EU regulation into Indonesian insolvency regulation.

That being said, Indonesia should consider moving towards the reformation as a part of ASEAN by proposing and urging ASEAN to follow in the footsteps of the European Union in creating its cross-border insolvency regulation. As an alternative, Indonesia can also independently engage in bilateral or multilateral treaties with other countries of choice. To add on, Indonesia should advance from the idea of absolute territorialism or absolute universalism and instead seek to implement modified universalism to address the current inconsistency and improve Indonesian insolvency regulation.

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