

## Permasalahan hukum dalam penerbitan obligasi (bonds) di luar wilayah Indonesia: Studi Kasus atas Putusan Mahkamah Agung Republik Indonesia No. 381/K/Pdt./2006

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### Abstrak

Penerbitan surat utang/obligasi paling diminati sebagai sumber pendanaan perusahaan, karena jumlahnya besar, biaya kecil dan jangka waktu panjang. Didorong akan kebutuhan mata uang asing terutama dollar Amerika Serikat, maka perusahaan-perusahaan Indonesia cenderung menerbitkan obligasi/bonds mata uang asing di luar wilayah Indonesia. Struktur transaksi yang digunakan yaitu dengan cara (i) mendirikan special purpose vehicle (?SPV?) dengan kepemilikan 100% oleh perusahaan Indonesia; (ii) penerbitan bonds dijamin oleh perusahaan Indonesia; (iii) uang yang diterima SPV dari penerbitan bonds kemudian dipinjamkan kepada perusahaan Indonesia. Krisis ekonomi tahun 1997 mengakibatkan perusahaan Indonesia tidak dapat membayar kepada SPV, yang mengakibatkan SPV wanprestasi kepada bondholders, sehingga aset-aset yang dijamin oleh perusahaan Indonesia akan dilelang untuk membayar pinjaman bonds. Untuk mempertahankan aset-asetnya, perusahaan-perusahaan Indonesia yang beritikad tidak baik mengajukan gugatan perbuatan melawan hukum ke pengadilan Indonesia, agar perjanjian-perjanjian yang telah mereka tanda tangani dinyatakan batal demi hukum. Salah satu contoh kasusnya adalah gugatan atas perkara Nomor: 05/PDT.G./2003/ PN-BKS (Kasus Indah Kiat), telah diputuskan oleh Mahkamah Agung (MA) dengan No. 381/K/Pdt./2006, yang isi putusannya menolak kasasi dari para investor, sehingga yang berlaku adalah putusan Pengadilan Negeri Bengkalis (?PN Bengkalis?) yang dikuatkan oleh Pengadilan Tinggi Riau. Putusan PN Bengkalis adalah (i) menyatakan para Tergugat telah melakukan perbuatan melanggar hukum; dan (ii) menyatakan perjanjian-perjanjian pokok tidak sah dan batal demi hukum dan perjanjian-perjanjian jaminan tidak sah dan tidak berkekuatan hukum. Putusan MA ini harus dianalisis secara cermat dan seksama karena akan merugikan perekonomian Indonesia, karena dalam dunia bisnis semakin tinggi semakin tinggi risiko, semakin tinggi bunga yang harus dibayar oleh debitor. Meskipun pemilihan yurisdiksi Pengadilan Negara Bagian New York dalam Kasus Indah Kiat bersifat non-eksklusif dan pengadilan Indonesia mempunyai kewenangan yurisdiksional untuk memeriksa perkara tersebut, namun PN Bengkalis berdasarkan asas *lis alibi pendens* harus menolak untuk memeriksa perkara Kasus Indah Kiat. Untuk perjanjian jaminan kebendaan, penggugat harusnya mengajukan gugatan ke pengadilan negeri tempat penggugat berdomisili, karena tidak ada satupun dari tergugat yang berdomisili di Bengkalis. Selain itu perbuatan melawan hukum yang didalilkan kepada para tergugat tidak memenuhi unsur-unsur perbuatan melawan hukum, kecuali penandatanganan akta hipotik yang berdasarkan pada perjanjian yang dibuat di luar negeri, namun dalam perbuatan tersebut, unsur kerugian dan hubungan kausal antara perbuatan dan kerugian tidak terpenuhi. Selain itu perjanjian-perjanjian yang ditandatangani para pihak terkait telah memenuhi kausa yang halal, kecuali akta hipotik, sehingga sebagai konsekwensinya akta hipotik batal demi hukum, namun tidak mengakibatkan batalnya perjanjian pokok.

.....Issuing bonds is the most popular fund raising strategy chosen by companies, since such it will result funding in a great amount, low cost and the long term maturity. Due to the business activity requirement in foreign currency, mainly in United States Dollar, there is a tendency for Indonesian companies to issue

bonds out of Indonesian territory. The structure used in issuing the bonds by way of (i) establishing a special purpose vehicle which 100% owned by Indonesian Companies (?SPV?); (ii) such issuance guaranteed by Indonesian Companies by way of the provision of corporate guarantee and the creation of securities over their assets; (iii) the proceeds received from issuing bonds will be on-lent from SPV to Indonesian Companies. Economic crisis on 1997 caused Indonesian companies were not able to repay its debts to SPV, and then SPV were not able to repay its debts to note holders, and consequently, the assets of Indonesian companies that has been placed as security would be seized and sold in a public auction to settle such debt. To avoid enforcement for of security over their assets, the bad faith Indonesian companies submitted a claim to Indonesian court to declare the contracts that they have been entered into null and void. One of the cases using similar structure was the case Number: 05/PDT.G./2003/PN-BKS, has been decided by Indonesia Supreme Court with decision Number: 381/K/Pdt./2006 that rejected cassation of the investors. Therefore the decision of Bengkalis District Court that has been firmed by Riau High Court will take place. Bengkalis District Court declares that the Defendants have conducted unlawful action and the principal agreements that have been entered into by the parties were null and void. This decision result in the investors construed that make investment in Indonesia is high risk, and it will be disadvantages for the development of Indonesian economics. In view of the above, the judgments consideration in deciding the case must be thoroughly analyzed. The agreements that have been entered into in issuing the bonds were governed by the States of New York Law and the choice of jurisdiction was the court of the States of New York. Prior to the claim was submitted to the Indonesian Court, the defendants has submitted claim to the court of the States of New York, therefore nevertheless the choice of jurisdiction was non-exclusive, and Indonesian court has jurisdictional competency to examine the case, based on the principle of *lis alibi pendens* the district court of Bengkalis must decline to examine the case. With regard to the security documents, the plaintiff should submit its claim to the district court within the jurisdiction of the domicile of plaintiff. According to the legal reasoning of the judge council of Bengkalis District Court and Riau High Court in their decisions, it can be concluded that the legal action of the defendants was not meet the elements of unlawful action. The only legal action that can be construed as an unlawful action was the entering into Hypothec Deed, but it was not meet the elements of (i) damages; and (ii) the causality between the damages and such action. In addition, the agreements that have been entered into by the parties have met the lawful causal, except the hypothec deed, and consequently, such hypothec deed was null and void, but it would not cause the invalidity of the principal agreements.