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RESEARCH ARTICLE

HIERARCHY OF THE DISTRIBUTION OF BANKRUPTCY PROPERTY IN SYNDICATED LOAN FACILITY AGREEMENT FOR THE BANKRUPT DEBTOR

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Abstract

The position of individual creditors over the collateral in syndicated loan is represented by security agent as the recipient of collateral and the holder of material collateral. It is the legal consequence of agency relation as regulated in Syndicated Loan Facility Agreement. Therefore, the security agent in this syndicated loan, for the sake of law, serves as preference creditor to other syndication participation. This research aims to answer the problems related to the implementation of pari passu pro rata parte principles in determining the hierarchy of creditor in syndicated loan facility agreement to the bankrupt debtor. Firstly, it is intended to find out the position of individual creditors to the collateral in syndicated loan in bankruptcy position; and secondly, it is intended to the hierarchy of bankruptcy property payment to the debtor of syndicated loan in bankruptcy position. The research method employed in this research was a normative research. It used juridical normative research type aiming to find the truth based on the legal science logic from its normative side. Data source used in this research was secondary data including laws, court verdicts, books, journals, articles, materials from internet, and dictionaries.

Introduction:-

The need for fund and capitalization is very essential to any types of business. To a company, fund can derive from various sources. It can be equity or loan. The equity fund can derive from its founders in the form of the capital deposit from the founders or from investors that deposit fund for the corporate capital after the company has been established [1].

The function of distributing fund in the form of loan is one of bank's functions, but excessive loan concentration can harm the bank. For that reason, Bank of Indonesia (BI) obligates the banks to apply caution principle in distributing loan and in disseminating portfolio of fund provision, particularly by limiting fund provision in certain percentage to the related or the non-related parties by considering the bank's capital condition. It is called Maximum Limit of Credit (Indonesian: Batas MaksimumPemberianKredit, thereafter called BMPK) as regulated in the Bank of Indonesia's Regulation (PBI) No. 7/3/PBI/ 2005 as amended with PBI No. 8/13/PBI/2006 about Maximum Limit of Credit for Public Bank. This stipulation is regulated further in Bank of Indonesia's Circulars (SEBI) No.

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7/14/PBI/DPNP dated April 18, 2005. In the presence of BMPK rule, the bank is incapable of giving loan beyond the maximum limit specified. In relation to BMPK specified, the rule confirms that BPMK allowed is only 10% of bank's capital for the bank-related party, and up to 20% for the non-related party [2]. In fact, sometimes a customer, generally big company, needs a great amount of fund beyond the maximum limit of credit through syndicated loan facility agreement, the loan distribution in which one of debtors is given loan by two or more creditors. Stanley Hum in his book entitled Syndication Loan (A Handbook for Banker and Borrower) defines syndicated loan as follows :[3]

"A syndicated loan is a loan is a loan made by two or more lending institutions, on similar terms and condition, using common documentation and administered by a common agent"

Based on the definition, the elements of syndicated loan include:
1. Two or more banks or financial institutions;
2. Based on shared requirements to all participants of syndication;
3. Using one shared loan document; and
4. Administrated by the same agent.

As long as the loan payment performs well, no problem will arise. A problem will arise if the loan does not perform well, in which the payment is no longer done fully and even there is no payment at all. This condition will make the loan accepted by the debtor based on syndicated loan default, for the sake of law, leading the debtor to be bankrupt. Being Bankrupt is a condition in which debtor is incapable of repaying their loan to creditor. Meanwhile, bankruptcy is the court's verdict leading to general seizure over all properties of bankrupt debtor, either those preexisting or to exist in the future [4]. In literature, Algra defines bankruptcy as follow: Faillissementiseengerechtelijkbeslag op het gehelevermogen van eenschuldenaar ten behove van zijngezamenlijkeschuldeiser[5] (bankruptcy is a general seizure over all properties of a debtor to repay its debt to creditor). Henry Campbell Black defines bankruptcy as a statutory procedure by which a (usu.insolvent) debtor obtains financial relief and undergoes a judicially supervised reorganization of liquidation of the debtor's assets for the benefit of creditors.[6]

Bankruptcy is managed and resolved by curator under the supervision of supervisory judge aiming primarily to use the result of property sale to pay entire loan of the bankrupt debtor proportionally according to the creditor's structure. It is relevant to the objective of Bankruptcy Act Number 37 of 2004, to ensure that the division of debtor's properties between creditors is corresponding to the pari passu pro rata parte principle.

Legal principle is the broadest foundation of the birth of a rule of law. It means that the rules of law can eventually revert to those principles. Legal principle is not a concrete legal norm but basic thought that is general in nature or constituting the background of concrete regulation existing inside and behind each of legal systems [7]. Generally, legal principle is not put onto concrete regulation or articles, but legal principle is also often put onto it [8].

In Indonesia the standardization of pari passu pro rata parte principle is contained in Article 1132 of Civil Code (KUH Perdata) explaining legal relation of property in which the legal subject has more than one obligation to comply with to more than one legal subject deserve the obligation compliance. The article states:

"The object becomes joint collateral to all people lending money to him/her; the result of object sale is divided proportionally, according to the proportion of their credit, unless those debtors should be transcended for some legitimate reasons".

The article explains that every party deserves the fulfillment of the contract of the assets of the obligated party (debtor) in:
1. Pari passu, obtaining the repayment jointly without transcending one party;
2. Pro rata parte, proportionally calculated based on the ratio of their credit to total credit, to the debtor's property.

There is an amendment to the latest Bankruptcy Law, Law Number 37 of 2004 about Bankruptcy and Delay of Debt Payment Obligation compared with Law Number 4 of 1998 about Bankruptcy that has not regulated yet the position of creditor in the term of the application for bankruptcy in syndicated loan. The Law Number 37 of 2004 about Bankruptcy and Delay of Debt Payment Obligation mentions that there is creditor syndication; therefore each of creditors is the one as mentioned in the explanation of Articles 1 and 2:

"Creditor intended in this clause includes concurrent, separatist, and preference creditors that can file the application for bankrupt statement without losing the material collateral right to the debtor's property and to transcend their right. If there is creditor syndication, each of creditors is the ones as mentioned in Articles 1 and 2".

It confirms the persona standi in judisio principles enabling the creditor, as the personal legal subject, to use its right to demand the debtor to repay its loan [9]. In addition, the strong position of individual creditors in syndicated loan is also supported by event of default clause usually regulated in the syndicated loan agreement, mentioning that the ones deciding default are creditors, rather than agent. The agent only anticipates the potential breach of contract, as one of its duties is to reveal any material fact occurring in both creditors and in the facilities of all creditors. In syndicated loan, there is also an acceleration clause constituting the provision in which the creditor can declare a debt to be immediately due. In addition, in syndicated loan, the position of agent remains to be subjected to legal relation of instruction, authority or power subjected to lastgeving regulated in Civil Code. A lastgeving will not authorize the lastgever to complete itself the task assigned to lasthebber. In relation to syndicated loan institution, although agent as lasthebber is instructed, authorized or given power to take action on behalf of all banks, the position of banks as lastgever remains to be authorized to receive the payment from debtor and if the creditor does not repay its credit, the bank can demand the fulfillment including the application for bankruptcy statement. In the attempt of redeeming its interest, the creditors focus on the execution of collateral the debtor has given to them in the beginning of syndicated loan agreement. In relation to this collateral, in syndicated loan there is usually additional collateral the creditors ask to save their credit. This collateral can include mortgage, pawning, fiduciary, and hypothecation rights over other objects. Analysis should be conducted on the position, the right, and the execution of collateral by syndication creditors recalling that in syndicated loan any collateral-related affairs are managed by agent, the agent signing it represents creditors, and the is collateral registered as the representative of creditor.

In the case of default in syndicated loan, some creditors will act as wolf against others (machiavellian attitude). In addition, there are debt repayment levels in bankruptcy:
1. Bankruptcy Cost.
2. Curator
3. Improvement cost arrear
4. Creditor.
In bankruptcy, creditor is divided into three:
a. Separatist creditor
b. Preference creditor
c. Concurrent Creditor

The creditors will tend to take as many as possible actions to save their interest. Therefore, the existence of pari passu pro rata parte principle is necessary to provide balance concerning this interest. The balance established in bankruptcy case is very important to realize harmonization for the sake of economic stability and to ensure investment climate because syndicated loan is a backbone of development program. In addition, this balance is also useful to measure the effectiveness of bankruptcy institution in undertaking their two primary functions: as the institution guaranteeing that debtor will not be fraudulent, and will remain to be responsible for all of their loans to all creditors and as the institution also protecting the debtor from the potential massive execution by the creditors.

The author will elaborate it further in a study entitled "HIERARCHY OF THE DISTRIBUTION OF BANKRUPTCY PROPERTY IN SYNDICATED LOAN FACILITY AGREEMENT FOR THE BANKRUPT DEBTOR"

Therefore, this article explores the following research questions: What is the hierarchy of property payment to debtors of syndicated loan in bankruptcy position?

Research Method:-

Type of Research

The type of research used was normative one. A normative legal research is a scientific research procedure to find the truth based on legal science logic, viewed from normative aspect. The constant scientific logic in normative legal research builds on scientific discipline and work mechanism of normative legal science, the legal science the object

of which is the law itself. Alegal research conducted by means of studying literature or secondary data only, according to SoerjonoSoekanto, can be called normative legal research or library legal research.

Material:-

In this research, the data source was obtained from secondary data. Secondary data is the type of data obtained indirectly from its source (e.g. reading sources like book, paper or finding of research, document, legislation, court verdict, statistic data, etc). Legal materials becoming the object of library research are divided into 3: primary, secondary, and tertiary materials [10]. In relation to this research, the legal materials used are as follows:

a. Primary legal materials, the binding legal materials consisting of:

1) Civil Code

2) Basic regulation, 1945 Constitution (Indonesian: Undang-Undang Dasar 1945, thereafter called UUD 1945)

3) Legislation including:

a) Law Number 10 of 1998 about Banking.

b) Law Number 37 of 2004 about Bankruptcy and Delay of Debt Repayment Obligation.

4) PBI No. 7/3/PBI/ 2005 that has been amended with PBI No. 8/13/PBI/2006 about Maximum Limit of Credit in Public Bank.

5) Bank of Indonesia's Circular (SEBI) No. 7/14/PBI/DPNP dated 18 April 2005.

6) Supreme Court's Verdict Number: 190 K/PDT. SUS/011

b. Secondary legal material is the one explaining primary legal materials such books, journals, articles, newspaper, and scientific work of legal bachelor and various materials written in internet (website), containing the principle of pari passu pro rata parte in syndicated loan facility agreement and its implementation in bankruptcy case in Indonesia.

c. Tertiary legal material is the one giving instruction and explanation about primary and secondary legal materials, including legal dictionary, Indonesian dictionary, and English dictionary, etc.

d. Data Processing and Analysis

In this research, the presentation of research finding (as the result of data processing) is united into data analysis. It means that the author conducts analysis in detail and systematically on each source obtained, in which comparison is made comprehensively and qualitative to provide an appropriate writing and to achieve the objective of writing intended.

Discussion and Analysis:-

Hierarchy of property payment to the debtor of syndicated loan in bankruptcy position

The author analyzes the hierarchy of property payment to the debtor of syndicated loan in bankruptcy position by investigating first the syndicated loan process, form and substance of agreement resulting from the syndicated loan process, and the bankruptcy occurring in it. Syndicated loan, according to Stanley Hurn in his book entitled A Syndicated Loan (A Handbook for Banker and Borrower), is a loan made by two or more lending institution on similar terms and conditions, using common documentation and administered by common agent. Syndicated loan is the one given by some syndicated creditors, usually consisting of banks and/or other financial institutions to a debtor in the form of corporation to fund the debtor's project. The loan is given in syndication recalling the amount needed to fund the project is so great, so that it is impossible to be funded by a single creditor [11].

The standard of syndicated loan facility agreement used is the one published by Asia Pacific Loan Market Association. Asia Pacific Loan Market Association is a banking association established in August 1998 basing in Hong Kong and publishing standard loan facility agreement that can be used by its members. This syndicated loan transaction can includes some agreements:

a. Syndicated loan facility agreement;

b. Security agent agreement;

c. Security sharing agreement;

d. Security agreement has various forms of security such as lien, pawning, share, fiduciary of the transfer of right to claim (checking account), the transfer of right to claim (insurance), subordination agreement mentioning that the claims of shareholder or those affiliated with debtor will be overridden up to the time when the obligation of syndicated debtors have been met;

e. Warranty Agreement.

Basically, to analyze the problems existing in syndicated loan, attention should be paid to the clauses contained in the syndicated loan agreement. It is related to the principles in agreement law: consensuality and freedom of contract as regulated in Book III of Civil Code about contract, particularly Articles 1230 and 1338 clause (1) constituting the law binding and applying to the parties in the syndicated loan agreement.

In syndicated loan agreement, there are event of default clauses stating that the one deciding default is creditors rather than agent. Agent only anticipates the potential breach of contract because one of its duties is to reveal each of material facts, occurring in either creditor or facilities of all creditors. In addition, acceleration clause constitutes the provision in which creditor can enclose statmement that I owe you and immediately due. Generally, in syndicated loan agreement this clause can be included in the presence of majority creditors.

To analyze the position of respective creditors to the collateral of syndicated loan in bankruptcy position, it should be seen first the type of legal relation of the parties in it. This legal relation is necessary to analyze the form of contract or agreement. Legal relation (rechtsverhouding/rechtsbetrekking) is a relation occurring within society, either between subject and legal subject or between legal subject and object, as regulated by the law and resulting in legal consequence including right and obligation. In legal relation, it can be seen that there is right on the one hand and there is obligation on the other hand. J. Satrio states that if in legal contract the debtor does not comply with its obligation well voluntarily and duly, the creditor can ask for legal aid to repress the debtor to comply with its obligation despite non-real execution [12]. This element is important to distinguish the contract intended in syndicated loan from the relation arising in moral field and habit.

Legal relation in syndicated loan is not regulated specifically in Indonesian legislation. It is because syndicated loan is established through an agreement between creditors affiliated with the syndication. Therefore, just like a common agreement, the regulation on this syndicated loan establishment is generally regulated in Articles 1320 of Civil Code jo Article 1338 clause (1) of Civil Code, stating that all agreements developed legitimately are enacted to be the law to those formulating it. The regulation of syndicated loan in legislation follows the contract law governed in Civil Code (KUH Perdata). The essential point of contract, according to Civil Code, as mentioned in the Article 1234 of Civil Code is that "each of contracts is intended to give something or not to do anything". The acts of giving something, doing something, or not doing anything in a contract are commonly called performance. Performance is anything contained in a contract that should be implemented obligatorily by the parties in it. In a syndicated loan with only one loan documentation used and signed by borrower, agent bank and all participants, the parties have agreed to perform in loan facility based on the same requirement despite not equal capital participation. In this presence of this single documentation, it can be ensured that the relation between debtor and all and each of banks as the participants of syndication builds on the same provisions of loan. Therefore, agreement plays a very important role in syndicated loan because through this agreement, the position of individual parties can be seen in the syndicated loan. The standard of syndicated loan facility agreement used is the one published by Asia Pacific Loan Market Association. Asia Pacific Loan Market Association is a banking association established in August 1998 basing in Hong Kong and publishing standard loan facility agreement that can be used by its members. This syndicated loan transaction can includes some agreements:

1) Syndicated loan facility agreement;
2) Security agent agreement;
3) Security sharing agreement;
4) Security agreement has various forms of security such as lien, pawning, share, fiduciary of the transfer of right to claim (checking account), the transfer of right to claim (insurance), subordination agreement mentioning that the claims of shareholder or those affiliated with debtor will be overridden up to the time when the obligation of syndicated debtors have been met;
5) Warranty Agreement.

From all the agreements, the clauses of regulation that can be analyzed to analyze the position of individual creditor to the collateral of syndicated loan are regulated in syndicated loan facility agreement, security agent agreement, and security sharing agreement.

a. Syndicated loan facility agreement

Syndicated loan facility agreement is the most important document as it pertains to the granting of syndicated loan and the basic agreement applies to the parties in a syndicated loan. This syndicated loan agreement regulates the right and obligation of creditor and debtor. It also determines the authority and obligation of agent designated. This

loan agreement becomes a rationale and reference for the parties in settling dissenting opinion and conflict between them. Because this loan agreement is important, each of parties in syndicated loan will attempt to provide syndicated loan agreement that can result in the certainty of legal relation between all parties in it. It can be seen from the formulation of clauses that will later bind all the parties, including creditor, debtor, and agent in it.

The loan agreement sets up clauses regulating the authority and obligation of agent designated. The relation between creditors in a syndicated loan is the form of agency relation through the granting of authorization as explained in Article 1792 of Civil Code mentioning that the granting of authorization is an agreement in which an individual grants power (authority) to another that accepts it and organizes some affairs on behalf of him. The signing of loan agreement is the sign of the completed stage or process of syndication establishment and the beginning of fund distribution stage by creditor affiliated with the syndication and the beginning of syndicated loan use by debtor. With the beginning of syndicated loan using process, the role of arranger (lead manager/lead bank) ends following the signing of loan agreement. Following the signing of loan agreement, the collateral binding agreement is signed and at that time the arrangers' duty ends and then it is handed over to or taken over by the one designated to be an agent. This agent will later serve to administrate and to operate syndicated loan and to act on behalf of syndication in the relation to debtor and to obtain fee for this duty implementation. This agency relation will later confirm the position of individual parties to the collateral in syndicated loan. The agency relation in syndicated loan mentions that if there is some collateral for the granting of syndicated loan, all the banks will benefit from the result of collateral sale collectively through proportional sharing according to the proportion of loan share given by each of syndication participants.

The bank agent in syndicated loan consists of facility agent and security agent. Facility agent is the one administrating and operating the loan, while security agent is the one dealing with collateral and its agreement. For a not-too large amount of syndicated loan, there is usually one agent only. And the agent will serve as both facility agent and security agent. The word "agent" only refers to facility agent. A security agent separated from facility agent is usually necessary in a syndicated loan project, the collateral location of which is different from the base of facility agent. The security agent will be responsible for assessing the collateral, examining legal validity and document completeness related to the collateral, including the title of land, the designation of legal consultant, and the designation of Land Title Registrar that will enter into a collateral agreement. It, of course, will be the important responsibility for the security agent in dealing with collateral in syndicated loan recalling the potential problem arising in syndicated loan related to the act of saving loan from individual creditors independently because the of the strong position of creditor as the individual legal subject in syndicated loan, particularly during bankruptcy.

Bankruptcy is syndicated loan is regulated in the Law Number 37 of 2004 about Bankruptcy and Delay of Debt Repayment Obligation stating that if there is creditor syndication, each of creditors is the one as intended in the explanation of Articles 1 number 2 of Law Number 37 of 2004 about Bankruptcy and Delay of Debt Repayment Obligation. It means that each of creditors in syndicated loan can apply for bankruptcy statement. Of course, it will lead to authority of each of creditors, as the participants of loan syndication, to take legal action in the attempt of obtaining repayment they deserve over the loan granted to debtor. If it is not regulated firmly, it will create a harmful condition in which each of creditors may compete for saving and getting the repayment for their credit first. There are some clauses formulated concerning the independence of creditor, related to their rights formulated in a syndicated loan: [13]

1) The formulation of clause model I: "Separated Right". The right to each of creditors in this agreement is also separated. The amount owed by debtor to other parties in this agreement is the debt standing alone and separated from the debt to other parties. Each of parties is entitled to protect their own interest.

2) The formulation of clause model 2: "If for whatever reason one of creditors receives payment from debtor or other party to pay or to repay the amount of money owed by debtor to creditor based on the loan agreement, the creditor should obligatorily give the amount of money received to the facility agent o security agent according to the provision of Article 4.6 of Loan Agreement Deed. The phrase "for whatever reason" and phrase "one of creditors" above mean that each of creditors is entitled to take their own action in the attempt to get payment for their credit.

3) The formulation of clause model 3: "If a breach or a default occurs, each time a breach or a default has occurred, creditor or agent is entitled to demand for full payment simultaneously and all at once all borrowings owed by debtors and having not been paid fully along with the payable interest and other amount of money to be paid obligatorily by debtor to creditor based on this agreement, promissory notes/bank acceptance and security agreement in the case of the debts should be repaid simultaneously and all at once completely by debtor to creditor or to agent

(for the creditor), and creditor is entitled and authorized to undertake its right and authority based on security agreements".

4) Formulation of clause model 4: Creditors agree to give loan facility with amount/commitment decided individually by each of creditors. Similarly, the amount of money borrowed by debtor to respective banks is a separated and standing-alone loan; thus each member of syndication creditor, agent, and security agent are entitled to protect and to implement their own rights resulting from the facility agreement, including the right to collect the debt directly from debtor and its insurer; for that reason, there is no imperative for other banks or agents to file lawsuit jointly.

From the sample clauses aforementioned, it can be concluded that the independence of individual creditors in filing lawsuit over syndicated loan does not require the each of parties to do so jointly. Because of the position of individual creditors in this syndicated loan, the agency relation between creditor and security agent should be reconfirmed to organize and to prevent the creditors from competing for settling their right to collect loan from debtor that may be harmful to other creditors, related to the creditor's tendency to take redemption actions for their own interest or called machiavellian attitude. It builds on the legal rationale that although in syndicated loan there is a provision regulating legal relation between agent and creditors participating in syndication that states that this relation builds on the granting of authorization by creditors to agent and that in the granting of authorization, a principle applies that the authorizer will not lose its authority to take its own action, the action that has been authorized to others, but this discretion is limited by agency relation within it. Through the designation of security agent by syndicated creditor based on the granting of authorization, the right should limit the participant creditors' authority to file their own lawsuit in syndicated loan.

In syndicated loan agreement, the security agent serves as the recipient of collateral from the holder of material collateral [14]. In signing the collateral deed, security agent will serve as the recipient of collateral, in which debtor is the grantor of collateral. Through this role, the security agent has the right to receive precedence compared with other syndicated creditors. This precedence is called preference right that becomes legal justification to the fact that if the debtor does not repay its debt, syndicated agent is entitled to be prioritized to receive debt repayment from the execution of collateral object. In addition, the position of creditor related to the collateral held by the agent in syndicated loan can also be seen from the pro rata provision and agent's authority that restricts creditor as mentioned in the master agreement of syndicated loan. The provision mentions that:

"If a lender ("the sharing lender") receives or recovers (by way of set off or otherwise) in respect of any sum owing by the Borrower under this agreement a proportion of its pro rata share of that sum which is greater than the proportion of its pro rata share received by another Lender, the sharing lender shall pay to the agent the amount which represents the excess proportion, and the agent shall distribute the amount to the Lenders Pro rata in accordance with their respective participant in that amount. The amount shall be treated as if it had been paid by the borrower directly to the agent on account of sums owning by the borrower hereunder"

The provision above explains that each of syndicated creditors can claim to the debtor for their right to debt payment. However, each payment they receive should remain to be shared with other creditors through agency. Therefore, actually the creditor will not benefit from claiming direct repayment without employing the agent, because eventually it is the agent that will share the amount of payment using pari passu principle according to its own contribution. In addition, this debtor's independent action will not be effective because there is no special incentive it will receive more than other creditors will.

In syndicated loan, there are two types of collateral: general collateral according to Article 1131 of Civil Code (KUH Perdata) resulting in concurrent creditor and particular collateral such as hypothecation, security right, and fiduciary resulting collecting right. Any affairs concerning collateral are dealt with by agent representing, it acts for and on behalf of creditors in administrating and undertaking right and authority of creditors over collateral and security document registered on behalf of his name as the rehaltohwerresenvireptatives creditor.

That the right of the creditor to file lawsuit against debtor separately cannot be implemented in relation to the collateral held by Agent is confirmed in the clause of agent designation, as follows:

"Each lender hereby appoints the Agent to act its agent in relation to the administration of the facility and the security agent to act as its agent in relation to the security documents and authorizes the security on its behalf and

authorize each of the agent and the security to take such action on its behalf and to exercise and enforce such rights, powers and discretions as are expressly delegated to the agent or, as the case may be, the security agent by terms of this agreement and the security documents and such rights, power and discretion as are reasonably incidental thereto "

Each of creditors herewith designates an agent to act as its representative to deal with facility and a security agent to act as its representative in relation to collateral document and by granting the authorization to the security agent to sign collateral document on behalf of its name and implement right, power, and authority granted firmly to agent and security agent based on this provision of agreement and collateral document and right, power and other authority considered as relevant to it.

This provision, of course, has limited the creditor's right to file lawsuit separately against the debtor effectively. The parties in syndicated loan can formulate the right and the obligation of agent in which each independent lawsuit filed by a creditor against a debtor should get approval from majority creditor and through agent.

The clauses about right, power, and authority of previous agent can also be used to analyze the registration of collateral document in syndicated loan such as lien and fiduciary, whether it is registered on behalf of security agent or all creditor names are included as those deserving the collateral according to the loan facility they have given to debtor. Article 3 clause (2) of Law Number 4 of 1996 about lien on land (UUHT) mentions that lien can be given for debt coming from a legal relation or for one or more debts coming from some legal relations. Meanwhile, in relation to fiduciary collateral, Article 8 of Law Number 42 of 1999 about Fiduciary Collateral (UUJF) mentions that Fiduciary collateral can given to more than one fiduciary receiver or to the representative of fiduciary receiver. In practice, there are two options to do:
1) Including the name of all creditors participating in syndicated loan in the lien or fiduciary document;
2) Only the name of security agent is included, in which the agent acts for and on behalf of syndicated loan.

The second approach conducted by including the name of agent only is the most practical option recalling that sometimes creditors' account receivable is transferred more than once; thus, if only the name of security agent is registered, the change of lien and fiduciary certificates is unnecessary for cost efficiency because the security agreement will cost higher, in addition including the name of security agent only will confirm the agency relation between parties in it.

b. Security Agent Agreement

The position of security agent in syndicated loan builds on basic principle of agency law as regulated in Commercial Code (Indonesian: Kitab Undang-Undang Hukum Dagang, thereafter called KUHD) about commissioner in Articles 76 - 85 and in Articles 1792-1819 of Civil Code about the granting of authorization. In addition, the agency relation is also subjected to both general provisions about agreement as regulated in Articles 1233-1312 of Civil Code and to the provisions about agreement resulting from an agreement as regulated in Articles 1313-1351 and about the revocation of agreement (Articles 1381-1456 of Civil Code).
Generally, the security sharing agreement contains some points, as follows:
1) Terms and conditions of security agent assignment;
2) Enforcement and application of proceeds;
3) Statement of indemnity, the statement issued by creditors that any legal consequences of the existence of security agent can be imposed to the agent only according to the agreement (generally in pari passu), when the agent also serves as a creditor;
4) Others including similar agreement, for example, definition of terminology used in agreement, the payment of fee to the agent, legal option, etc.
This security agent agreement regulates the position of security agent, to do some jobs:
1) Representing principals (creditors) in the term of loan security agreement;
2) Representing principals in the term of loan security execution;
3) Distributing the result of loan security execution to creditors according to the promised proportion, in casu, usually proportionally according to the proportion of debt amount (pari passu);
4) Doing other things in relation to loan security, like supervising the object becoming the object of loan security, receiving/holding insurance policy of loan security and if necessary dealing with other administrative affairs.

A firm regulation is required to govern position, right, and obligation of agent in security agent agreement, to confirm the agency relation specifically. In syndicated loan, security agent acts based on basic principle of agency

law, in which in the term of agency there should be 2 (two) parties: agent and principal. The agent in syndicated loan will do some performance to represent its principle according to consensus. If for a reason an agent acts beyond its authority as approved in the agreement, juridically the agent will be accountable personally for any legal consequence of it, because in this case agent is considered as acting for itself rather than in its position as an agent, but as one of the parties.

c. Security Sharing Agreement

If the debtor defaults, an agreement called "security sharing agreement" will be entered into to resolve anything concerning the distribution of security result; it is an accessory agreement to the syndicated loan agreement. The agreement will elaborate in detail the distribution of security output of the collateral given by debtor in ensuring the loan repayment.

Security sharing agreement is usually entered into by creditors to deal with the banks' objection to hold second-rank lien and so forth. This security sharing agreement is made for the syndication creditors' interest, but the presence of debtor as the owner of collateral is desirable to contribute to signing the agreement and to know, to approve, and to be bond to the content of agreement with any legal consequence occurring.

The security sharing system is desirable in the loan granting practice done by more than 1 (one) creditors, because other security forms do not know the first, second levels of lien, and so forth. Thus, it cannot be more one loan securities, except with security sharing agreement. Security sharing system can avoid the competition for collateral execution because it regulates the system to share collateral proportionally (pari passu). This security sharing agreement reconfirms the rights of creditor including, among others: right to ask for security execution, right to give assessment to the default occurred corresponding to the provision included in syndicated loan agreement, and right to the payment received by agent according to the investment of individual banks. In the presence of security sharing agreement, creditors have equal ranks and rights to get repayment from the result of collateral sale if the debtor defaults or is bankrupt. It is a legal consequence of the most important clause in security sharing agreement stating that the parties have agreed to share entire result of collateral sale between them in pari passu. Pari passu means sharing the payment of money resulting from the collateral execution or collection from the debtor proportionally between creditors without privilege or precedence for individual creditors.

Security sharing agreement is very important in syndicated loan to facilitate the sharing of money resulting from the execution of collateral in pari passu or equally. The presence of security sharing agreement is equipped with the pari passu agreement between the parties. Security sharing system is applied to the collateral of debt, in which the execution is done by the agent that has been authorized by the creditors of a syndicated loan. The result of execution will later be shared proportionally (pari passu).

From the result of analysis on documents in syndicated loan, it can be seen that the position of each of creditors to the collateral (security) in syndicated loan is represented by security agent as the receiver of security or the holder of material collateral. It is the legal consequence of the agency relation regulated in Syndicated Loan Facility Agreement. Therefore, the security agent serves as preferent creditor to other participants of syndication, for the sake of law. It means that in the bankruptcy position, security agent has the right to take precedence to get debt repayment from the execution of collateral, so that in the case of syndicated loan bankruptcy, it is the security agent that is entitled to represent the creditor. It is noteworthy that the position of security agent builds on the agency relation, the organization of which is reconfirmed in the security agent agreement, so that it aims not to benefit itself but to organize the debt repayment to creditors to prevent unlawful execution due to the competitions among creditors for getting their debt repayment from debtor that will be harmful to either debtor or weak creditor. In syndicated loan, individual members of syndication do not have direct legal relation to debtor. The legal relation to debtor existing is the one to syndicated loan represented by agent and not to the members of syndication. The members of loan syndication are not creditor but merely the fund provider, while the creditor is loan syndication. So, ideally these members of loan syndication cannot apply for the bankrupt statement independently without being represented by agent. It also aims to create orderliness and to avoid potential machiavellian attitude in which a creditor becomes a wolf to another one for the sake of getting benefit. Therefore, it can be said that the formulation of loan syndicated in Article 2 clause (1) of Bankruptcy Law stating that each of creditors in loan syndication can act independently is less appropriate when analyzed from the basic legal relation in loan syndication and legal usefulness of regulation.

To other creditors with the same rank in loan syndication, the same position is given, the concurrent separatist creditors. Therefore, the provision just like (as if) concurrent creditor applies to them. The provision in Article 1136 of Civil Code states that all people giving credit are on the same level or rank, and repaid proportionally. Based on the provision of Article 1136 of Civil Code, the requirement of the enactment of provision to be concurrent separatist creditor is that those giving credit should be on the same rank; therefore the repayment is conducted proportionally, based on the proportion of credit given.

The position of security agent against loan syndication as separatist creditor is the creditor holding the right to material collateral that can take its own action. This creditor class is not affected by the bankrupt statement of debtor, meaning that their right to execution still can be undertaken just like that when there is no debtor bankruptcy. This class of creditor can sell itself the object becoming the collateral, as if there is no bankruptcy. From the result of collateral sale, separatist creditor takes its share according to the amount of credit given, and the rest should be deposited to the curator cash as bankrupt estates. Otherwise, if the result of sale is not adequate, the creditor for the unpaid claim can include the unpaid amount into concurrent creditor.

However, if there is a special creditor, the rank of its is higher than separatist creditor, vide Article 1134 clause (2) of Civil Code, privileged curator and creditor can ask the separatist creditor to give the result of collateral sale to them in the amount equal to the privilege credit (Article 60 clause (2) of Law Number 37 of 2004 about Bankruptcy and Delay of Debt Repayment Obligation). Although separatist creditor can execute and take the result of collateral itself, it should be subjected to the law about the postponement of execution for certain period of time, maximally 270 (two hundred and seventy) days for the delay of debt repayment obligation, vide Article 228 clause (6) of Law Number 37 of 2004 about Bankruptcy and Delay of Debt Repayment Obligation. Thus, in relation to the assets guaranteed, the separatist creditor has very high position, higher than other privileged creditors do (Articles 1139 and 1149 Civil Code). In other words, the position of separatist creditor is the highest one compared with other creditors, unless the law decides otherwise.

The position of separatist creditor (collateral holding creditor) as specified in Article 55 clause (1) of Law Number 37 of 2004 about Bankruptcy and Delay of Debt Repayment Obligation, the creditor can ask for the rest of debt repayment; this provision is also corresponding to that regulated in Article 6 clause (3) of Law Number 37 of 2004 about Bankruptcy and Delay of Debt Repayment Obligation, stating that:

“In the case of the result of collateral sale as mentioned in clause (1) is not adequate to repay the corresponding credit completely, the right holding creditor can apply for the claim for full repayment over the deficit from the bankrupt asset as concurrent creditor, having filed the request for credit vouching”.

Therefore, based on Article 60 clause (3) of Law Number 37 of 2004 about Bankruptcy and Delay of Debt Repayment Obligation, it can be explained that in addition to have higher position and right to take precedence compared with other creditors, the collateral holding creditor (separatist creditor) has another right, the right to the security of its entire debt. So, if the collateral object has been sold and in fact the result of sale is not enough to repay the debtor’s loan, the separatist creditor is entitled to collect the deficit of debtor’s payment and can act as the concurrent creditor having filed the request for credit vouching. Otherwise, the provision of Article 54 clause (1) of Law Number 37 of 2004 about Bankruptcy and Delay of Debt Repayment Obligation states that the position of separatist creditor changes, it is no longer separated and not entitled to take precedence like that mentioned in Articles 1132 and 1134 of Civil Code. Article 56 clause (1) states that:

“The creditor’s right to execution intended in Article 55 clause 91) and the right of third party to demand for their asset under the mastery of bankrupt debtor or postponed curator for at most 90 (ninety) days since the date when bankrupt decision is announced”

The article has put the separatist creditor on the postponed position for 90 (ninety) days, and during that period the position of separatist creditor is neither separated nor taking precedence compared with other creditors, so that its position is equivalent to the concurrent creditor. Similarly, the provision of Article 228 clause (6) of Bankruptcy Law states:

"If the permanent postponement of debt repayment obligation as intended in clause (4) is approved, the postponement along with its extension may not be beyond 270 (two hundred and seventy) days after the decision of provisional debt repayment obligation postponement is announced".

Based on the article above, the position of separatist creditor is equal to that of concurrent creditor, because the right of separatist creditor is postponed in longer time, 270 (two hundred and seventy) days, if the postponement of debt repayment is approved. Therefore, the explanation of Article 56 clause (1) juncto Article 228 clause (6) of Law Number 37 of 2004 about Bankruptcy and Delay of Debt Repayment Obligation during the postponement period of separatist period actually changes, in which it no longer take precedence, does not higher position than other creditors, and is no longer separated from other creditors.

In relation to the postponement period in bankruptcy law, the one authorized to sell the security asset is curator. It is based on the provision of Article 56 clause (3) of Law Number 37 of 2004 about Bankruptcy and Delay of Debt Repayment Obligation, stating that:

"During the postponement period as mentioned in clause (1), the curator can use bankrupt asset including the movable asset under the mastery of curator in the attempt of debtor's business sustainability, in the case of obligatory protection is provided to creditor and third party, as mentioned in clause (1)".

The provision of regulation in this article replace the authority of the security right holding creditor (separatist creditor) in executing the collateral object to the curator for the sake of protecting the debtor's business interest.Since the bankrupt statement is decided by Commercial Court, in principle curator has been authorized to deal with and to settle the bankruptcy estate, although appeal is filed to Supreme Court over the decision (Article 16 clause (1) of Law Number 37 of 2004 about Bankruptcy and Delay of Debt Repayment Obligation) as the legal consequence of immediately executable (Uitvoorbaarbijvooraad) characteristics of the bankrupt statement decision. Therefore, the position of security agent as the separatist creditor in this loan syndication is under the curator related to the transfer of the responsibility for dealing with the bankrupt asset to the curator, following the bankrupt decision. As a separatist creditor, the position of security agent in bankruptcy is postponed in certain period of time, during which the security agent does not have right to take precedence, is neither higher nor separated from concurrent creditor. In the postponement period, the security agent's authority of executing collateral is replaced by the curator.

The security agent, as separatist creditor, is subjected to the regulation about the postponement of execution and debt repayment. In this case, the separatist creditor can execute the collateral after passing the postponement period at most 90 (ninety) days since the date when the statement of bankrupt is announced and the execution will be done at most 2 (two) months after the beginning of insolvency condition according to the regulation mentioned in Law Number 37 of 2004 about Bankruptcy and Delay of Debt Repayment Obligation. Having passed this 2 (two) month-period, the curator should later demand for the transfer of collateral object to be sold in the way as explained in Article 185 of Law Number 37 of 2004 about Bankruptcy and Delay of Debt Repayment Obligation without reducing the right of security agent as the holder of right to the result of collateral sale. Thereafter, the security agent can share the result of collateral sale to individual creditors as approved and regulated in security sharing agreement. If this payment has not been completed, the creditors, through the security agent, can apply for the deficit as concurrent creditor during credit vouching"

Conclusion:-

1. Business actors who do not include an expiration date in terms of private law are violating Article 4 letter a. and letter c and Article 8 paragraph (1) letter i and letter g of Law Number 8 of 1999 concerning Consumer Protection, yet seen from public law consumers have received legal protection, this can be proven by the imposition of criminal sanctions in the form of imprisonment for 1 (one) month, and confiscation of 6 (six) products ready for circulation to be destroyed, as regulated in Article 62 Paragraph (1) in conjunction with Article 8 Paragraph (1) letter g and the letter i of Act No. 8 of 1999 concerning Consumer Protection. Other regulations governing expired food products are Law Number 18 of 2012 concerning food, especially in Article 97 paragraph (1), and Government Regulation Number 69 of 1999 concerning Food Labels and Advertisements, especially in Article 3 paragraph (2).

2.The position of individual creditors over the collateral in loan syndication is represented by security agent as the receiver of security and the holder of material collateral. It is the legal consequence of agency relation regulated in Syndicated Loan Facility Agreement. Therefore, the security agent serves as preferent creditor over other syndication participants, for the sake of law. It means that the bankruptcy position of security agent is entitled to get debt repayment first from the execution of collateral, so that in the case of syndicated loan bankruptcy, it is the security agent that is entitled to represent the creditor. The members of syndicated loan have no direct relation to debtor, related to the collateral. The creditor is the loan syndication represented by the agent. Although each of creditors in syndicated loan is independent creditor, they remain to be restricted by agency relation confirmed in the syndicated loan facility, security agency agreement, and security sharing agreement.

3. Hierarchy of asset (property) payment to the debtor of syndicated loan in the bankruptcy position cannot be implemented yet uniformly in various bankruptcy verdicts existing, due to no shared comprehension on the creditor rank stated obviously in Bankruptcy Law. Ideally, if the Bankruptcy Law should be made one of legal instruments prioritizing justice and legal usefulness, the sharing of bankrupt asset should follow the following order: 1) curator fee; 2) Bankruptcy asset saving cost; 3) tax payment; 4) payment of workers' right; 5) separatist creditor; 6) concurrent creditor. The pari passu pro rata parte principle aims to put the payment of all creditors to their portion according to position and debt proportion; thus, it is expected to fulfill the feeling of justice to all the parties. However, in practice it is difficult to achieve because individual parties will attempt as maximally as possible to maintain their claim. Therefore, this existence of principle gives the debtor an opportunity of making reconciliation to achieve the objective of bankruptcy as the solution to non-performing loan.

Recommendation:-

1. To the parties in syndicated loan, it is important to require obligatorily the inclusion of regulation about pro rata clause into the section of agent designation in syndicated loan agreement to confirm the position of the parties and to clarify the agency relation in it. In the presence of such clause, the right of creditors to file lawsuit separately against debtor cannot be implemented in relation to the collateral held by the agent.
2. To practitioners and law enforcers, a clear comprehension is required concerning the recognition of security agent's position in bankruptcy in order to create legal consistency in the implementation of court verdict.
3. Revision should be made over the substance of bankruptcy law in the future to provide shared conception on the creditor rank (level) clearly in Bankruptcy Law, to help achieve law order and certainty concerning the hierarchy of bankruptcy asset payment obligation and if necessary to allow for the presence of implementing regulation to elaborate further the substance of bankruptcy law.
4. There should be cooperation between executive, legislative, and judicative institutions to ensure law certainty and the feeling of justice to the welfare of workers constituting human rights or basic rights to all workers and any violation against the right is the breach of human rights.

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