

The Juridical Implications of Acts of Default on Cooperation Financing Agreements Associated with Guarantees on Behalf of Third Parties

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Abstract. *This study aims to find out and analyze the juridical implications of default on financing cooperation agreements associated with guarantees on behalf of third parties. To find out and analyze efforts to resolve defaults on financing cooperation agreements associated with guarantees on behalf of third parties. The research approach method used in this thesis is a sociological juridical legal research method. The specification of this research uses descriptive analysis. The type of data used in this research is primary data which includes Al-Quran, Hadith, UUD 1945, HIR, Civil Code, UU no. 2 of 2014 concerning Amendments to Act No. 30 of 2004 concerning the Office of a Notary Public, as well as secondary data containing books and other supporting documents. Collecting research data using interview techniques and study of documents or library materials. The data analysis method used in analyzing the data is qualitative analysis, such as description techniques, evaluation techniques and argumentation techniques. The results of the study show that private agreements on financing the construction of housing plots in the Bandung Regency area are very high risk, but can truly bind the parties and have legal certainty if they fulfill the requirements as stipulated in the Civil Code. Regarding the existence of a guarantee on behalf of a third party in an agreement that is not bound by itself, even if there is a power of attorney to sell made by an authorized official on behalf of the owner of the guarantee to the recipient of the capital, it does not have any strength or value whatsoever.*

Keywords: *Agreements; Guarantees; Financing.*

1. Introduction

In essence, humans are creatures that have a role in social life and as social beings, humans carry out many activities, interact with fellow humans and their environment, not all human activities can be carried out alone, because every human being will need the help of other humans and help each other. . In this social interaction, a relationship arises between parties that can produce an

event where someone promises someone to do something. This can be in the form of freedom to do something, to give something and not to do something. Indonesia is a state based on law as stated in Article 1 paragraph (3) of the 1945 Constitution, in which every life of its people is governed by various laws and regulations which aim to achieve order and prosperity together. Mochtar Kusumaatmadja, defines law as the overall principles and rules governing human life in society, including the institutions and processes in realizing the enactment of these rules in the reality of society.¹

In the business world, a contract made in writing (underhand) is due to an offer and acceptance. To ensure that the offer and acceptance process does not cause problems in the future, it is necessary to pay attention to the party making the offer and the party receiving the offer has the capacity and authority to do so.

Agreements or contracts are developing rapidly at this time as a logical consequence of the development of business cooperation between business people. Many business collaborations are carried out by business people in the form of contracts or written agreements. Even in business practice, there has been an understanding that business cooperation must be carried out in writing. Contracts or written agreements are the basis for the business actors of the parties to carry out a lawsuit if one party does not carry out what has been agreed in a contract or agreement.²

Through legal actions a person can carry out his affairs/interests and of all the legal actions that can be carried out by a person, entering into an agreement is the most popular legal action and is often carried out by someone in carrying out his affairs. There are almost no rights and obligations that can be obtained by someone through an agreement, of course with the provisions, the party invited to enter into an agreement must agree. In other words, to place rights and obligations in an agreement requires an agreement between the parties in it, which in law is known as a consensus.³

An agreement or contract is a legal relationship between two or more people who bind themselves based on an agreement to cause legal consequences. The legal consequence is in the form of reciprocal rights and obligations between the parties.⁴

Contracts or agreements are regulated in Article 1313 of the Civil Code and regarding the terms of the validity of the agreement which are usually stated in Article 1320 of the Civil Code. In essence, the law provides protection for the rights of everyone fairly and stipulates their obligations, provides limitations on rights and obligations so as not to disturb or harm other parties related to the

¹Mochtar Kusumaatmadja, 2002, *Legal Concepts in National Development*, Alumni Publishers, Bandung, p. vii.

²Muhammad Syaifudin, 2012, *Contract Law*, CV Mandar Maju, Bandung, p. 1.

³Ridwan Khairandy, 2013, *Indonesian Contract Law in a Comparative Perspective Part One*, FH UII Press, Yogyakarta, p. 90.

⁴Muhammad Noor, June 2015, *Application of the Principles of Contract Law in Making Contracts*, Mazahib, *Journal of Islamic Legal Thought*, Vol. XIV, No. 1, p. 90.

rights and obligations of the parties in carrying out legal actions, and provides justice for everyone insiders trying to fulfill life. In the dynamics of society, sometimes to carry out legal actions, legal subjects cannot do it alone. Under these conditions, a representative or proxy institution emerges.

The granting of power of attorney is regulated in Article 1792 of the Civil Code. The granting of power of attorney in this discussion will discuss the granting of power of attorney to sell land and buildings as outlined in a notarial deed which is then guaranteed by the recipient of the power of attorney to another party, in this case, namely to the capital provider in a private housing development financing cooperation agreement.

In a contract or cooperation agreement in business the aim is to gain an advantage for the parties, but sometimes on the way there are obstacles, obstacles and problems that occur as a result of the actions of one party, whether intentional or unintentional, resulting in losses for the other party. That is, if one of the parties is unable to carry out an agreement, then it can be said to have committed a default as referred to in Article 1243 of the Civil Code.

In making an agreement or contract it is necessary to understand the legal provisions of the engagement, besides that it also requires the expertise of the parties in making contracts in order to avoid disputes or disputes that are difficult to resolve. Therefore, contracts are very important as work guidelines for related parties. However, in drafting the contract it is necessary to pay attention to applicable laws, public order, customs and decency.⁵

Cooperation agreement accompanied by a guarantee, if the party providing the guarantee does not fulfill its achievements, then the party providing the capital has certainty guaranteeing compensation for losses or the capital that has been given, namely by selling objects from the recipient of the capital, which then proceeds from the sale used to compensate for losses suffered by investors.

In the case example, the position that will be discussed here is a case that occurred to an investor in a developer in Bandung, where the act of default was carried out by a second party as the recipient of capital as the owner of a developer company, by not returning capital and profits as agreed in the financing cooperation agreement. In the agreement, the second party has guaranteed a certificate of ownership on behalf of the third party, along with a power of attorney to sell from the third party to the second party made by a notary.

The third party in this case was not included in the cooperation agreement, where what the author knows through one of the attorneys from the first party is from the name on the certificate of ownership and the power of attorney to sell which is used as collateral by the recipient of capital to the provider of capital. Because of this, the financier has difficulty obtaining the guarantee through a judicial mechanism because it is owned on behalf of a third party.

⁵Joni Emizon, 1998, *Fundamentals and Contract Forming Techniques*, Sriwijaya University, Palembang, p. 7.

In this research proposal, the authors intend to dig deeper into the juridical implications related to the method of settlement with legal certainty and the existence of legal protection for the aggrieved party over the problem.

2. Research Methods

Research is an activity aimed at knowing the ins and outs of something.⁶ The research method is a method that explains how research works, which includes materials or research materials, tools, research paths, variables and data to be provided and analyzed.⁷ The specification of this research uses descriptive analysis, namely research that besides providing an overview, writing and reporting an object or an event will also draw general conclusions from the issues discussed. Source of data comes from primary data and secondary data. Data collection methods include interviews, document studies or library materials. The data analysis method used in analyzing the data is qualitative analysis.

3. Results and Discussion

3.1. Juridical Implications of Acts of Default on Cooperation Financing Agreements Associated with Guarantees on Behalf of Third Parties

In the Housing Plot Development Financing Cooperation Contract made in writing under the hand, as in the case examples studied, it still has several weaknesses which could have implications when a default occurs in the future, as follows:

- a. The contract with a principal financing capital value of IDR 720,000,000 (seven hundred and twenty million rupiahs) was made only underhanded;
- b. Guarantees contained in the contract, namely 2 Freehold Certificates are on behalf of third parties and do not bind themselves in the contract;
- c. There is no encumbrance of mortgage rights for the 2 Freehold Certificates;
- d. Guarantees contained in the contract, namely 2 power of attorney to sell from on behalf of 2 certificates of ownership to the second party;

Of the several weaknesses mentioned above, the Cooperation Contract for Financing the Development of Housing Plots dated February 10, 2021 should have been made notarized, because it has far more legal force for the parties making it.⁸

If an agreement is made privately it can result in weak evidence, as based on the Jurisprudence of the Supreme Court of the Republic of Indonesia Number: 775 K/Sip/1971 dated 06 October 1971, in the consideration of the Panel of Judges as follows:

"A letter of sale and purchase of land "underhand" submitted in court, then denied by the opposing party, and not supported by other evidence, the

⁶Beni Ahmad Saebani, 2008, Research Methods, CV Pusaka Setia, Bandung, p. 39.

⁷Mahsun, 2005, Language Research Methods: Stages of Strategy, Methods and Techniques, PT Raja Grafindo, Jakarta, p. 70.

⁸Results of an interview with a Notary in Bandung City, 15 January 2022.

certificate of sale and purchase of land is considered as weak and imperfect evidence."

Guarantees for certificates of ownership on behalf of third parties have a very high risk if used as collateral in a contract/agreement, because they cannot be executed. Especially if on behalf of the certificate of ownership does not participate in and sign the said agreement.

The existence of a deed of power to sell is not a transfer of rights from on behalf of the Certificate of Ownership to a second party (recipient of capital), because basically the deed of power of attorney to sell is only a power of attorney to carry out an act, in this case it is to sell it. The deed of power to sell does not have a legal relationship with the first party as the capital provider, so it does not have an executorial if the second party as the recipient of the capital (housing manager and developer) defaults.⁹

The principle of legal certainty can be understood, namely as clarity of norms, so that it can be used as a guide for the people who are subject to these regulations. The relation between legal certainty and a contract or agreement made by the parties is the legal consequence of the agreement itself and is binding on the parties, resulting in rights and obligations that must be obeyed by the parties to the agreement in question.

As in an engagement known as *pacta sunt servanda* is the principle of legal certainty in agreements related to the consequences of the agreement. The principle of *pacta sunt servanda* signals that judges must respect the substance of the contract made by the parties, as befits a law.

In the case of the Housing Plot Construction Financing Cooperation Contract under study, it can have legal certainty even though it was made privately, if at least it fulfills the legal requirements of the agreement as stipulated in Article 1320 of the Civil Code, regarding the elements of the terms of the agreement, as follows:

- a. There is an agreement between the parties;
- b. The ability to make an engagement;
- c. There is a certain subject matter; and
- d. About the contract that is not prohibited.

A notary is a state institution or organ that is authorized to make authentic deeds and store them as state documents or archives. A notary as a public official appointed by the Minister of Law and Human Rights has the duty and authority to make authentic deeds. An authentic deed is a deed that has certainty of content, certainty of date and certainty of the person.¹⁰

In Act No. 2 of 2014 concerning Amendments to Act No. 30 of 2004 concerning the Position of Notary Public explains the importance of the role of the notary in

⁹Results of an interview with an Advocate in the City of Bandung, January 16, 2022.

¹⁰Habib Adjie, 2009, *Observing the Khazanah Notary and PPAT Indonesia*, Citra Aditya Bakti, Bandung, p. 106.

making authentic deeds. Making an authentic deed itself is required in the framework of certainty, order and legal protection.

In the case of this position, a deed of power of attorney to sell has been guaranteed from the second party as the recipient of capital to the first party as the first party, the contents of the deed of power of attorney to sell is that the owner of the certificate authorizes the second party to sell/transfer it to any party at a price and conditions considered good by the attorney (recipient of capital) for a plot of land.

There is a problem when the second party as the recipient of capital from the first party as the provider of capital commits an act of default, in this case the second party does not return the capital along with profit sharing from the sale of housing to the first party according to the time agreed in the contract.

When the second party does not return the said capital or is in default, the first party as the holder of the guarantee certificate on behalf of the third party and the power of attorney to sell it cannot make a legal remedy against the guarantee because the owner of the certificate is still on behalf of the third party and the power of attorney to sell it is not a transfer of rights from on behalf of the certificate owner to the second party, moreover the third party does not bind himself and/or sign the cooperation contract.

In the event that the second party as the recipient of capital from the first party as the capital provider commits a default, it is clear and obvious because the contract was agreed upon and signed on 10 February 2021 and 3 (three) months after that the second party also did not return the capital, so the second party fulfills the elements acts of default as regulated in Article 1243 of the Civil Code, which states:

"Reimbursement of costs, losses and interest due to non-fulfillment of an agreement begins to be required, if the debtor, even though he has been declared negligent, remains negligent in fulfilling the said agreement, or if something that must be given or done can only be given or done within the specified time. ."

The legal consequences of defaults committed by the second party as the recipient of capital, where the second party does not return the capital and profit sharing to the first party as the capital provider based on the Housing Plot Development Financing Cooperation Contract dated February 10, is very clear and unequivocal an act of default.

The cooperation contract complies with Articles 1320 and 1338 of the Civil Code, in this case the terms for the validity of the agreement and freedom of contract or written contract are laws for those who made and agreed to them.

The Housing Plot Development Financing Cooperation Contract dated 10 February 2021 includes a guarantee of 2 (two) Original Certificates of Ownership and 2 (two) Original Copy of Deed of Authorization to Sell which has been submitted to the first party as the capital provider, but according to the author of the guarantee it does not have any value because the guarantee belongs to a third party and even a fourth.

According to the author, at the beginning of the contract, the first party did not look carefully at the guarantee, because in the end, the guarantee could not be owned or confiscated through a District Court Decree. According to the author's investigation, the first party finally took legal action by making a police report regarding the alleged criminal acts of fraud and embezzlement, but the author will not go too deep into these criminal elements.

Guarantees that are not on behalf of the parties who bind themselves in an agreement or contract are very high risk and can be of no value at all when legal action is taken by the party who feels aggrieved, especially in civil cases. Even if a court decision wins and/or the second party as the recipient of the capital is declared in default and is punished to compensate for a number of material and immaterial losses to the first party, the first party will only win on paper.

Based on the theory of legal certainty, where the law is the implementation of the law in accordance with the sound, so that people can ensure that the law is implemented. The creation of legal certainty in statutory regulations, requires requirements relating to the internal structure of the legal norms themselves, so legal certainty in the Housing Plot Development Financing Cooperation Contract is clear and can be truly binding for the parties, but related to guarantees on behalf of the parties third and power of attorney to sell in the contract does not have legal certainty.

3.2. Efforts to Settle for Acts of Default on Cooperation Financing Agreements Associated with Guarantees on Behalf of Third Parties

The first party as the provider of capital to the second party as the recipient of capital in the cooperation agreement on the construction of housing lots of 10 (ten) housing units, needs to be seen from a risk perspective, such as a fairly large capital value of IDR 720,000,000.- (seven hundred and twenty million rupiah), in making a written contract at least it must be made notarized considering the binding power of an agreement made by an authorized official according to law, in this case a notary.

In a business contract, it is necessary to have a sure guarantee, namely a movable object or an immovable object that has the highest legality and directly on behalf of the recipient of capital (the debtor) land, fiduciary guarantee certificate if the collateral is in the form of a vehicle.

Repressive legal protection can be carried out when a problem has occurred, when an act of default was found by the recipient of the funds by not returning the capital along with the profit sharing from the sale of the intended housing, the capital provider can make efforts to resolve the dispute.

When 3 (months) have passed, as stipulated in Article 4 of the Housing Plot Construction Financing Cooperation Contract dated February 10, 2021, the first party as the capital provider can make written subpoenas 3 (three) times to the second party as the recipient of the capital. The purpose of this subpoena is to

warn that the beneficiary of capital has failed/negligent in fulfilling the contents of the contract and promises can be billed.

If after being subpoenaed 3 (three) times, the recipient of the capital does not fulfill its obligations according to the contract, then the party providing the capital can file a lawsuit for default to the District Court according to what is chosen and stated in the contract or at the domicile of the recipient of the capital as the Defendant.

The party providing capital here is clearly a victim of the actions committed by the recipient of capital, in which for these actions the party providing capital suffers material and immaterial losses. In the case of the position as described above, what is interesting is that it is the recipient of the capital who filed a lawsuit for default in advance to the Special Class IA Sleman District Court, where the domicile of the capital provider is located in Sleman Regency, Special Province of Yogyakarta.

The capital provider has visited the location of the development of housing development work in the Bandung Regency area on August 14 2021, where out of 10 housing plot units as stated in the contract, they have not been completed as they should. Some houses are still vacant and have not been built at all and some are still being built but not 100% (one hundred percent).

From this review, the capital provider also reported to the police regarding the alleged crime of fraud and embezzlement as referred to in Article 378 Jo. 372 of the Criminal Code. The process at the Police has carried out an investigation based on the Notification Letter on the Progress of Investigation Results (SP2HP). The author has also conducted interviews with the Legal Counsel from the capital provider and it is known that currently it is still in the process of trial at the Class IA Sleman District Court and will enter the agenda for the conclusions of the parties, which will then be the agenda for reading the decision by the Panel of Judges who examined and adjudicate the case.

Based on the theory of legal protection, namely providing protection for human rights that are harmed by other people and that protection is given by law. So, if a party is harmed as a result of an agreement or written agreement, the law gives rights to those who feel aggrieved to claim their rights through legal means. Legal protection is a universal concept of a rule of law. Basically, legal protection consists of two forms, namely preventive legal protection and repressive legal protection, namely:

a. Preventive legal protection which is basically preventive is defined as prevention. Preventive legal protection is very significant for government actions based on freedom of action because with preventive legal protection, the government is encouraged to be careful in making decisions. The form of preventive legal protection is contained in laws and regulations in order to prevent the occurrence of a violation and to provide limitations in carrying out obligations, and

b. Repressive legal protection functions to resolve disputes that have arisen as a result of violations. This protection is the final protection in the form of imposing sanctions on violations that have been committed.

Efforts to settle non-litigation (out of court) had been made before the lawsuit was filed at the Sleman Class IA District Court, in which the capital provider as the Defendant had contacted the recipient of the capital as the Plaintiff several times, but there was no response at all, until finally around mid-May 2021, the Plaintiff through his Attorney has communicated with the Defendant, resulting in an agreement based on the Statement of Willingness to Pay dated May 17, 2021 which contains: that the Plaintiff will realize a total payment in full to the Defendant of IDR 1,122,000,000.- (one billion one hundred and two twenty two million rupiah), of which the return on capital is IDR 720,000,000, - (seven hundred and twenty million rupiah), the payment of profit sharing value is IDR 342,000,000,- (three hundred forty-two million rupiah) and payment of penalties for lateness from 10 May 2021 to 05 July 2021 in the amount of IDR 60,000,000.- (sixty million rupiah).

Because the recipient of the capital as the Plaintiff had submitted a lawsuit to the Class IA Sleman District Court before July 5, 2021, to be exact on June 28, 2021, the provider of capital as the Defendant made efforts to report the Plaintiff to the police on August 18, 2021 on the basis of an alleged criminal act of fraud and embezzlement.

Regarding efforts to resolve through litigation (in court) in the case of the position referred to, that initially the Defendant received a court summons release on June 28, 2021, in which the Defendant was asked to appear before the court on July 6, 2021.

Even though the provider of capital as the Defendant has been sued by the recipient of the capital as the Plaintiff does not close the counterclaim as an effort to seek proper justice.

Judging from the position of the case, where the agreement was made by the parties to the litigation underhand and has been recognized in court both in the lawsuit and in the answer, as well as counterclaims. Because the agreement was private, it must first be requested to be declared valid and legally binding in the claim/petition filed by the Defendant so that the Defendant as the aggrieved party can obtain legal certainty.

Legal certainty for the Defendant or the party providing capital can have legal force, if in that case the Panel of Judges decides to declare a valid and binding agreement on the cooperation contract for the construction of housing plots, so that later if it is also determined in the decision regarding capital, profits, penalties/interest must be returned and/or paid by the Plaintiff to the Defendant, an execution can be requested after the decision has permanent legal force.

Legal certainty requires efforts to regulate law in legislation, made by authorized and authoritative parties, so that these rules have a juridical aspect. This aspect

can later guarantee certainty, that the law functions as a rule that must be obeyed.

The Plaintiff in this case has guaranteed the Certificate of Ownership on behalf of the Third Party, along with the Deed of Authorization to Sell, but the Deed of Authorization to Sell is not a transfer of ownership of a property right, so that the ownership of the Certificate of Ownership that is guaranteed does not legally belong to the Plaintiff. When the Defendant was about to enter into a binding agreement with the Plaintiff, he did not pay attention to the fact that the collateral belonging to the third party that was guaranteed could not be taken care of in the future when there were problems.

The power of attorney to sell as Article 1792 of the Civil Code states that:

"Granting of Power of Attorney is an agreement that contains the granting of power to another person who receives it to carry out something on behalf of the person giving the power of attorney".

Based on the theory of legal protection, in the case of cooperation in housing development financing, the parties' agreement should use an authentic deed made by a Notary so that it can maximize legal efforts, where when one of the parties defaults or defaults, the aggrieved party can use the authentic deed referred to to claim their rights legally.

Therefore, by drawing up a deed by a Notary, the party providing capital in the case above, for example, is the party most deserving of legal protection, because it has issued a certain amount of money or capital for a work/project that has been agreed upon, when the recipient of capital undertakes default or default.

Whereas legal certainty is one of the conditions that must be fulfilled in law enforcement, namely it is justifiable to arbitrary actions, which means that someone will be able to obtain something that is expected in certain circumstances as stated by Sudikno Mertokusumo.

4. Conclusion

The juridical implications of default on a financing cooperation agreement are associated with guarantees on behalf of third parties, namely agreements made in writing and privately can have legal certainty as long as they fulfill the terms of the agreement and can be proven true, but when one party neglects to carry out the contents of an agreement, it can be said to be in default. As for the guarantee given by the recipient of capital to the capital provider, land with a certificate of ownership on behalf of a third party, along with the power to sell, cannot have any value at all because it is not a transfer of ownership rights, because it is only a power of attorney to help sell land. Efforts to resolve civil law disputes regarding default are: preventive legal protection and repressive legal protection. An agreement or cooperation contract of value to the parties should be drawn up in an authentic deed by a Notary. Based on the theory of legal protection, in the case of cooperation in housing development financing, the parties' agreement should use an authentic deed made by a Notary so that it can

maximize legal efforts, where when one of the parties defaults or defaults, the aggrieved party can use the authentic deed referred to to claim their rights legally.

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