

Research Article

The Application of Affidavits in Bankruptcy Proceedings: A Comparative Study of Indonesia, Malaysia, and Singapore

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Abstract.

In bankruptcy cases, affidavits are commonly used as written evidence that is both effective and efficient for simple evidentiary procedures before the court. In countries adhering to the civil law system, such as Indonesia, affidavits are implicitly regulated under Article 1866 of the Civil Code (KUH Perdata) and Article 164 of the HIR/Article 284 of the RBg, classified as written evidence in the form of documents. On the contrary, in countries with common law systems, such as Malaysia and Singapore, the application of affidavits as evidence in bankruptcy cases differs significantly. This study aims to examine the application of affidavits in bankruptcy cases across several countries, including Indonesia, Malaysia, and Singapore. It employs normative legal research methods by analyzing legal documents within the context of bankruptcy law. The study utilizes statutory, conceptual, and comparative approaches, relying on secondary data collected through library research encompassing primary, secondary, and tertiary legal materials. The findings of this study indicate that in Indonesia, affidavits cannot be classified as authentic deeds and do not possess the characteristics of conclusive evidence, thus they cannot be equated with witness testimonies. However, affidavits can be used as ordinary written evidence to support other evidence, assisting judges in efficiently resolving bankruptcy cases within a limited examination period. In contrast, in Malaysia and Singapore, affidavits in bankruptcy cases are generally used as authentic deeds, sworn before a commissioner for oaths or notary public, and are required to be submitted as evidence by both creditors and debtors in court proceedings. Thus, the distinction between common law and civil law systems in the application of affidavits is clearly lied at their level as a tool of evidence in bankruptcy proceedings.

Keywords: affidavits, bankruptcy, distinction, systems

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1. Introduction

As a developing country, Indonesia's economy faces fluctuations depending on global conditions. These fluctuations will affect various business sectors. For example, in the year of the subprime mortgage crisis in America in mid-2007, it had implications for the collapse of international financial companies. In addition, the impact of the crisis spread globally, including Indonesia. The share price of the Indonesia Stock Exchange fell sharply, which had an impact on the decline in the Indonesian currency exchange rate against the US dollar, to the point that banks had difficulty in providing liquidity (Sugema, Iman, 2014).

From this phenomenon, the possibility of bankruptcy cannot be avoided. Bankruptcy of a company or commonly called going bankrupt is a risk that occurs when running a business. In general, the cause is due to failure of management in terms of economy and finance. This is indicated by the recording of profits, operating costs and equity books which are in a negative position (Lerinsa, Friska, 2021). Based on these indicators, some companies will declare themselves bankrupt or be declared bankrupt by creditors. This statement is affirmed by a court decision which is called a state of bankruptcy.

The court's decision to declare bankruptcy is based on Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations (Bankruptcy and PKPU Law). Referring to Article 1 number 1 of the Bankruptcy and PKPU Law, it explains that the consequences of being declared bankrupt are that a general seizure is carried out on all assets of the bankrupt debtor, which will later be settled by the curator under the supervision of the Supervising Judge (Wijayanta, T., & Adistia, ST). As this is a civil realm, the procedure in carrying out this trial refers to Indonesian civil procedural law. Evidence in civil procedural law has the principle of revealing formal truth.

The formal evidence, in civil procedural law is clearly regulated in Article 163 HIR, one of which states that written evidence is one of the evidence in civil procedural law. Currently, with the development of the era, the types of written evidence as evidence have also developed, one of which is the use of affidavits as written evidence in a court. Indonesia itself does not regulate it specifically because affidavits are evidence that is usually used by common law countries. Singapore and Malaysia as countries that adhere to common law use affidavits in various legal actions as evidence to assist in resolving disputes in various matters.

As mentioned earlier, that the bankruptcy dispute court process refers to civil procedural law, it becomes interesting regarding the position of affidavit in Indonesia itself.

For Singapore and Malaysia, they use affidavit in bankruptcy settlement, namely as an official statement from a person as an argument of proof from both the creditor and debtor side. This is important because the contents of the affidavit will present in detail what the parties are considering. For more details, this study will discuss the position of affidavit in the implementation of the bankruptcy process in Indonesia compared to Malaysia and Singapore.

2. Methods

This study uses a normative legal research method by analyzing legal documents in the context of bankruptcy law (Barus, Z. 2013). This study uses a statute approach, a conceptual approach, and a comparative approach. The data used in this study are secondary data obtained through library research techniques that include primary legal materials, secondary legal materials, and tertiary legal materials.

3. Results and Discussion

3.1. Bankruptcy Regulations in Indonesia

The definition of bankruptcy itself is generally not that different, based on the Encyclopedia of Trade Finance Economics, it explains that what is meant by bankruptcy or bankrupt is the condition of a person who is declared bankrupt by the court which has implications for his assets or inheritance being used to pay his debts (Apriantoro, MS, Sekartaji, SI, & Suryaningsih, A, 2021). This definition is in line with the provisions based on Article 1 number 1 of Law Number 37 of 2004 concerning Bankruptcy which reads, “Bankruptcy is a general seizure of all the assets of a Bankrupt Debtor, the management and settlement of which is carried out by the Curator under the supervision of the Supervising Judge as regulated in this Law.”

Based on this, it is known that in general there is a common understanding, namely that bankruptcy is the confiscation of the assets of a debtor who is declared bankrupt and which will later be used to pay off his debts to the debtor (Wijayanta, T, 2024). In addition, bankruptcy is said to be a condition the debtor's inability to be responsible in this case in making payments on debts to creditors (Hartono, Dedy Tri, 2016).

In a state categorized as bankrupt, it is often accompanied by an element of stopping payment. This condition is known as insolvency which is an absolute requirement for

bankruptcy (Achmad, F., Daulay, PN, & Nurwidiatmo, N, 2017). Thus, bankruptcy is a condition of the debtor's inability to fulfill payments to creditors which is accompanied by a failure to pay. This condition is confirmed by a court decision which has implications for the general seizure of the debtor's assets to pay off the debt to the debtor.

The bankruptcy application itself is made to the Commercial Court as the competent court. To determine a person or business entity must meet the requirements as stated in Article 2 paragraph (1) of the Bankruptcy and PKPU Law. Based on this article, it can be simply concluded that there are 3 requirements for bankruptcy. First, there is debt as the basis for the obligation that must be paid off. Second, one of the debts at the due date that can be collected. Third, the debtor has at least two or more creditors (Wijayanta, Tata. 2014).

In addition to its simple requirements, the proof process is also carried out simply or in a vague manner (Claudia Priscilla, & Karouw Chintya, 2020). This is because the bankruptcy process must be carried out quickly, openly, and effectively. The goal is to protect the business interests of the parties so that the costs during the bankruptcy process do not increase (Explanation of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Obligations Debt Payment). However, in this process there are many differences in perception in the court process which result in simple evidence becoming not simple (Sidharta, Iwan. 2018).

In general, proof based on civil procedural law is regulated in Article 1866 of the Civil Code or Article 164 of the Herziene Indonesia Reglement (HIR), which states that there is evidence of incoming mail as evidence, especially in Article 1868 of the Civil Code which states:

"An authentic deed is a deed that is in the correct form determined by law, made by or in the presence of public officials who have authority for that purpose in the place where the deed is made" Although it has been clearly explained how a letter is positioned as evidence. There are still differences in interpretation in the evidence which always cause debate in court.

According to Article 1865 of the Civil Code, anyone who claims to have a right or points to an event to confirm his right or to deny the rights of others, is obliged to prove the existence of the right or the event stated. So that proof is one of the things that is mandatory to convince the judge about the truth of the disputed arguments (Sunge, M, 2012).

Evidence that only includes a statement without going through a trial also does not have the power of proof. This is in accordance with the journal Practice of Applying Affidavits in Bankruptcy Law and Postponement of Debt Payment Obligations which explains that based on Supreme Court Jurisprudence Number 3901K/Pdt/1985 dated 29 November 1988 which states that a statement taken from a person who will providing information without going through a trial, then the statement cannot be equated with testimony (Leonardus, 2023). So that in the jurisprudence it is stated that information in the form of a letter of evidence that is not submitted directly even though it is sworn in does not have sufficient force in a trial.

Efforts to minimize these differences sometimes use methods from different legal systems because they are considered better. One of them is the adaptation of the use of affidavits which are commonly known in the common law legal system. In general, an affidavit is a written statement sworn by an authorized person. The authorized party is generally a notary public. The notary public himself will validate the affidavit for the benefit of the court and take questions under oath (Sari, Endah Puspita, et al, 2015).

The Indonesian legal system was originally an adherent of the civil law legal system brought in during the Roman era, which means that there was a codification of law in Indonesia so that there was uniformity of law that was used until now. However, along with the development of the times, judicial law in Indonesia also adhered to the characteristics of the common law (Anglo Saxon) legal system, with the existence of local rules in society that were recognized and lived in society (Ramadhan, C, 2018). So that the legal system used in Indonesia is no longer entirely a civil law legal system. This is in line with the application of affidavits in bankruptcy cases even though it is only as evidence of ordinary letters Leonardus, Rado Fridsel; Wijayanta, Tata, 2023). For more details, we can see how the use of affidavits in bankruptcy matters in the country the British Commonwealth which is in the same region as Indonesia, namely Malaysia and Singapore.

3.2. Bankruptcy Regulations and Use of Affidavits in Malaysia

As a British Commonwealth country, the legal system adopted will also adopt British bankruptcy law. This adoption provides a difference to Indonesia, where in Malaysia the use of the words bankruptcy and insolvency is different. Bankruptcy is used for individual debtors, while insolvency is used for corporate debtors. The impact is on different regulations, for individuals using the Insolvency Act 1967 regulation, while for

corporate insolvency using the Companies Act 2016 (Wijayanta, Tata & A.H, Muhammad Bagus, 2021).

According to a journal written by Siti Khairunissa, a company in Malaysia is considered insolvent when a debt is collected by a creditor against the company and the company is then unable to pay the amount of money requested or does not make any effort to make an agreement regarding the payment of debt to the creditor for three weeks from the time the debt is collected (Khairunnissa, S. 2024). The application for bankruptcy requirements in Malaysia is based on the main source of law regarding personal bankruptcy, namely the Insolvency Act 1967.

The conditions are set out in Section 5 verse 1 Insolvency Act 1967 as follows:

- a. amounting to at least RM50,000 (fifty thousand ringgit);
- b. debt for a specified amount, which must be paid immediately or which is due at a specified time;
- c. the act of bankruptcy has occurred within six months before the bankruptcy petition is filed; and
- d. The debtor must be domiciled in Malaysia for at least one year before the bankruptcy petition is filed in the Court.

In the trial process in Malaysia, an affidavit is briefly a sworn statement in the bankruptcy process where its use is very important. The regulation of the procedure itself is contained in the Insolvency Rules, 2017. In these regulations, there are various uses of the affidavit which are essentially as a required supporting document. For example, in Section 17 of the Insolvency Rules, 2017:

“Except where these Rules or the Act otherwise provide, every application to the court shall, unless the Chief Judge otherwise directs, be made by summons in chambers supported by affidavit.”

Based on the article, it can be seen how an application to the court needs to be supported by an affidavit. Furthermore, the application will be given to the parties along with their affidavits as stated in Section 19 of the Insolvency Rules, 2017 (Section 19 of the Insolvency Rules, 2017). For the opposing party itself, it is also necessary to prepare an affidavit to oppose the application given as stated in Section 20 of the Insolvency Rules, 2017 (Section 20 of the Insolvency Rules, 2017). Thus, in general, the use of an affidavit becomes a kind of official supporting document that is required in the bankruptcy process.

Based on what was explained earlier, the role of affidavit is very important to support the bankruptcy process in Malaysia. As a country that adheres to common law, judges in Malaysia have a role not only as interpreters and implementers of existing rules, but judges have a very large role in shaping the order of life in society (Sari, Endah Puspita, et al. 2015).

In forming this order, the law also has the authority to create new legal principles. These principles will be used as a basis for other judges in deciding a case. In addition, in determining a new decision, the judge always makes adjustments to changes of the times that are based on truth, common sense, and the values of justice that it holds.

Thus, the function of the affidavit as evidence is as evidence that explains and completes a fact in an event that occurred. So that judges in assessing a case will find it easier to understand the problem being tried.

3.3. Bankruptcy Arrangements and Use of Affidavits in Singapore

Similar to Malaysia, Singapore differentiates the regulation on bankruptcy between individuals and companies. The regulation for individual or partnership bankruptcy is subject to the Bankruptcy Act. Meanwhile, corporate bankruptcy is regulated in the Companies Act (Larose, Angreina, et al. 2023). In addition, the court process for insolvency itself is handled by the High Court. Regarding the requirements for filing a bankruptcy application in Singapore, it is regulated in Article 311 of the Insolvency, Restructuring and Dissolution Act, which reads:

“311. (1) Subject to section 314, no bankruptcy application may be made to the Court in respect of any debt or debts unless at the time the application is made

a. the amount of the debt, or the aggregate amount of the debts, is not less than \$15,000;

b. the debt or each of the debts is for a liquidated sum payable to the applicant creditor immediately;

c. the debtor is unable to pay the debt or each of the debts; and

d. where the debt or each of the debts is incurred outside Singapore, such debt is payable by the debtor to the applicant creditor by virtue of a judgment or an award which is enforceable by an enforcement order in Singapore.”

Regarding the procedure, the use of affidavits in Singapore is also important in the process of resolving bankruptcy proceedings. The affidavit itself is one of the most

important documents commonly referred to as evidence in the court process. In general, the definition of an affidavit in Singapore is the same as in other countries, namely a sworn legal statement. The statement of a person who makes an affidavit can be used as strengthening evidence of legal arguments in court. In addition, in Singapore there are no specific regulations on who can make an affidavit. However, the most important thing is that the person must have the ability to understand the facts, morals, and laws of the oath (Lengkong, LY, 2020).

Its use is also the same as Malaysia for both creditor and debtor bankruptcy applications, both must be accompanied by an affidavit. These are listed as follows:

“Article 307 of the Insolvency, Restructuring and Dissolution Act

(2) A creditor who is entitled to make a bankruptcy application against a firm under subsection (1)(b) may make a bankruptcy application against any of the partners in the firm without including the others.

(3) Every creditor’s bankruptcy application must be in the prescribed form and be supported by an affidavit of the creditor or of some person on the creditor’s behalf having knowledge of the facts.”

Article 308 of the Insolvency, Restructuring and Dissolution Act

(2) A debtor’s bankruptcy application must be in the prescribed form and be supported by an affidavit to which is exhibited “

Based on the 2 articles, it is known how important the role of affidavit is in bankruptcy applications in Singapore. The obligation to have an affidavit in bankruptcy applications as the two countries apply can be implemented in Indonesia. This aims to ensure that in the bankruptcy application, arguments have been provided by someone who has expertise in the related case so that it is easier for the judge to decide a case, so that the contents of the statement made will be more competent and in accordance with the existing facts.

3.4. Comparison of the Use of Affidavits in Indonesia with Malaysia and Singapore

As previously mentioned, there are obstacles in simple proof as stated in Article 2 paragraph (1) of the Bankruptcy and PKPU Law. These obstacles occur due to differences in interpretation and inconsistency among judges regarding simple proof. This is also

caused by the absence of a concrete definition regarding clear limits on simple proof (Sidharta, Iwan. 2018).

Related conditions result in the bankruptcy court process that should be carried out quickly, openly, and effectively being unattainable. The use of affidavits as a tool to facilitate submission as evidence of facts may be the answer to the judge's understanding of a case in order to minimize the occurrence of congestion in the court process.

In Indonesia, the official use of affidavits is recognized only for immigration as stated in immigration as a facility for children of foreign passport holders who have dual citizenship as stated in Law Number 12 of 2006 concerning Indonesian Citizenship (Nurkumalawati, I. 2018). Article 41 of Law Number 12 of 2006 concerning Citizenship provides information that only children born in a legal marriage according to Article 4 letters c, d, h, and i can obtain an affidavit by first reporting themselves to the Indonesian Representative (Darusman, Y. 2017).

For that reason, there needs to be official regulation regarding the use of affidavits, especially in bankruptcy court processes. This is different from Malaysia and Singapore, which require the use of affidavits as mandatory documents included in the bankruptcy dispute resolution process, which is a burden. mandatory proof to be submitted in evidence for the parties (Mulyana, Asep Dwi, & Fajaruddin. 2020). which is derived from English insolvency law.

Basically, if you look at the characteristics of the affidavit itself, it is included in a written statement made before a notary or under hand. With that, it is included in the category of evidence, namely a letter as stated in Article 1868 BW (Utami, PDY. 2021). However, with its position not considered as official evidence, the affidavit is only considered as ordinary evidence, not a deed of evidence of facts. Based on this, Indonesia needs more detailed legal regulations regarding the position of affidavits in Indonesia. Especially if the affidavit is made by an expert.

4. Conclusion

The implementation of the use of affidavits in Indonesia may have been done directly or indirectly. Especially in the settlement of bankruptcy disputes in Indonesia, it would be good to learn from Malaysia and Singapore regarding the use of affidavits. The use of affidavits in common law countries is commonly used because judges must continue

to follow the developments of the times which can be seen from the thoughts of law enforcers which are stated in a document, one of which is an affidavit. For this reason, an affidavit is needed so that judges can understand a case more easily thanks to the explanation from the maker. If in Indonesia the use of affidavits is required, especially if there are certain qualifications for someone who can make an affidavit or make a statement in an affidavit, it is hoped that the judicial process will be better. In addition, this aims to ensure that the integrity and competence of the affidavit can be accounted for because it was made by someone who understands the problem being resolved.

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