

# THE ROLE OF SUPERVISORY JUDGE IN RESOLVING THE DEADLOCK OF THE ASSETS SETTLEMENT IN BANKRUPTCY OF FOUNDATION

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## ABSTRACT

This article of law aims to find out how is the role of judges in overseeing the supervisory curator during the liquidation of the Foundation assets which is experiencing bankruptcy, as mandated in The Law Number 28 of 2004 on The Changes of Law Number 16 of 2001 on the Foundation and Law Number 37 of 2004 on Bankruptcy and Suspension of Payments of Debt. This Legal research is doctrinal and perspective. Source of the legal materials are used in the form of primary and secondary legal materials. The technique used in collecting the legal materials is study of librarianship. The technique used is analysis and interpretation of syllogism by using deductive thinking pattern. The results of the research and study produce a conclusion that these forms of control can be exercised by Supervisory Judge in supervising liquidation process while the curator of Foundation who has experienced bankruptcy is to provide licensing, approval, awarding, and proposal to curators in conducting the management and liquidation of bankrupt assets of foundation, including analyzing if there is a deadlock/bottleneck in that settlement. Additional supervision conducted by Supervisory Judge is reporting responsibility of curator against the Builder of the Foundation regarding to the results of process of liquidation of Foundation's assets which suffered bankruptcy. In addition, Supervisory Judge also examine the results of liquidation which is performed by curator over the clearing of the foundation's assets which is experiencing bankruptcy.

**Keywords:** Supervisory Judge, Curator, Liquidation, Foundation, Bankruptcy

## A. INTRODUCTION

Foundation has existed for a long time and has been known by society since the beginning of history (Chatamarrasjid Ais, 2000: 1). The presence of foundation in society's activities in Indonesia has taken place before the Independence Day. The founding of the foundation, at that time was only based on the society's customs; doctrines and jurisprudence, there had not been legislation which regulated in particular the foundation in Indonesia. The legal basis for foundation had just present

since 6<sup>th</sup> August 2001 by the emergence of Act Number 16 year 2001 which had been revised through Act Number 28 year 2004 on the Changes upon Act Number 16 Year 2001 on Foundation (Act of Foundation) which then was followed by the emergence of Government regulation Number 63 Year 2008 on the Administration of Foundation Act.

Foundation as a kind of legal institution (Irwanto, A. K., & Prabowo, 2009) has some specification which is not owned by other legal institutions. Foundation is a private legal institution, although it can be founded by public legal institution, but its status is still private legal institution (Simamora, Y. S, 2012: 178). The purpose of a foundation entering social, religious and humanity territory is by nonprofit oriented character. When a foundation has a status as a legal institution, then the foundation as an independent entity or institution whose every legal action is represented by builder, supervisor, and administrator in accordance to each authority (Habib Adjie & Muhammad Hafidh, 2015: 18). In administering this purpose, the foundation administration is entirely carried out by the foundation's body which consists of builder, administrator, and supervisor. (Richard Burton Simatupang, 2007: 24).

Foundation as well as other legal institutions can come to an end because of the expiration of the foundation (Lewi, J. T., & Djajaputra, 2018: 11). There are some reasons which cause the foundation comes to an end, one of them is the bankruptcy of the foundation. In Article 62 of Act of Foundation, it is explained that a foundation can be end because of some reason, including: the period of time given in the Articles of Association has been achieved or unachieved; and the court ruling that has gotten legal force is still based on some reasons: 1) The foundation has broken public order and decency; 2) has not able to pay its debt after being stated bankruptcy; or 3) the Foundation's asset is not enough to pay its debt after the statement of is revoked.

In the Act of Foundation it is confirmed that if a foundation experiences bankruptcy, then automatically it is applied the Act of Bankruptcy. Bankruptcy itself is regulated in Act Number 37 Year 2004 on Bankruptcy and Postponement of Debt Payment Obligation (Act of Bankruptcy). In Act of Bankruptcy, the definition of bankruptcy itself is general confiscation over all bankrupt Debtor assets whose administration and settlement is carried out by Curator under a supervision of Supervisory Judge as well as regulated in this Act. In bankruptcy process, there exist the role of Curator and Supervisory Judge. Curator is a party who is appointed by the court to do bankrupt assets settlement, whereas Supervisory Judge is judge who is appointed by the court in the bankruptcy decision or the decision of debt payment obligation who has duty to supervise the administration and the settlement of bankrupt assets.

The big amount of interest arises after the bankruptcy decision, makes the role of supervisory judge becomes significant enough, and because of that it needs to be arranged. The most dominant potency is the creditors. Supervisory judge has

to be able to ensure that the curator does division of the settlement assets to the creditors evenly. In some countries, the settlement of bankruptcy assets has to give attention to the creditors' interest (Changyin, H, 2002: 32). Potency of conflict after the foundation's bankruptcy decision arises because of some reasons, including: struggle of foundation's assets if in the same period of time there are some creditors who collect the debt from the foundation; claim of material guarantee from the creditors; moral hazard (Rogerson, W. P, 1985:69-75) of creditors, foundation manager and some parties who do bankruptcy assets settlement. The existence of supervisory judge is a kind of effort which is given by Act of Bankruptcy in order to supervise curator in carrying out his duties in accordance to the regulation and not arbitrary.

Another problem is in the depositing of the assets of bankrupt foundations, the curators appointed to do the management were foundations, such as in the bankruptcy of the Yayasan Bakti Sosial Surakarta based on Decision Number. 141/G Pdt. 2010/PN Ska, whose management of bankruptcy was protracted due to the dualism of management and unclear decisions of judges who appointed the curators. The position of the Supervisory Judge should be more able to play a role in this matter, but in fact it does not occur.

Based on the above explanation, the writer will discuss on how is the role of supervisory judge in supervising curator at the time of doing the foundation's asset settlement which is declared bankrupt.

## **B. PROBLEM STATEMENT**

In accordance with the theme above, this research focuses on how is the role of supervisory judge in supervising curator in doing the bankrupt foundation's assets settlement, with a suppose that a settlement of bankrupt foundation's assets which is fair and not violate act and propriety and while there is a deadlock/bottleneck?

## **C. RESEARCH METHOD**

Type of research which the writer uses is legal research. The nature of research used by the writer in this legal research is prescriptive and applied. This study aims to give an argumentation upon the result of study which has been carried out. In this legal research the writer uses statue approach and conceptual approach (Peter Mahmud Marzuki, 2014: 136). Legal material which the writer uses is primary legal material that is Law Number 16 of 2001 on Foundation, Law Number 8 of 2004 on the Changes upon Law Number 16 of 2001 on Foundation, and Law Number 37 of 2004 on Bankruptcy and the Postponement of Debt Payment Obligation, and legal material in the form of scientific papers and other legal researches such as thesis and journals.

Data collecting technique which is used in this study is library research or literature research in order to get theoretical basis in this legal writing. After the data analysis has finished, then the result will be presented descriptively, that is by revealing and describing factually in accordance to the issues being studied.

## **D. DISCUSSION AND RESEARCH RESULT**

### **1. Foundation Bankruptcy Process**

According to Article 15 (1) Act of Bankruptcy in the decision of bankruptcy statement there should be appointed Curator and a Supervisory Judge which is appointed from the Court judges (Shubhan, M. H, 2015:64). The bankrupt asset management and settlement which is done by curator is supervised by a supervisory judge, supervisory judge is a judge who are appointed by the Court in bankruptcy decision in order to supervise the management and settlement of bankrupt assets as well as regulated in Article 65 of Act of Bankruptcy. The position of supervisory judge is extremely important because before deciding something which relates to the management and settlement of bankrupt assets, Commercial Court listens to the supervisory judge's opinion/ advice.

Bankruptcy process which happens between the foundation and other legal institution has some difference. The bankruptcy process which happens in a foundation requires the curator to do a report upon the process of foundation's assets settlement to the foundation board of supervisor.

The requirements of bankruptcy are very important because if a bankruptcy application does not fulfill the requirements, then the application will not be granted by the commercial court. These requirements of bankruptcy are as follow (Edy Putra Meliala, Ramli Siregar, & Windha, 2013: 4):

- 1) Bankruptcy is set when a debtor has two or more indicators is not capable to pay at least a debt which has been due date (Article 2 (1) of Act of Bankruptcy)
- 2) At least there should be 2 (two) indicators (*concursum creditorum*).
- 3) There should be some debt.
- 4) The requirement is that the debts has to be due date and can be billed. Article 2 (1) Act of Bankruptcy are not differentiating but uniting debt requirements which has been due date and debt which can be billed.
- 5) The requirement is at least one debt which has been due date and can be billed.
- 6) Debtor should be in condition of insolvent, does not pay more than 50% of his debt. Debtor should have been in a condition where he has stopped paying to all creditors, not merely to one or two creditors only.

After a bankruptcy decision is read out, the judge appoints curator who will have a duty to report the bankruptcy to public and begins to carry out bankrupt assets recording, no later than two days after the curator receives his appointment letter as a curator. The result of this recording is then given to the court courtesy in order that it can be seen by public for free.

Curator has special duty and authority in bankruptcy which is experienced by a foundation. At the time a bankruptcy decision is dropped then automatically the foundation is also broke up. A curator has other duty in the Act of Foundation on Bankruptcy which is experienced by a foundation. Article 65 Act of Foundation explains that Liquidator or curator who is appointed to do a disbanding or disbanded foundation's assets settlement, not later than 5 (days) from the date of appointment has to announce the dissolution of the foundation and its liquidation process in Indonesian daily newspapers. Curator also has other duty that is announcing the result of settlement process of the bankrupt foundation's assets which is strengthened in Article 66 Act of Foundation which confirms that Liquidator or curator in the latest period of 30 (thirty) days from the date of liquidation process has finished, is required to announce the result of liquidation in Indonesian daily newspaper. The final duty that should be done by curator in a bankruptcy process of a foundation doing a reporting on the result of settlement of the foundation's assets to the Foundation Board of Supervisor, it is included in Article 67 (1) Act of Foundation which explains that Liquidator or curator in not later than 7 (seven) days from the date of liquidation process has finished, has to report the dissolution of the Foundation to the Founder.

If the report on the dissolution of foundation and the report of the liquidation process do not carried out, then the dissolution of the foundation is not in effect for the third party. An arrangement on the date when the foundation dissolution being is effect is the same as Limited Liability Company, where it will be declared dissolved after the curator has finished doing liquidation process, reporting the result of liquidation to RUPS or supervisory judge who has appointed him. And the last step is reporting the dissolution to the legal institution's administration system. This stage does which confirms that either the foundation or the company is declared dissolved.

## **2. The Role of Supervisory Judge in Supervising Curator When Carrying out a Settlement of Foundation's Assets which Experiences Bankruptcy**

Supervisory Judge has an extremely important role after the occurrence of bankruptcy decision. There are some duties and authorities which have to be done immediately after a bankruptcy decision is set. These duties and authorities are.

- 1) Ensuring the Fulfillment of Publicity Principle Properly by Immediately Making an Announcement.
- 2) Identifying assets and ensuring the assets freezing and securing is done.
- 3) Ensuring the excepting of certain goods from the bankruptcy assets is done.
- 4) Leading debt verification and renvoi procedure meeting.
- 5) Giving determination on insolvency stage if it is needed.
- 6) Giving permission to curator to liquidate the assets.
- 7) Assets division.

In (MurdionoSahupala, 2016: 59) it is explained that the duties and authorities of supervisory judge are as follow:

- 1) Leading verification meeting;
- 2) Supervising the actions of curator in doing his jobs; giving advice and warning to the curator upon the execution of his duties;
- 3) Approving or rejecting the list of bill which is proposed by the creditors;
- 4) Continuing on the bills which can not be settled in verification meeting to the Commercial Court Judge who decides the case;
- 5) Listening to the witnesses and experts over everything related to bankruptcy (for example: on the bankrupt situation, bankrupt attitude etc.);
- 6) Giving permission or rejecting permission the bankrupt to travel (living his residence).

The forms of supervisor which can be done by the Supervisory Judge is giving permission, approval, and giving some suggestion to curator in doing management and settlement of the foundation's bankrupt assets.

There are some curator's actions which need from the Supervisory Judge, as well as regulated in Act of Bankruptcy, including (Jono, 2010: 161):

- a. In which before the decision of bankruptcy statement is stated, the sale of assets owned by the debtor, either moveable properties or immovable properties in order to execution has been so far away until the date of sale the properties has been set, then with the permission of supervisory judge, Curator can continue the sale upon the bankrupt assets dependents (Article 33).
- b. In order not to receive inheritance, Curator needs the supervisory judge's permission (Article 40 (1)).
- c. In order to face up in the Court (Commercial), Curator should get permission previously from the supervisory judge, except credit adjustment dispute or in the matters as well as mentioned in Article 36, Article 38, Article 39 and Article 59 (3) (Article 69 (5)).

- d. Ready cash which is not needed for the management of bankrupt assets, has to be saved by curator in bank for the benefit of the bankrupt assets after getting the supervisory judge's permission (Article 108 (2)).
- e. Curator after asking for suggestion to the temporary creditor committee, if there, and by the permission of supervisory judge, has authority to make peace in order to terminate such a case which is still ongoing or prevent the emergence of a case (Article 109)
- f. All properties have to be sold in public in accordance to the procedures which are determined in the regulation (Article 185 (1)). If in public sale as well as intended in Article 185 (1) it is not achieved, then an underhand sale can be done by the permission of supervisory judge (Article 185 (2)). To all properties which are not immediately or not settled at all, Curator will decide the action which has to be taken to the properties by the supervisory judge's permission (Article 185 (3)).

There are some curator's actions which need permission from supervisory judge previously as well as regulated in Act of Bankruptcy, including (Jono, 2010: 164):

- a. Supervisory judge can propose a revocation for a bankrupt statement decision to the court, if the bankrupt assets are not enough to pay the bankruptcy cost (Article 18 (1)).
- b. Supervisory judge can propose to the court to replace and appoint other curator and/ or appoint additional curator (Article 71 (1)).
- c. Supervisory Judge can propose 2 (two) creditor candidates who have duty to give some advice to curator, if the chosen creditors by the court reject their appointment, resign, or pass away (Article 79 (3)).

Supervisory judge has a right to give suggestion either to curator or the court. Supervisory judge can propose to the court to replace and appoint other curator and/ or appoint other curator. Supervisory judge can propose 2 (two) candidates of creditor who have duty to give advice to curator, if the creditors who are chosen by the court reject, resign, or pass away. In some matters, supervisory judge can give an instruction to curator, attorney or other related parties as well as regulated in Act of Bankruptcy.

In the context of this rule, in fact, if there is an obstacle that causes a deadlock in the settlement of the assets of a bankruptcy foundation, the supervisory judge may propose to the court to revoke the bankruptcy status. The Condition become "status quo". Thus the foundation's assets can still be controlled by the foundation. If the are conflict occurs will be resolve not in the bankruptcy court,

but in the general court, regarding the validity/legality of the management or legal standing.

Basically, the role of supervisory judge in supervising curator at the time of doing settlement of foundation's assets which is experiencing bankruptcy has already been determined generally in the Act of Bankruptcy, but remembering that in the Act of Foundation there are special duties which are done by curator, then automatically the role of supervisory judge also increases in supervising curator. The additional supervisory which is done by Supervisory Judge is accountability report from curator to the Foundation Founder on the result of settlement process of the foundation's assets which is experiencing bankruptcy. Besides that, supervisory judge has also to check the result of liquidation which is done by curator over the settlement of the foundation's assets which is experiencing bankruptcy.

## **E. CLOSING**

### **1. Conclusion**

The forms of supervision which can be done by Supervisory Judge is giving permission, approval, and proposing suggestion to curator in doing management and settlement of the foundation's bankrupt assets. Basically, the role of supervisory judge in supervising curator at the time of doing settlement of foundation's assets which is experiencing bankruptcy has been set generally in the Act of Bankruptcy, but remembering that in the Act of Foundation there is special duty which has to be done by curator, then automatically the role of supervisory judge also increases in supervising curator. Additional supervising which is done by Supervisory Judge is reporting accountability from curator to the Foundation Founder on the result of settlement process of the foundation's assets which is experiencing bankruptcy. Besides that the supervisory judge has also to examine the result of liquidation which is done by curator over the settlement of the foundation's assets which is experiencing bankruptcy.

### **2. Suggestion**

- 1) In supervising the management and the settlement of bankrupt assets, Supervisory Judge should supervise the management and the settlement of the bankrupt assets wisely and carefully.
- 2) In choosing curator, supervisory judge side or breaker should be able to choose a curator who can be active in settling bankrupt assets and delivering his reports to the supervisory judge, thus there are not any curators who have



poor performance and less active in clearing bankrupt assets and giving their reports to supervisory judge.

- 3) Supervisory judge has to be firm in giving warning to the curator side so that curator can immediately give his report, and if there is a curator who has poor performance, he has to propose curator replacement to the judge who give the verdict or the court case judge, so that curator can be replaced immediately and the settlement of bankrupt assets can be quickly finished.

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