



Executing mortgage auctions in insolvency: A study on normative conflicts, legal certainty, and separate creditor protection

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ABSTRACT

This paper discusses the normative asynchronism between the Mortgage Rights Law (UUHT) and the Bankruptcy Law in the execution of mortgage collateral object auctions during insolvency. Secured creditors, such as banks, face restrictions in executing mortgage rights even though Article 6 of the UUHT normatively grants direct execution rights. This research utilizes a normative legal approach with techniques including analysis of legal regulations, a comparison of the Dutch and German legal systems, and literature review. The findings indicate that there is legal uncertainty in the practical execution of collateral object auctions during insolvency, and that the protection of secured creditors is limited and dependent on the interpretations of curators and courts. The author argues that the position of secured creditors, such as banks, should be given stronger legal certainty guarantees within the framework of property rights protection and legal certainty.

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1. Introduction

In financing practice in Indonesia, the Right of Dependency plays a central role as the main guarantee instrument for financial institutions, especially banks, to secure the repayment of debtors' debts (Ika Atikah, 2022). Law No. 4 of 1996 concerning Dependent Rights on Land and Land-Related Objects (UUHT) explicitly grants the right of direct execution, known as *parate executie*, to separatist creditors through Article 6. This provision is designed to ensure efficiency and certainty in the recovery of receivables when debtors are injured in promises (Salsabila & Lubis, 2024).

However, problems arise when the debtor is declared bankrupt. At this point, the right of direct execution granted by the Law clashes with the principles of collectivity and specific restrictions stipulated in Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations (Bankruptcy Law). This conflict of norms creates significant legal uncertainty and has the potential to cause substantial losses to separatist creditors. The implications of this asynchronization are not only limited to the legal realm, but also extend to the macroeconomic sector, affecting the financing climate and investor confidence as a whole.

The fundamental cause of this inconsistency lies in the different philosophies of the two laws. The UUHT, with the granting of *the right of parate executie*, is fundamentally designed for efficiency and certainty in the recovery of individual debts, enforcing the principle of strong ownership. In contrast, bankruptcy law prioritizes the collective interests of all creditors and aims to distribute the debtor's assets in an orderly and fair manner, often by considering business continuity or maximizing the value of the bankruptcy boedel (Muis et al., 2022). Overall, this philosophical difference creates tension between the robust individual protection (*droit de préférence and parate executie*) embraced by the Mortgage Law, and the collective protection and equitable distribution that is the goal of the Bankruptcy Law. In practice, although the rights of separate creditors are still recognized as a priority, the exercise of these rights undergoes significant adjustments and limitations due to the mechanisms and procedures regulated under the Bankruptcy Law. The tension between the two creates legal uncertainty. If the protection for separate creditors is too weak, banks may become more conservative in lending. Conversely, if it is too strong, the bankruptcy process may be less effective in balancing the interests of all parties. The right balance is necessary to ensure the smooth functioning of the economy.

Paradox arises when two legal frameworks, each of which serves the legitimate and important public policy objectives of the protection of individual property rights on the one hand, and collective debt settlement on the other side clash in such a way as to erode the legal certainty they are supposed to provide (Halilah & Arif, 2021). The principle of *lex specialis*, which would simply take precedence over the UUHT, is often overridden by *the principle of lex posteriori* or the *sui generis* nature of the bankruptcy process. This dynamic is not just a normative issue, but reflects an unresolved philosophical difference in business law in Indonesia regarding the optimal balance between the protection of individual creditors' rights and the facilitation of collective rehabilitation or liquidation of debtors (Saragih, 2013). The uncertainty resulting from these tensions has a wide systemic impact.

This paper focuses on the analysis of how the auction of the object of the right of dependency in the period of insolvency, reviewed from the perspective of legal certainty, and its implications for the protection of the rights of separatist creditors and macroeconomic stability. This research has multidimensional significance. Academically, this research contributes to the legal discourse on the harmonization of norms and legal interpretation in the context of material guarantees and bankruptcy. Practically, the findings and recommendations produced are expected to provide guidance for legal practitioners and financial institutions in dealing with the problem of execution of dependent rights during the insolvency period. Furthermore, this research aims to inform policymakers in the formulation of more coherent and effective legal reforms, which can ultimately strengthen the investment climate and the stability of the national financial system.

2. Method

The research method applied is normative juridical, which means normative juridical legal research (or often called doctrinal law research) can be briefly understood as research that traces the existence of law in a particular jurisdiction. The researcher in this case seeks to collect and then analyze legal regulations and related legal norms (Solikin, 2021). This is usually done by reviewing other sources such as journal articles or other writings that comment on legal cases and laws and regulations (Tan, 2021).

3. Analysis and Results

3.1. Insolvency in Indonesian Bankruptcy Law

The insolvency period in the context of Indonesian bankruptcy law refers to the period after the bankruptcy declaration is pronounced until the end of the bankruptcy (Anisah & Suarti, 2022). Although Law No. 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment

Obligations (Bankruptcy Law) does not explicitly define "insolvency period" as a single term, conceptually, this period is interpreted as a period in which all debtors' assets become part of the bankruptcy estate and are under the control of the trustee (Putri & Rustam, 2025). This state of insolvency can occur automatically after a bankruptcy judgment if no peace offer is approved, or if the approved peace plan is not homologated.

3.2. The Right of Direct Execution (Parate Executie) Based on Article 6 of the UUHT: Principles and Legal Forces

Article 6 of the UUHT is the main basis for *the right of parate executie*, which gives the authority to the holder of the first Dependent Rights to sell the collateral object independently through a public auction if the debtor breaks the promise (Korompot, 2023). This provision provides a strong legal basis for separatist creditors, such as banks, to immediately execute guarantees without the need to go through lengthy judicial proceedings. This is a manifestation of the principle of *lex specialis* UUHT as a protection for creditors who hold guarantees.

The position of separatist creditors who hold material guarantees is considered very strong, even "strongest," and normatively "cannot be challenged by anyone, including even in the bankruptcy process." (Christy et al., 2020). Article 21 of the Law further emphasizes that the holder of the Dependent Rights can still exercise all his rights even if the debtor is declared bankrupt. This indicates that the UUHT is designed to provide a prompt and independent enforcement mechanism for the guarantor creditors.

The right to *parate executie* under Article 6 of the Constitution implicitly offers a high level of contractual certainty for lenders. This implies that if a debtor defaults, the lender has a clear, fast, and independent path to recover its investment by liquidating the collateral. This certainty significantly reduces the perceived risk of lenders allowing them to offer more favorable loan terms, such as lower interest rates or higher loan-to-collateral ratios. This embodies the principle of *pacta sunt servanda* (agreement must be kept) directly in the realm of collateral transactions (Evalina, 2016).

When this supposed insurable right is limited by the bankruptcy process, it fundamentally changes the risk assessment for secured loans. Lenders, anticipating potential delays, increased costs, or even loss of control over collateral during insolvency, will adjust their lending behavior. These adjustments can manifest as rising interest rates, tighter collateral requirements, a decrease in overall credit availability, or a shift away from collateral loans altogether. This erosion of contractual certainty, has a direct negative impact on the efficiency of the credit business and financial intermediation as a whole, ultimately hampering economic growth. This suggests that the legal framework, although aimed at collective justice in bankruptcy, indirectly creates a significant disincentive to credit that is so important for economic development.

3.3 Analysis of Norm Clashes Between Article 6 of the Law and Articles 56, 57, and 59 of the Bankruptcy Law

Although Article 6 of the Law gives the right of direct execution to separatist creditors, in the Bankruptcy Law there are significant restrictions that cause a clash of norms. Article 56 and Article 57 of the Bankruptcy Law state that the execution of the assets of a bankrupt debtor can only be carried out by the curator, and provides a period of 90 days for separatist creditors to execute their rights, starting from the date of the bankruptcy declaration of judgment (Achmad et al., 2017). Furthermore, Article 59 paragraph (1) of the Bankruptcy Law requires separatist creditors to exercise their right of execution no later than 2 months after the commencement of the insolvency situation. If this deadline is exceeded, the collateral object may be requested by the curator to sell as part of the bankruptcy bond (Yusticia & Rumesten, 2022).

The provisions of Article 55 paragraph (1) of the Bankruptcy Law which states that creditors holding material collateral rights "can execute their rights as if there were no bankruptcy" becomes inconsistent and weakened by Articles 56, 57, and 59. This creates "inequality" and

"legal uncertainty" for secured creditors. In practice, many law enforcement agencies apply the principle of *lex posteriori derogat legi priori*, which prioritizes the Bankruptcy Law (a newer law) over the Law, even though the Law is a *lex specialis* for the guarantee of dependents. This results in a "dysfunction of authority" for separatist creditors, where their right to self-execution is weakened (Natalia, 2018).

The treatment of the object of collateral that enters the bankruptcy bond, even if it is only temporary or conditional, constitutes a fundamental shift in the nature of the secured property. The core principle of a secured transaction is the creditor's preferential rights to a particular asset, which is conceptually separate from the debtor's common property. When bankruptcy law effectively "absorbs" these guarantees into the bankruptcy bank, it dilutes the essence of the interests of the guarantee itself. It turns *droit de suite* (the right to follow assets) and *droit de preference* (the right to take precedence in payments) into conditional rights, subject to the complexity and collective nature of the bankruptcy process (Sakti & Silviana, 2024).

Financial institutions, whose business models rely heavily on certainty and the applicability of guarantees, face much higher risks. This increased risk translates into higher interest rates, stricter collateral requirements, a decrease in credit availability, or even a strategic shift away from collateral loans altogether. This undermines mechanisms designed to facilitate credit flows and reduce lending risk (Rosdiana Dewi et al., 2024). By blurring the line between collateralized and unsecured assets in insolvency, the legal framework indirectly hinders the provision of capital, especially for long-term or high-value loans, which are crucial drivers for economic development.

3.3.1 Implications of Restrictions on Enforcement Rights for Separatist Creditors

The restrictions imposed by the Bankruptcy Law, such as a 90-day suspension period and a 2-month execution deadline, pose significant practical difficulties for separatist creditors. This often results in delays and increased costs in receivables recovery efforts. Data from banking institutions shows that separatist creditors typically require between 2 to 3 months to carry out the execution of the auction of guarantee rights of dependents, far exceeding the 2-month time limit set in the Bankruptcy Law.

A crucial risk faced by separatist creditors is the loss of their *parate executie* rights if the execution cannot be completed within the 2-month time limit. If this happens, the object of the collateral will go into bankruptcy, and the separatist creditors will have to join the general bankruptcy process, where they could potentially receive unfavorable or delayed payments, and their claims for shortfalls receivables will turn into concurrent claims. Curators often object if the 2-month deadline is exceeded, even if the creditor has started the execution process.

The pressures resulting from the tight deadline (2 months) and the risk of losing *the right to parate executie* in insolvency intensely prompted separatist creditors to act. Knowing that their preferential rights are time-limited and can be absorbed into the bankruptcy estate, secured creditors are encouraged to initiate enforcement actions *earlier* and *more aggressively* when the debtor shows signs of hardship, even if the debtor may be able to recover through informal settlement. This creates a "race" among creditors, where each party seeks to be the first to enforce their collateral before the debtor enters formal insolvency or before the 2-month limiting window closes.

This "race" can prematurely disrupt the stability of businesses, pushing them into formal bankruptcy or liquidation even when a consensual settlement or restructuring may be a more feasible and value-maximizing solution. It also increases the overall cost of debt collection, as creditors spend resources on swift and often uncoordinated enforcement actions, rather than collaborative solutions. This behavior, driven by legal uncertainty, often leads to suboptimal outcomes, where assets are sold quickly at potentially lower prices, rather than being strategically managed for maximum value. Ultimately, this is detrimental to the broader economy and contrary to the goals of an efficient bankruptcy regime.

The normative implication is a shift in legal paradigm from the Mortgage Law as an absolute, independent right to a right subject to the collective legal framework of Bankruptcy. Normatively, this means the principle of collective justice in Bankruptcy (which prioritizes equity for all creditors) takes precedence over the principle of certainty and individual autonomy in the Mortgage Law. The practical implication is delay and a limitation of authority. A separate creditor can no longer immediately execute their collateral but must wait until the stay period expires and, in some cases, must coordinate with or even cede the sale to the curator. This reduces efficiency and control for mortgage holders but ensures the process of distributing the bankrupt estate is more orderly and fair to all parties.

3.3.2 Impact on the Financing Climate, Investor Confidence, and Banking System Efficiency

Legal uncertainty in the implementation of the auction of the execution of the right of dependency has a direct and detrimental impact on the financing climate in Indonesia. When creditors, particularly banks, are unable to execute their collateral accurately and quickly, credit risk inherently increases. This increased risk in turn leads to an increase in borrowing costs for debtors, hampering the efficient circulation of assets and capital in the economy.

This uncertainty also contributes to the accumulation of non-performing loans (NPLs) in the banking system. Legal obstacles in the bail execution process, including the time-consuming nature of the auction execution and the uncertainty of court rulings, have been identified as major obstacles in the handling of NPLs. Inadequate NPL management can damage a bank's reputation and reduce public trust (Tobing & Allenvidia, 2024). Challenges in the execution of guarantees remain a constant concern.

The negative impact also extends to investor confidence and the overall "ease of doing business" environment. The World Bank in its *Doing Business* (2020) report assesses the efficiency of the guarantee execution system as an important indicator of ease of doing business. Indonesia, in 2020, ranked 48th in "Getting Credit" (with a score of 70.0 and a legal strength index of 6/12) and 38th in "Resolving Insolvency" (with a score of 68.1 and an insolvency framework strength index of 10.5/16). These figures show that there is still significant room for improvement in Indonesia's legal and insolvency framework regarding secured transactions.

This uncertainty also contradicts the government's efforts to encourage structural reforms and strengthen financial inclusion. A weak or ambiguous legal framework for collateral transactions inherently increases the perceived risk of lenders being perceived. This increased risk translates into higher interest rates and tighter lending conditions for borrowers. Higher borrowing costs, in turn, discourage businesses from investing, expanding, and creating jobs, especially affecting micro, small, and medium enterprises (MSMEs) that are often described as the "backbone of Indonesia's economy". This reduced investment activity slows overall economic growth, potentially leading to an increase in loan defaults and NPLs for banks. High NPLs then limit the bank's capacity to expand credit further, creating a detrimental cycle.

This directly disrupts the "efficiency of the savings and investment intermediation process" and the state's ability to attract vital private investment, both of which are crucial to achieving ambitious economic growth targets. The consistent focus of international bodies such as the World Bank and the IMF on "insolvency resolution" and "financial sector stability" underscores that a strong and predictable secured transaction legal framework is indispensable for a healthy financial ecosystem and sustainable economic growth.

3.4 Practical Challenges in the Implementation of Guarantee Execution

In practice in Indonesia, the execution of dependent rights faces significant challenges because it relies heavily on the discretion of the curator and the attitude of the court, which creates uncertainty for creditors (Syafrizal, 2023). Although the Supreme Court (MA) has issued several rulings that affirm that separatist creditors must still be given the opportunity to execute their rights—as seen in the Supreme Court Decision Number 605 K/Pdt.Sus-Pailit/2024—which

emphasizes the balance and certainty of law (Harkamto & Ramadhana, 2025), These decisions have not consistently formed binding jurisprudence (*stare decisis*). As a result, there is still room for diverse interpretations and potential disparities in treatment in similar cases, such as when the collateral object can go bankrupt if the creditor does not register or fails to execute within the specified time limit (Friedman et al., 2002).

As a concrete example, the Semarang Commercial Court Decision Number 29/Pdt.Sus-Pailit/2018/PN.Smg shows how Bank Jawa Barat (BJB) lost its independent execution authority after the collateral object was not sold within a period of 60 days (2 months) post-insolvency and Bank BJB did not register itself as a creditor. This case confirms the dominant position of the curator in managing the bankruptcy assets if procedures and deadlines are not followed, even though it has the potential to harm separatist creditors. Although the Guidelines for Bankruptcy Case Settlement and Postponement of Debt Payment Obligations from the Chairman of the Supreme Court (KMA No.109/KMA/SK/IV/2020, n.d.) exist, these guidelines focus more on procedural aspects and have not substantively addressed the conflict of fundamental norms between the Law and the Bankruptcy Law (Mulyasari, 2025).

In addition to the uncertainty of jurisprudence, separatist creditors also face a variety of practical challenges. First, there is a clash between their preferential rights and the principle of bankruptcy collectivity, which demands a balanced distribution among all creditors. Second, the lack of clarity in legal procedures and authority between the curator and the court often allows the curator to delay or obstruct execution on the grounds of repayment of the debts of other creditors, diminishing the credibility of the execution of the right of dependency. Third, the 2-month deadline for self-execution (Article 59 Law Number 37 of 2004 Concerning Bankruptcy and Suspension of Debt Payment Obligations, n.d.) is often unrealistic. The public auction process requires long preparation and meets various administrative prerequisites, so in practice it can take 3 to 4 months, far exceeding the set limit. Finally, the convoluted bureaucracy in registration and dispute resolution, as well as the risk of lawsuits and maladministration if the auction procedure is improper, further adds complexity and risk to creditors. Collectively, these challenges create an environment that is less conducive for separatist creditors to efficiently recover their receivables, even though they normatively have strong preferential rights.

4. Conclusion

The implementation of the Dependent Rights auction during the insolvency period in Indonesia faces a significant conflict of norms. Although the law grants strong direct execution rights (*parate executie*) to separatist creditors, the Bankruptcy Law limits it to a strict suspension period and execution deadline. This inconsistency, which in practice is often resolved by prioritizing the Bankruptcy Act, creates legal uncertainty to the detriment of separatist creditors. In the end, separatist creditors in Indonesia have difficulty obtaining strong legal certainty in protecting their property rights. To overcome this, legislative revisions are needed for the harmonization of laws, the establishment of consistent Supreme Court jurisprudence, the integration of the principle of the protection of creditors' property rights in bankruptcy assessments, and adjustments to macroeconomic policies to improve the efficiency of collateral execution, for the sake of financial stability and economic growth. By synergizing legal reforms with macroeconomic policies, Indonesia can create an environment that not only provides legal certainty for creditors but also maintains financial stability, encourages economic growth, and ensures justice for all business actors.

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