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LEGAL ANALYSIS OF THE POWER OF EXECUTION OF WARRANTY (BORGTOCHT) THROUGH BANKRUPTCY LEGAL REMEDIES

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Abstract

Borgtocht agreement or guarantee agreement is one form of credit security that aims to provide legal certainty for creditors. However, in practice, the implementation of borgtocht execution often faces obstacles when the main debtor or guarantor faces bankruptcy. This situation gives rise to a legal conflict between the creditor's rights to the borgtocht guarantee and the bankruptcy principle that prioritizes collective settlement for all creditors. This article analyzes the power of borgtocht execution through the bankruptcy legal mechanism in Indonesia by referring to the Civil Code and Law Number 37 of 2004 concerning Bankruptcy. Based on legal studies and case studies, this article provides recommendations to improve legal certainty in the implementation of borgtocht in the midst of the bankruptcy process.

This execution process becomes very important, especially when the debtor is unable to fulfill his obligations, because it provides a way for creditors to obtain fulfillment through collateral or third parties (guarantor). In addition, borgtocht execution is also closely related to bankruptcy procedures, which allow creditors to file claims on the collateral in order to obtain their rights. In the context of bankruptcy, borgtocht execution must be carried out by considering the principle of equality of rights between other Creditors, so as not to disrupt the process of dividing the assets of the bankrupt Debtor. Execution of borgtocht can be carried out through a more specific legal route, namely the bankruptcy procedure regulated in Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations (Bankruptcy Law). In the context of bankruptcy, creditors holding borgtocht can claim their rights through execution against the guarantor or collateralized assets, even though the debtor's bankruptcy process is ongoing. However, this execution process must pay attention to the applicable legal principles, including the pari passu principle which regulates equal treatment of all creditors in the distribution of assets of bankrupt debtors. This study aims to analyze the power of borgtocht execution in Indonesian law, as well as to identify the interaction between borgtocht execution and bankruptcy procedures regulated by law. A deeper understanding of the power of borgtocht execution is essential for creditors, debtors, and parties involved in the bankruptcy process, in order to ensure fair and balanced legal protection for all interested parties. Thus, this study contributes to the development of an understanding of creditors' rights in the execution of borgtocht guarantees within a broader legal framework.

Keywords: Execution of Borgtocht, Guarantee, Bankruptcy, Civil Law, Creditor's Rights, Bankruptcy Law.

INTRODUCTION

Borgtocht, or surety, is a form of additional obligation that plays an important role in civil legal relations, especially in the context of debt guarantees. Regulated in Article 1820 of the Civil Code (KUH Perdata), borgtocht is a mechanism in which a surety is willing to guarantee the implementation of a debtor's obligations to a creditor. If the debtor fails to fulfill his/her obligations, the surety is obliged to fulfill the obligation to the creditor. As a form of personal guarantee, borgtocht

has unique characteristics that distinguish it from material guarantees such as pawns or mortgages, because it emphasizes the personal responsibility of the surety (Subekti, 1983, p. 54).

In practice, borgtocht is often an option for creditors to provide additional protection for their receivables, especially when material collateral is not available or is considered inadequate. The guarantor, in this case, bears moral and legal responsibility to protect the interests of creditors. However, this mechanism is not free from various legal problems, especially in situations where the main debtor fails to pay or is even declared bankrupt. The bankruptcy process often has a significant impact on the legal relationship between creditors, debtors, and guarantors, creating a complex situation and demanding clarity in the implementation of the law (Harahap, 2007, p. 162).

In the context of bankruptcy, the position of borgtocht becomes more complicated because it involves various interests and different legal dynamics. The bankruptcy of the main debtor can raise questions regarding the legal position of the guarantor, such as whether the guarantor's responsibilities remain fully valid, or whether there are certain limitations in accordance with the principles of bankruptcy law. In addition, there is often debate regarding the creditor's right to directly execute borgtocht, especially when the main debtor has not fully completed the bankruptcy process. This is complicated by the possibility of a conflict of interest between creditors, debtors, and guarantors (Simanjuntak, 2019, p. 87).

Another problem that often arises in practice is how to determine the limits of the guarantor's liability, especially if the amount of obligations to be fulfilled is very large or there is a dispute regarding the validity of the borgtocht agreement. In many cases, the execution of borgtocht also faces legal obstacles, such as inconsistencies with the principles of bankruptcy law or administrative obstacles that slow down the settlement process. In addition, from the guarantor's side, there is a significant risk of losing assets that has the potential to affect their economic stability, especially if the guarantor is also a business entity (Rahardjo, 2020, p. 112).

The study of borgtocht in the context of bankruptcy is important to understand how this obligation operates in challenging situations. In-depth legal research and analysis are needed to identify legal loopholes, provide solutions to existing problems, and offer recommendations to improve the existing legal framework. This article aims to provide a comprehensive understanding of the power of borgtocht execution in relation to bankruptcy, including its impact on the parties involved. In addition, this article is expected to provide practical and strategic recommendations for creditors, debtors, guarantors, and other interested parties in managing legal risks related to borgtocht obligations.

Ultimately, the discussion on borgtocht is not only relevant to the development of civil and bankruptcy law in Indonesia, but also contributes to the protection of the rights of the parties involved, increasing legal certainty, and more effective dispute resolution. With a comprehensive and integrated approach, this study is expected to be a useful reference for academics, legal practitioners, and business actors who face challenges in implementing borgtocht in the field.

This study aims to comprehensively analyze how borgtocht operates in bankruptcy situations, including the challenges faced and the solutions that can be applied. This study is expected to contribute to the development of civil law and bankruptcy in Indonesia, as well as being a reference for legal practitioners, academics, and interested parties in understanding and resolving problems related to borgtocht so that the process of executing this guarantee becomes very important, especially when the debtor cannot fulfill his obligations, because it provides a way for creditors to obtain fulfillment through collateral or third parties (guarantors).

METHOD

This study uses a juridical-normative approach that aims to analyze legal norms related to borgtocht in the Indonesian civil law system, especially in relation to bankruptcy. The juridical-normative approach was chosen because this study focuses on the study of applicable legal provisions, doctrines, and their application in practice (Soekanto and Mamudji, 2001, p. 13).

This research is descriptive-analytical, where the collected data is analyzed to describe the legal position of borgtocht and the problems that arise in the context of bankruptcy. This method aims to provide an in-depth picture of the problems being studied, while also offering solutions based on legal analysis.

The data sources used in this study consist of:

1. Primary legal materials, namely relevant laws and regulations, such as the Civil Code and Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations.
2. Secondary legal materials, including law books, journal articles, and academic literature discussing borgtocht, guarantee law, and bankruptcy law.
3. Tertiary legal materials, such as legal dictionaries and encyclopedias, to support the explanation of the terminology used in the research.

The data collection process was carried out through document and literature studies, where legal documents and academic literature were analyzed to identify relevant legal principles (Marzuki, 2016, p. 93). The data analysis procedure was carried out in several stages, namely:

1. Problem identification, which involves examining the legal issues of borgtocht in bankruptcy.
2. Normative study, namely analysis of applicable legal provisions, both those originating from the Civil Code and bankruptcy law.
3. Comparative analysis, namely a comparison of the application of borgtocht law in Indonesia with practices in other countries that have similar legal traditions, such as the Netherlands.
4. Preparation of recommendations, based on the results of the analysis to provide solutions to the legal problems found.

This methodology is expected to provide a strong theoretical and practical basis to explain the power of borgtocht execution in the context of bankruptcy and its implications for the parties.parties involved. to ensure fair and balanced legal protection for all interested parties. Thus, this study contributes to the development of understanding of creditor rights in the execution of borgtocht guarantees within a broader legal framework.

RESULTS AND DISCUSSION

Power of Execution of Guarantee (Borgtocht) Through Bankruptcy Legal Efforts

Collateral in the form of borgtocht or guarantee is one of the instruments that has a strategic role in supporting financial transactions and credit provision. Borgtocht, as regulated in Article 1820 of

the Civil Code (KUHPerdata), is an agreement in which a third party (guarantor) binds himself to the creditor to fulfill the debtor's obligations if the debtor fails to fulfill his obligations (Subekti, 1995:25). As a form of personal guarantee, borgtocht provides additional guarantees for creditors against the risk of default by the debtor. This is very relevant in the practice of providing credit, especially when the debtor does not have sufficient assets to be used as collateral. The existence of borgtocht allows creditors to obtain additional legal protection, which theoretically strengthens the legal position of the creditor. In legal practice in Indonesia, the implementation of borgtocht often faces challenges, especially when the debtor is declared bankrupt. Bankruptcy, as regulated in Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations (UUK-PKPU), has a significant impact on the legal relationship between debtors, creditors, and guarantors. In the context of bankruptcy, all of the debtor's assets are considered as bankrupt estates under the control of the curator to be distributed to creditors according to the principle of paritas creditorum (Harahap, 2005:112).

However, borgtocht as a personal guarantee does not directly involve the debtor's assets, so there is a legal debate whether the execution of borgtocht is subject to the bankruptcy mechanism or can be carried out independently by the creditor. One of the problems that often arises in the implementation of borgtocht is the unclear legal position in the context of bankruptcy. Although borgtocht is a personal guarantee that is accessory in nature, its implementation is often disrupted by bankruptcy procedures. Articles 1131 and 1132 of the Civil Code stipulate that all of the debtor's assets become collateral for all of his creditors, which prioritizes the principle of equal distribution of creditor rights. However, this rule does not explicitly regulate the position of borgtocht in bankruptcy, giving rise to various legal interpretations. In practice, there is a view that states that creditors can still demand the implementation of borgtocht from the guarantor separately, even though the debtor is in the process of bankruptcy (Setiawan, 2014:45).

Another relevant issue is the effectiveness of borgtocht execution in providing protection for creditors. Creditors often face obstacles in executing the guarantor due to legal and administrative obstacles. In some cases, bankruptcy curators try to include borgtocht execution into the bankruptcy mechanism, thus complicating the creditor's execution rights against the guarantor. For example, in Supreme Court Decision Number 1795 K/Pdt/2018, there was a dispute regarding the implementation of borgtocht in the debtor's bankruptcy condition. The Supreme Court in the decision emphasized that borgtocht as a personal guarantee can still be executed independently by the creditor, even though the debtor is declared bankrupt. This shows that borgtocht has a unique legal force compared to material guarantees.

From a legal doctrine perspective, there are several differences of opinion regarding the implementation of borgtocht in bankruptcy situations. Some legal experts argue that borgtocht as a personal guarantee is not subject to the paritas creditorum mechanism, so that creditors can execute their rights directly to the guarantor (Subekti, 1995:34). However, other opinions state that the implementation of borgtocht must be adjusted to the principle of equality to protect the interests of all creditors, considering that bankruptcy aims to provide justice for all interested parties (Harahap, 2005:117).

In civil law practice in Indonesia, borgtocht guarantee or surety is one of the important instruments in guaranteeing the debtor's debt repayment to the creditor. Borgtocht is regulated in Article 1820 of the Civil Code (KUHPerdata) which states that surety is an agreement in which a third party, called the guarantor (borg), promises to the creditor to fulfill the debtor's obligations if the debtor fails to carry out his obligations. The power of borgtocht execution is often tested in situations where the principal debtor is declared bankrupt.

When the principal debtor is declared bankrupt based on Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations (UUK-PKPU), creditors often face challenges in collecting obligations from the guarantor. Bankruptcy results in the cessation of all legal actions against the bankrupt debtor, but not against the guarantor. In this context, creditors can still demand the implementation of the guarantor's obligations without being bound by the moratorium applicable to the bankrupt debtor (Article 1831 of the Civil Code). This shows that borgtocht has permanent execution power, regardless of the bankruptcy status of the principal debtor.

As a personal guarantee, borgtocht has several special characteristics that distinguish it from material guarantees, such as mortgages or pawns. One of its characteristics is the subsidiary nature, which means that borg can only be sued if the main debtor is declared negligent (default). However, in the case of implementing borgtocht through bankruptcy legal remedies, creditors can take advantage of this mechanism to accelerate the realization of their rights. Bankruptcy allows the execution of all of the debtor's assets, including liabilities guaranteed by third parties or called borg. (Trias Kusuma Wardani, 2020:45).

Bankruptcy Legal Remedies in Borgtocht Execution

Bankruptcy is regulated in Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations (Bankruptcy Law). In the context of borgtocht, if the debtor is declared bankrupt, the creditor can file a claim with the borg to pay off the debt according to the guarantee that has been given.

This process begins with the filing of a bankruptcy petition to the Commercial Court. After the debtor is declared bankrupt, the debtor's assets will be managed by a curator to pay all obligations to creditors. If the debtor's assets are insufficient to pay off the obligations, the borg can be held accountable in accordance with the provisions contained in the borgtocht agreement.

Although this mechanism is effective in protecting the interests of creditors, there are several obstacles in its implementation. One of the main obstacles is determining the limit of the borg's liability, especially if the borgtocht agreement does not explicitly regulate the maximum amount of liability. In addition, bankruptcy often involves prolonged disputes between the parties, both debtors, creditors, and borgs.

However, there is a dilemma in the application of the law regarding borgtocht in bankruptcy cases. Guarantor often raises objections on the grounds that their responsibility is only secondary and depends on proving the inability of the principal debtor to fulfill its obligations. In some cases, the court must determine whether the creditor has taken sufficient steps to pursue the principal debtor before demanding the implementation of borgtocht. This case is reflected, for example, in Supreme Court Decision Number 1866 K/Pdt/2014, which confirms that the guarantor is obliged to fulfill its obligations if the principal debtor is unable to pay off its debt.

In theory, borgtocht offers strong legal protection for creditors. However, in practice, its effectiveness often depends on the clarity of the guarantee agreement and the willingness of creditors to pursue the guarantor legally. Therefore, creditors are advised to ensure that there is an explicit clause in the borgtocht agreement to mitigate the risks arising from the bankruptcy of the principal debtor.

Challenges Faced in ImplementationExecution of Guarantee (Borgtocht) by Creditor

Challenges in the Implementation of Borgtocht Guarantee Execution as follows:

1. Lack of Understanding of Legal Provisions
   One of the main challenges is the lack of understanding of the parties involved, including the guarantor, regarding the legal provisions governing borgtocht. Guarantor is often unaware of the legal responsibilities they assume when signing a guarantee agreement (Setiawan, 2015, p. 102). This can trigger legal disputes when creditors try to execute the guarantee.
2. Issues of Formality and Validity of Agreements
   A borgtocht agreement must meet certain formal requirements to be valid and enforceable. For example, this agreement must be made in writing and approved by the guarantor without coercion. If these requirements are not met, the guarantor can challenge the validity of the agreement, which can hinder the execution process (Marzuki, 2010, p. 87).
3. Guarantor Asset Limitations
   The execution of borgtocht depends on the availability of assets owned by the guarantor. If the guarantor does not have sufficient assets or the assets have been pledged to another party, execution becomes difficult. Creditors often have to make additional legal efforts to identify and obtain rights to the guarantor's assets (Yamin, 2018, p. 220).
4. Protracted Legal Process
   The guarantee execution process often faces obstacles in court, especially if the guarantor files an objection or lawsuit. Long and complex legal procedures can delay the fulfillment of creditor rights, increase litigation costs, and reduce execution efficiency (Supreme Court Decision of the Republic of Indonesia Number 123/Pdt/2018).
5. Social and Ethical Challenges
   In some cases, the execution of the guarantor presents a social and ethical dilemma. The guarantor oftentimes are family members or close friends of the debtor, so that the execution effort can cause tension in personal relationships. Creditors may face social pressure to relax their demands (Setiawan, 2015, p. 115).

CONCLUSION

In conclusion, the implementation of borgtocht execution presents various challenges that include legal, administrative, and practical aspects. Legally, creditors often face obstacles due to unclear agreements, resistance from guarantors, and varying interpretations from judges. From an administrative perspective, negligence in preparing documents or the claim submission process can worsen the situation, while from a practical perspective, difficulties in executing guarantor assets such as insufficient assets or having been burdened with other mortgage rights are the main challenges.

Addressing these challenges requires a comprehensive approach, from improving creditors' competence in understanding legal aspects to strengthening related legal regulations that are more in favor of legal certainty. Legal reform is needed to ensure that borgtocht agreements can be implemented effectively and efficiently, without causing prolonged disputes. On the other hand, optimizing the court system, including the use of technology, can speed up the litigation process and increase the parties' trust in the legal system.

In the long term, it is important to create a balance between the interests of creditors and guarantors. The principle of justice must remain the main reference in resolving disputes, so that the rights of all parties can be properly protected. With regulatory reform, including harmonization with

Law Number 4 of 1996 concerning Mortgage Rights and optimization through Law Number 11 of 2020 concerning Job Creation, it is hoped that the execution of borgtocht can run more smoothly, provide greater legal certainty, and support a healthy investment and financing climate in Indonesia.

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