

THE BANKRUPTCY OF FOREIGN CAPITAL COMPANIES AND INDONESIAN LABOR PROTECTION

Fadilah Nariza Farahni¹

Abstract

Indonesia as a destination for investment will open an opportunity to foreign investor to come and invest their money in Indonesia. As the time goes by, those foreign companies cannot survive due to tight competition that may lead to bankruptcy. In Indonesia, Law No. 37 Year 2004 about bankruptcy and debt moratorium/suspension of payment has not been arranged in detail about foreign stock company bankruptcy. Therefore, this research aims to examine 2 aspects, which are first, to show that foreign stock company in Indonesia can be bankrupted. Second, to explain the rights of Indonesian employees that works in that bankrupted company. From this research, we found that foreign stock company in Republic of Indonesia area can be bankrupted based on Act No. 25 Tahun 2007 about capital investment, which says that foreign capital investment must be in a form of Limited Liability Company based on the Indonesian law. This clearly states that foreign stock company in Indonesia should obey the law and order of Republic of Indonesia. Indonesian labor's rights for the labour who works for foreign stock company that experiences bankruptcy based on Labour Law No. 13 Year 2003 Act 165 states that the labor's rights include: severance payments, long service payment and compensation payment.

Keywords: bankruptcy; foreign capital investment; labor protection, Indonesia

A. Introduction

1. Background

Indonesia is a developing country that has the potential to be an investment both for Domestic Investment (PMDN) and foreign investment (PMA). In 2016, the development of foreign investment in Indonesia had shown a rapid increase by 20% compared to previous years. The investment value itself increased by 20% to US\$ 22,6 billion from US\$ 18.8 billion compared to previous years. The growth of foreign investment in Indonesia is the second highest in East Asia².

Foreign investment in Indonesia, in its operation process also complying on concerning investments rules namely Law no. 25 of 2007. Domestic Investment is regulated in the Concerning Investment law no 25 of 2007 concerning investment activities to conduct business in the Republic of Indonesia territory carried out by domestic investors using domestic capital. Meanwhile foreign investment in the act is an investment activity to conduct business in the Republic of Indonesia territory which carried out by foreign investors, both those who use foreign capital fullr or affiliated with domestic investors. With the existence of foreign capital investors who invest their capital in Indonesia has various benefits. First, if the foreign investors are export-oriented, they can increase the country's income from tax sector, the technology and knowledge experts. Second, it can create demand for domestic product as raw material. Third, it can add foreign exchange and absorb labor in the capital recipient country³. Although foreign investment is quite promising, in reality not all companies who have invested in Indonesia can survive. The world economy weakening,

¹ Magister Pengembangan Sumber Daya Manusia, Universitas Airlangga, Jl. Airlangga 4-6, Surabaya, Indonesia | fadilah.farahni@gmail.com.

² Galih Gumelar, 'Naik 20%, Investasi Asing Di Indonesia Tertinggi Di Asean' <<http://www.cnnindonesia.com/ekonomi/20150625010145-92-62208/naik-20-investasi-asing-di-indonesia-tertinggi-di-asean/>> [accessed 7 March 2016].

³ Hendrik Budi Untung, *Hukum Investasi* (Yogyakarta: Sinar Grafika).

as well as the weakening of people purchasing power, made some foreign company left. By today, one of the foreign capital companies that went bankrupt occurred in 2010 was PT. Kymco Lippo Motor Indonesia. Even the bankruptcy of foreign companies has been relatively long, it is not impossible that bankrupt of foreign companies will emerge again, remembering the relatively uncertain economic conditions and increasingly fierce competition. Foreign capital companies which operating in Indonesia, as stated in the investment law, foreign investment must be in the form of a limited liability company under Indonesian law and domiciled in the territory of the Republic of Indonesia. In major labor laws of Indonesia, major labor must prioritize Indonesian workers. Considering there are several bankruptcy cases concerning about foreign capital companies, while the law which specifically regulates bankruptcy of foreign capital companies has not yet regulated in more detail among foreign companies. Thus, the law gap on bankruptcy will be made by foreign companies not fulfill the existing labor rights.

Even though bankruptcy is regulated in the law, but not many legal subjects use the bankruptcy institution. There are several reasons why bankruptcy institution are rarely used. One of them is that the bankruptcy procedure and its settlement are too complicated and require a long time⁴. One of the aspects of complexity caused by bankruptcy is related to the fulfillment of labor rights. As a party who has worked in a company, workers sometimes do not have a strong position to be able to sue a bankrupt company. This could be due to bankrupt companies that bear a relatively large debt burden on creditors so that labor rights are ignored or the remaining capital used to pay labor wages is insufficient. Another factor is also caused by the lack of knowledge of the legal rules that strengthen the rights that should be fulfilled by the bankrupt company to workers.

The Constitutional Court has given legal protection to workers. The constitutional court gives a different position on wages and workers' rights. Wages are placed in a higher position than other rights as stipulated in Article 1 number 3 of Law Number 13 of 2003 concerning Labor. The Manpower Act does not recognize the definition of other rights. To find out what are called other rights of workers, must be correlated with termination of employment (FLE). Workers who experience layoffs are entitled to wages for several reasons that support the decision of the Constitutional Court No. 67 / PUU-XI / 2013.

By seeing the rules set by the Constitutional Court, workers have the power to claim their rights when the company is declared bankrupt by the court. But the bankruptcy system in Indonesia does not distinguish between legal subjects of people and legal entities. Therefore, if examined in more depth there are norms which can only be applied to bankruptcy on individual subjects but cannot be applied to limited liability companies. And vice versa many norms that can only be applied bankruptcy about limited liability companies but cannot be imposed on individual subjects.

In connection with background explained above, this showed that the Law governing foreign capital companies that experienced bankruptcy is still not regulated in detail. The regulation only regulating the bankruptcy of individual legal subjects and domestic capital companies (PMDN). With not yet regulated, the bankruptcy of foreign capital companies will certainly have an impact on the rules regarding the rights of Indonesian workers who

⁴ M.Hadi Shubhan, *Hukum Kepailitan: Prinsip, Norma Dan Praktik Di Peradilan* (Kencana Prenadamedia Group).

work for these companies. Thus, this study will examine bankruptcy in foreign companies and labor rights in foreign companies that have been declared bankrupt.

2. Problem Statement

1. Can a foreign capital companies be bankrupt?
2. How are the rights of Indonesian labors who had worked for the bankrupt foreign capital companies?

3. Methods

This study used a normative juridical method with (1) statue approach; by examining all laws and regulations relevant to the legal issue under investigation, (2) case approach; by solving the answer for the study problem statement and referring to the *ratio decidenci* (legal reasons used by the judge to arrive at his decision), in this study the case approach used was the Bankruptcy of a foreign capital company namely PT. Kymco Lippo Motor Indonesia, (3) conceptual approach; by providing answer to the problem statement by referring to the concepts of relevant legal principles.

This study used primary and secondary legal material sources. The primary legal material used is statutory regulations that have relevance to this research. Secondary legal materials used in research are legal text books, legal journals, media articles, and materials from the internet that have relevance to this study.

B. Discussion

1. The Bankruptcy of Foreign Capital Companies

Bankruptcy is a situation where the debtor is unable to repay debts from his creditors due to financial distress from the debtor's business that is experiencing a setback. While bankruptcy was declared by the court. Bankruptcy management and settlement is carried out by the curator below supervising judge's supervision with the primary purpose of using sales proceeds these assets to repay all debts of the bankrupt debtor proportionally (*prorate parte*) and in accordance with the creditor structure. The bankrupt company or enterprise must fulfill certain requirements.

Regarding the requirements for a person to be declared bankrupt, it can be seen on Article 2 Paragraph (1), stated A debtor having two or more creditors and failing to pay at least one debt which has matured and became payable, shall be declared bankrupt through a Court decision, either at his own petition or at the request of one or more of his creditors. From provisions of Article 2 paragraph (1), it can be concluded that a request for a bankruptcy statement to a debtor can only be submitted if it meets the following conditions:⁵

- a. The debtor to whom the petition filed to must have at least two creditors; or in other words must have more than one creditor.
- b. The debtor failing to pay at least one debt to his creditor.
- c. The unpaid debt must have matured and payable

In Article 5 paragraph (2) Law number 25 of 2007 concerning investment and domicile has stated that the forms of foreign business entity. Foreign investments must be in the form of a limited liability company under Indonesian law, and domiciled within the territory of the state of the Republic of Indonesia, unless provided otherwise by law. The purpose of the

⁵ Sutan Remy Sjahdeini, *Hukum Kepailitan: Memahami Undang-Undang No. 37 Tahun 2004 Tentang Kepailitan* (Jakarta: Graffiti, 2010).

conduct of investment is explained in the law number 25 of 2007, is one of the government efforts in giving legal certainty to the conduct of foreign investment. Hence, the regulation of the form of business entity on the implementation of foreign investment is an order from Law number 25 of 2007 about the capital investment which purposed to give legal certainty. The following are legal certainty instruments given in "PT" as regulated in Law Number 40 of 2007 concerning Limited Liabilities companies:

I. Articles of Association

Based on Law Number 40 Year 2007, types and business activities as well as procedures for implementing Limited Liabilities Company activities are regulated in the articles of association made in a notarial deed and must be registered and approved by the Ministry of Law and Human Rights.

II. Capital Alliance

The use of capital for business activities can only be used with company or enterprise approval through a mechanism and agreement of the shareholders set forth in the articles of association

III. Established based on an Agreement

Article 3 paragraph (1) of Law Number 40 Year 2007 concerning Limited Liability Companies states that

"Companies' shareholders are not personally liable for legal relationships entered into on behalf of the Company and are not liable for the Company's losses in excess of the shares they own".

Based on this article the company understands that the shareholders' responsibility in PT is limited to the number of shares owned and cannot cover the personal wealth of the shareholders.

IV. Company Organ

A limited liabilities company carrying out its business activities run by company organs consisting of General meeting of Shareholders; Board of Commissioners; and Directors

Related to the problem of bankruptcy of foreign capital companies, there are examples of cases that can be analyzed. Example of case at PT. Kymco Lippo Motor Indonesia filed for bankruptcy with case register No. 25/PAILIT/2010/PN.JKT.PST. PT. Kymco Lippo Motor Indonesia is a legal entity that is 75% owned by a foreign capital company, Kwang Yang Motor Co which bankrupt by 3 of his creditors, namely:

- a. Petitioner I was PT. Abdimetal Prakarsa
- b. Petitioner II was Rumah Sakit Ibu & Anak Amanda (PT. Amanda Vida Mitratama)
- c. Petitioner III was all employees who are members of the Work Unit (PUK) Union of Automotive and Component FSPMI PT. Kymco Lippo Motor Indonesia.

The legal consideration of the panel judges was PT. Kymco Lippo Motor Indonesia legally there are elements of two or more creditors as referred in Article 1 paragraph 2 and paragraph 3 of the Bankruptcy Law fulfilled. A bankruptcy petition in this case also filed by an Advocate of Article 7 paragraph 2, hence in fact the formal requirements in petition of bankruptcy in this case concerning creditors and debtors are valid and correctly submitted in accordance with the Bankruptcy Law. The bankruptcy defendant, namely PT. Kymco Lippo Motor Indonesia has a debt wherein in the Bankruptcy Law is explained in Article 1 number 6. Then, based on Article 8 paragraph 4 of the Bankruptcy Law, a petition for a bankruptcy statement must be granted if there are facts or conditions that are simply proven that the

conditions for bankruptcy as referred to in Article 2 paragraph 1 has been fulfilled:

1. PT. Kymco Lippo Motor Indonesia not only has the creditors mentioned above but there are 5 other creditors namely PT. Arpu Selaras Cemerlang (PT. ASC), CV. Rino Multi Niaga (CV. RMN), PT. Idocipta Hasata Perkasa (PT. IHP), PT. MCE Seimitsu Indonesia and Sumber Sehat Jaya Pharmacy.
2. PT Kymco Lippo Motor Indonesia has not paid the debt in full at least one debt
3. PT Kymco Lippo Motor Indonesia has a debt to each of its creditors that is past due and collectible

Thus, the panel judges granted the petition for bankruptcy statement and PT. Kymco Lippo Motor Indonesia was declared bankrupt on May 10, 2010 by the Central Jakarta Commercial Court. Based on the results of the Commercial Court Bankruptcy Decision with case register No. 25/PAILIT/2010/PN.JKT.PST, which declared the bankruptcy of PT. Kymco Lippo Motor Indonesia, the decision showed that foreign companies with legal entities could be declared bankrupt by the Court. The elements in bankruptcy for a debtor can be declared bankrupt contained in the provisions of Law Number 37 of 2004 Concerning Bankruptcy in Article 2 number 1. Bankruptcy decisions on foreign companies are also based on Limited Liability Company Law No. 40 of 2007 Article 5 number 2 which stated "Foreign investments must be in the form of a limited liability company under Indonesian law and domiciled within the territory of the state of the Republic of Indonesia, unless provided otherwise by law".

Based on the regulation of the Law, it can be concluded because PT. Kymco Lippo Motor Indonesia is a foreign capital company in the form of a limited liability company based in Indonesia. Thus, PT. Kymco Lippo Motor Indonesia can be declared bankrupt by the Constitutional Court. It can be interpreted that the petition for bankruptcy in a foreign capital company is the same as a domestic company in general. Because foreign capital companies which are established in Indonesia and operate their businesses in Indonesia must be in the form of limited liability companies in accordance with Law Number 25 of 2007 concerning Investment in Article 5 number 2. Therefore, these foreign capital companies are subject to the laws and regulations in the Republic of Indonesia. In the case of bankruptcy, foreign capital companies established and conducting business in the territory of the Republic of Indonesia are subject to the rules based on Law Number 37 of 2004 Concerning Bankruptcy and Suspension of Obligations for Debt Payment in Article 2 number 1 regarding bankruptcy requirements. In the substance of Article 3 number 5 of Law Number 37 of 2004 Concerning Bankruptcy and Suspension of Debt Payment Obligations, which means the establishment of a foreign capital company must state the legal position in its articles of association, namely the Republic of Indonesia.

2. Worker Rights in a Bankrupt Foreign Capital Companies

When a company is declared bankrupt by The Constitutional Court, a common event is Termination of Employment. A step to terminate the employment relationship between workers and employers for a certain reason. Termination of employment is the termination due to certain matters which result in the termination of rights and obligations between workers or laborers and employers.

Mentioned in Law No. 13 of 2003 in Article 165, employers can terminate

employment relations with workers because of a bankrupt company, provided that workers/laborers are entitled to severance pay in the amount of 1 (one) time under Article 156 paragraph (2), 1 (one) time service award money stipulated in Article 156 paragraph (3) and compensation for rights in accordance with Article 156 paragraph (4). In this case, the Constitutional Court guarantees workers or laborers whose companies have experienced bankruptcy. The Constitutional Court issued a decision numbered 67 / PUU-XI / 2013 in testing the Labor Law, Law no. 13 of 2003 Article 94 paragraph (5) of the 1945 Constitution of the Republic of Indonesia Article 28 D. In the case of a petition from PT. Pertamina worker who consider that the protection and guarantee of its labor rights has the potential to be ignored by the existence of Article 95 paragraph 4 which does not guarantee the fulfillment of labor rights in the case of a bankrupt company. In this article states that "In case the enterprise is declared bankrupt or liquidated based on the prevailing laws and regulations, the payment of the enterprise's workers/ laborer's wages shall take priority over the payment of other debts" but in practiced are placed in the position after fulfilling state rights and separatist creditors, this causing legal uncertainty of Law No. 13 of 2003. There is no clear interpretation of the "prioritized payment" clause. In Article 1134 paragraph *juncto* Article 1137 of the Civil Code and Law Number 28 of 2007 concerning general provisions and taxation procedures, there is something out of sync with the creditors 'debt settlement because there is a sequence after the separatist creditor, laborers' wages await after the bill of state rights, office auctions and public bodies formed by the government to take precedence. In fact, based on Article 95 paragraph 4 of Law Number 13 Year 2003, legally there is bankruptcy for companies, in terms of fulfilling workers' rights such as severance pay and other rights must take precedence over the fulfillment of bankrupt company obligations.

Therefore, The Constitutional Court grant their petition by creating two new norms. If the enterprise or the company was declared bankrupt, The Constitutional Court Decisions No. 67/PUU/XI/213:

- 1) Workers' wages take precedence over payments of all types of bills and other creditors, including those from separatist creditors and invoices state tax.
- 2) Workers' rights are paid in advance of all bills and other creditors, except if the debtor has a separatist creditor. The Court gives a different position on wages and other workers' rights. Wages are placed in a higher position than other rights.

The right to receive wages arises for one of the following reasons. First, when the bankruptcy verdict is made, the debtor's operations continue to operate. In such situation's workers' wages are paid until the verdict is bankrupt set. Second, when the debtor is terminated bankrupt, the debtor has been in arrears on the wages of workers. Third, wages arising after the bankruptcy decision. Noting these three reasons, the Constitutional Court's decision No. 67/PUU-XI/2013 is positioned to protect workers' wages as stated in the second reason.

The existence of Constitutional Court Decisions No. 67/PUU/XI/2013 already able to become a legal basis for workers to claim their rights and this decision makes an enterprise or a company with a good legal entity that secures domestic capital and foreign investment is bound by this decision. The existence of material tests conducted by Pertamina Co., Ltd. workers shows that in practice companies that are experiencing bankruptcy are most likely not to fulfill their obligations or in other words violate the Law rules. There are labor rights in companies that have been declared bankrupt because based on Article 1149 of the Civil Code that the rights of preferred creditors must be paid first, and labor is one of the

preferred creditors. The case of workers in a company that has been declared bankrupt, the form of termination of employment that occurred was a layoff due to a court decision. All matters relating to labor rights are not due to labor errors but as a result of binding legal decisions due to a bankruptcy decision on the company. The logic of fulfilling labor rights also applies to foreign companies because they are incorporated companies. Because the legal rights that bind the incorporated company are binding on the entire company.

The Constitutional Court's decision also applies to foreign workers who work in Indonesia because foreign workers must obtain the same rights and treatment as Indonesian workers based on Labor Law No. 13 of 2003. Foreign workers who its companies are in Republic of Indonesia territory have the same rights and treatment to Indonesian workers. Law number 13 of 2003 concerning Manpower covers the use of foreign workers in companies, namely Article 42 to Article 49. The foreign worker works based on an employment agreement made between the employer and the foreign worker which is in principle the same as an employment agreement made by entrepreneurs with Indonesian workers. Work agreements must be made on the basis of an agreement between the two parties and the work agreed upon must not be in conflict with the provisions of the work agreement, public order, decency and legislation applied in the territory of the Republic of Indonesia.

C. Closing

Foreign capital companies can be bankrupt in the Republic of Indonesia territory by the Indonesian commercial court. There are provisions in Law Number 25 Year 2007 Article 5 number 3 which states foreign investments must be in the form of a limited liability company under Indonesian law, and domiciled within the territory of the state of the Republic of Indonesia. Because foreign capital companies must be in the form of a limited liability company and domicile in Indonesia, therefore all binding legal actions on the company applied including bankruptcy against the company.

The rights of Indonesian and foreign workers are in the same principle because both of them work by making work agreements between employers and workers in general. Law number 13 of 2003 concerning Manpower stated in substance regarding foreign workers in Article 42 to Article 49. In foreign capital companies that went bankrupt, referring to the provisions of Law Number 13 of 2003 in Article 165 namely if the company is bankrupt, the company may terminate the employment of workers/laborers with the condition that workers/laborers are entitled to severance pay in the amount of 1 (one) time under Article 156 paragraph (2), one year of service award money stipulated in Article 156 paragraph (3) and compensation for rights in accordance with Article 156 paragraph (4).

The need for more detailed regulation of the bankrupt foreign capital company. It can become a reference for the future if there is a bankruptcy on a foreign capital company domiciled in the Republic of Indonesia territory. A bankrupt case for foreign capital companies should prioritize the rights of the workers/laborers who work for the company because the workers are the preferred creditors whose rights must take precedence.

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