

The Legal Consequences of Credit Guarantee by Banks to Third Parties

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Abstract. *Research with the title "Legal Consequences of Credit Guarantees by Banks to Third Parties" examines legal issues that arise in credit agreements, especially with motorized vehicle guarantees at Bank Lampung, West Lampung branch, where collateral is not placed on the creditor but on the debtor, the guarantee given to the creditor is only the BPKB of the car while the car unit remains with the debtor, so that in this case the debtor pawns the car as the object of collateral to a third party. The approach method used in this study is sociological juridical, meaning that research is carried out on the real conditions of the application of law to society with the aim and objective of finding facts (fact-finding), which then leads to identification (problem identification) and then leads to problem solving (problem solutions). The default on credit while the solution to these legal problems is (i) Obliging the debtor to provide a replacement guarantee that is equivalent in value. (ii) Obliging debtors to repay their debts.*

Keywords: Bank; Consequences; Guarantee.

1. Introduction

In general, accounts payable is a situation where one party needs a certain amount of money and the other party is willing to lend the money. One Indonesian legal expert, R. Subekti uses the term borrowing and borrowing and gives its definition, namely: "An agreement whereby one party gives to another party a certain amount of goods that are used up due to use, on condition that the latter party will return the same amount of the same type and quality (Article 1754 of the Civil Code (hereinafter referred to as the Civil Code))".¹

The agreement itself contains 3 (three) principles, namely first, the principle of consensualism, which means that the agreement occurred because of the agreement of the will of the parties. Second, the principle that the agreement has binding power between the parties, namely an agreement made legally between the parties is a law for the parties themselves. Third, the principle of

¹Subekti, 1995, Various Agreements, Intermedia, Bandung. P. 125.

freedom of contract which contains elements: a person is free to enter into an agreement with anyone and regarding the content and extent of the agreement, the person has the right to determine for himself as long as it does not conflict with decency, custom or law.²

The definition of lending and borrowing by R. Subekti mentioned above does not mention whether the agreement is in the form of underhanded or authentic deed. The lending and borrowing agreement is not only a form of agreement between the parties but also as a basis that results in the emergence of rights and obligations. Therefore an authentic deed is the most appropriate choice because it has the power as perfect evidence. As stated in Article 1870 of the Civil Code that an authentic deed provides between the parties and their heirs or people who receive rights from them, a perfect proof of what is contained in it.³

Whereas default in the banking world has become commonplace because it is part of banking risk, because when a debtor defaults, the credit guarantee will be sold or auctioned to pay off the debtor's debt. The credit guarantee as intended is a material guarantee in which in law the creditor guarantee is given the privilege to sell collateral. This is because the function of guarantee legally is the legal certainty of repayment of debt in a debt agreement or the certainty of the realization of an achievement in an agreement, by entering into a guarantee agreement through guarantee institutions known in Indonesian law.⁴

However, in practice, especially in credit agreements with motor vehicle collateral, the vehicle unit is not placed on the creditor but on the debtor, the guarantee that is given is only the BPKB letter, whether motorbike or car. With collateral still being carried by the debtor, this becomes a legal problem if the collateral object in the form of a car or motorbike is transferred to another party, either by buying and selling, renting or pawning.

Fiduciary Guarantee is a guarantee right over movable objects both tangible and intangible and immovable objects, especially buildings that cannot be encumbered with mortgage rights as referred to in Law Number 4 of 1996 concerning Mortgage Rights which remain in the control of the Fiduciary Giver, as collateral for repayment of certain debts, which gives a priority position to Fiduciary Recipients over other creditors.⁵

²Mashudi and Chidir Ali, 2001, *Elementary Understandings of Civil Agreement Law*, Mandar Maju, Bandung. P. 72.

³Article 1870 of the Indonesian Civil Code (*Burgerlijk Wetboek*), translated by R. Subekti and Tjitrosudibio, 2008, Pradnya Paramita, Jakarta.

⁴Djuhaedah Hasan, 1998, *Basic Economic Law Series 4: Indonesian Guarantee Law – Collateral Institutions*, ELIPS, Jakarta, p. 68.

⁵Article 1 paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Guarantees.

Solving the problem regarding the legal consequences of guarantees pawned by third parties creates a new dilemma for fiduciary guarantee providers if they are going to carry out executions, the authors provide solutions in implementation to prevent and provide ways in the event of guarantees pawned by third parties when this happens.

2. Research Methods

In researching and compiling this thesis, the writer used a sociological juridical research method. Juridical is used to analyze various laws and regulations related to credit guarantees mortgaged by third parties. Meanwhile, sociology is used to analyze the operation of various laws and regulations on sexual violence and their application in society. Thus the sociological juridical approach is a legal research method that is used in an effort to see and analyze a real rule of law and analyze how a rule of law works in society.

The use of the sociological juridical approach in legal research is due to the fact that the problems studied are closely related to juridical and sociological factors. That is, the object of the problem studied here does not only concern the problems regulated in laws and regulations, but the problems studied are also related to sociological factors.

3. Results and Discussion

3.1. Implementation of Mortgage Credit Guarantees to Third Parties at Bank Lampung, West Lampung branch

Based on Article 1150 jo. Article 1152 of the Civil Code, objects that are pledged as collateral are movable objects, where these objects must be placed under the control of the debtor or a third party appointed by both parties. Pledge is invalid if the object being pawned remains in the hands of the debtor or the pawnbroker.

These provisions are often ignored in placing collateral for loans with cars or motorbikes which are placed or kept by creditors only BPKB for cars or motorbikes while the unit is on the debtor's side. This is the root of the problem in this study where the debtor can still transfer the car or motorbike unit to a third party either by buying and selling or by renting or pawning.

This problem also occurred at Bank Lampung, West Lampung branch, where the car was pledged as collateral at Bank Lampung, West Lampung branch, but later it was found out that the car had been mortgaged by a third party by the debtor.

The implementation of credit guarantees mortgaged to third parties at the West Lampung branch of Bank Lampung is by:

1. That the car owner has pledged/guaranteed the car at Bank Lampung West Lampung branch on the credit application submitted by the car owner.
2. Whereas what is kept by Bank Lampung West Lampung branch of the collateral is the BPKB of the car which is pledged as collateral, therefore the car unit remains with the debtor.
3. Without the knowledge and consent of the Lampung West Lampung branch, the debtor pawned the car unit to a third party.⁶

The problem was revealed when the debtor defaulted on the loan at Bank Lampung West Lampung branch so that the Bank Lampung West Lampung branch looked for the existence of a car for execution as a debt payment, but the car had moved to a third party with a pawn agreement from the debtor.

For more details, we explain with the following scheme: Description:

1. The debtor has entered into a credit agreement with the Bank Lampung branch of the West Lampung bank.
2. The collateral for the credit agreement is a car in which the West Lampung branch of Bank Lampung controls the BPKB while the debtor controls the car unit.
3. The car is mortgaged by the debtor to a third party.

3.2. Legal Consequences and Solutions for Loan Guarantees Pawned to Third Parties at Bank Lampung, West Lampung branch

Based on Article 1150 jo. Article 1152 of the Civil Code, objects that are pledged as collateral are movable objects, where these objects must be placed under the control of the debtor or a third party appointed by both parties. Pledge is invalid if the object being pawned remains in the hands of the debtor or the pawnbroker.

However, in reality, many of the collateral items remain in the hands of the creditor/debtor/guarantor, this is an example of a credit agreement with a motorized vehicle BPKB guarantee, which so far has caused many problems in guarantees controlled by the debtor.

This incident is not one or two, but there are many, in fact this is used as a means to eliminate/hide the unit if the creditor is unable to pay again at Bank Lampung West Lampung branch, so that Bank Lampung West Lampung branch has

⁶Results of interview with Jimmy Wijjaya Marketing Staff and Account Officer of Bank Lampung West Lampung branch on August 2, 2022

difficulty finding the whereabouts of the unit so it cannot be withdrawn/ on execution.⁷

These constraints can impede the implementation of the execution in parate execution and cause legal consequences for the execution. This difficulty is as difficult as the guarantee object that is transferred to a third party, which can be done by means of collateral again, buying and selling, exchanging and so on. Transfer actions are usually followed by surrender actions so that the transferred object becomes the property of another person. Generally this occurs with collateral objects in the form of movable property such as vehicles, machinery or inventory items.

The problem that occurred in the implementation of the execution of the credit guarantee object at Bank Lampung, West Lampung branch was because the collateral object had been pledged again to a third party so that the execution could not be carried out.

When the collateral that is pledged as collateral at Bank Lampung, the West Lampung branch is in the form of a BPKB, it is difficult to execute the car because when the item has been mortgaged to someone else, inevitably the person receiving the pledge will retain the unit as collateral, if you want to take it then must be redeemed either by the pawnbroker or by the West Lampung branch of Bank Lampung itself.

By guaranteeing the object as collateral to a third party, the party at the West Lampung branch of Bank Lampung did not carry out the execution parate because legally the execution had to go through a lawsuit in court so that the West Lampung branch of Lampung Bank was harmed by this.

If the Bank Lampung branch of West Lampung or another party forcibly withdraws the Unit, the pawnbroker contacts the pawnbroker to resolve this matter, then inevitably the pawnbroker must return the pledged money before the unit is given to Bank Lampung, West Lampung branch.⁸

In fact, this is a fraudulent act committed by a customer because there are conveniences available at the West Lampung branch of Lampung, on the other hand, the recipient of a pawn car or motorbike uses this to receive pawn cheaply and can use the unit.⁹

As the law of execution that the author has stated above, the execution of collateral on credit can be carried out by parate execution or execution through a court. For fiduciary guarantees usually use parate execution on the basis of a

⁷Results of interview with Jimmy Wijaya Marketing Staff and Account Officer of Bank Lampung West Lampung branch on 2 August 2022

⁸Results of interview with Jimmy Wijaya Marketing Staff and Account Officer of Bank Lampung West Lampung branch on 2 August 2022

⁹Results of interview with Jimmy Wijaya Marketing Staff and Account Officer of Bank Lampung West Lampung branch on 2 August 2022

fiduciary agreement that is protected by law, but in credit agreements at Bank Lampung West Lampung branch with collateral for motorized vehicle documents it is difficult to do because the guarantee does not use a fiduciary agreement but an ordinary credit agreement so that when the debtor does not want to surrender the collateral object voluntarily, the execution of the guarantee must use a court decision.

As the author conveys, the legal consequence of mortgaged credit guarantees to third parties is that credit guarantees cannot be executed at Bank Lampung West Lampung branch.

Default as intended is that the debtor does not pay the debt as it should and the debtor also mortgages credit guarantees to a third party without the knowledge of the West Lampung branch of Bank Lampung. The legal consequences of default due to the debtor's mistake can be said to be intentional or negligent not fulfilling the achievement, this really needs to be questioned, because the default has consequences or legal consequences for the debtor.

Because every agreement, including a credit agreement, always raises the rights and obligations of both parties that must be carried out, which is called Achievement, which is fulfilled by the debtor in every engagement. According to the provisions of article 1234 of the Civil Code, every engagement is to give something, to do something or not to do something. Thus the form of achievement is giving something, doing something or not doing something.

The obligation to fulfill the achievements of the debtor is always accompanied by responsibility (liability), meaning that the debtor is risking his assets as collateral for fulfilling his debt to the debtor. According to the provisions of articles 1131 and 1132 of the Civil Code, all assets of the debtor, both movable and immovable, both existing and448you are guaranteed to fulfill your debts to creditors. This kind of guarantee is called a general guarantee. However, in practice the liability in the form of collateral for these assets can be limited to the amount that is the debtor's obligation to fulfill, which is specifically and specifically stated in the agreement, or the judge can determine appropriate or appropriate limits in his decision.¹⁰

Usually this limited asset guarantee is called a special guarantee. This means that the special guarantee only concerns certain objects whose value is commensurate with the value of the debtor's debt. These objects are for example houses, yards, motorized vehicles and others. If the debtor does not fulfill his achievements, it is this special collateral object that can be cashed to fulfill the debtor's debt. In other words, up to a certain number of object values, this is the limit of the debtor's responsibility to the creditor in fulfilling his achievements.¹¹

So that the meaning of Article 1131 contains the principle that everyone is responsible for his debts, which responsibility is in the form of providing his

¹⁰Abdulkadir Muhammad, 1992, Engagement Law, cet. 3, Citra Aditya Bakti, Bandung. P. 17.

¹¹Ibid., p. 18

assets, both movable and immovable objects, if necessary, to sell them to pay off his debts. The principle as mentioned above is further described in article 1132 of the Civil Code. This article states that "the objects mentioned in Article 1131 of the Civil Code become joint guarantees for the creditors, and the results of the auction for these materials are divided among the creditors in proportion to the size of their respective receivables, except for valid reasons to prioritize one receivable over another. another.

The credit agreement is a loan agreement that specifically applies to legal objects that occur in the world of banking.¹²Credit agreements regulated in the Basic Banking Law are only cursory, so for credit agreement legal issues in general the interpretation of the loan-replace agreement (*verbruiklen*) in book III of the Civil Code and regulations issued by the government, through departments, especially departments Finance, non-departmental government institutions especially Bank Indonesia and prevailing customs.

According to book III of the Civil Code, in general, loan agreements are divided into 2 (two) types, namely loan agreements and loan-replace agreements and specifically in banking, credit agreements regulated in the Basic Banking Law, namely:

1. The loan-use agreement according to article 1740 of the Civil Code is: "an agreement in which one party gives an item to another party to be used for free, with the condition that the recipient of the item after using it or after it has expired (expired) at a certain time will return it"

The property right to the object lent remains with the lender. When compared with leasing, in the lend-use agreement it occurs for free, while in the leasing agreement there is an achievement by the lessee to pay rent to the lessor.

2. The loan-replace agreement according to article 1754 of the Civil Code is: "an agreement in which one party gives to another party a certain amount of goods that can be used up due to use, on condition that the other party will return the same amount of the type and same character"

According to article 1756 of the Civil Code, debts that occur due to borrowing money only consist of the amount of money stated in the agreement. If before the time of repayment there is an increase or decrease in price or there is a change regarding the validity of the currency, then the withdrawal of the amount lent must be made in the currency valid at the time of settlement, calculated according to the price prevailing at that time.¹³

Here the meaning of repaying a loan is adjusted to developments⁴⁴⁹because the money in a country often changes or changes, payments are made according to the prices and types of money prevailing at that time; excepted if in the agreement made by both parties it is expressly stated that the return is according to the agreement of both parties as long as it reflects the principle of good faith that is heeded as intended by article 1338 of the Civil Code.

¹²Marhainis Abdulhay, 1983, *Material Civil Law*, volume II, Pradnya Paramita, Jakarta. hal. 134.

¹³*Ibid.*, p. 137.

With regard to the freedom of the parties to enter into agreements, it was explained by one of the leading proponents and schools of natural law, Hugo Grotius, who argued that: The right to enter into agreements is one of human rights and he considers that a contract is a voluntary act of a person where he promises something to someone else with the intention that the other person will accept it. The contract is more than just a promise, because a promise does not entitle the other party to the performance of that promise.

The application of the principle of freedom of contract in other Indonesian contract law can be concluded and Article 1338 of the Civil Code which states that: all agreements made legally apply as laws for those who make them. This article implies that the parties must have an agreement. Thus that the freedom to contract is closely related to the principle of consensualism or agreement between the parties making the agreement. Without an agreement and one of the parties making the agreement, the agreement made is invalid. However, the freedom to contract or the freedom to make agreements is not freely made by the parties.

This can be concluded from article 1320 paragraph (4) 10 article 1337 jo. Article 1338 Paragraph (3) jo. Article 1339 of the Civil Code that provided that it is not regarding clauses that are prohibited by law or contrary to good decency, propriety or public order and law. This means that if we study the articles of the Civil Code, it turns out that the principle of freedom of contract is not absolute freedom. There are several limitations imposed by the Civil Code on this principle which make this principle an unlimited principle or an agreement that is one-sided or lame. Article 1320 Paragraph (1) of the Civil Code which stipulates that: Agreements or contracts are invalid if they are made without them⁴⁵⁰you tone⁴⁵⁰and the parties who made it.

Article 1320 Paragraph (2) of the Civil Code which concludes that freedom to make agreements is limited by a person's ability to make agreements. Article 1320 Paragraph (4) of the Civil Code stipulates that parties are not free to enter into agreements involving causes prohibited by law or contrary to decency or public order. Article 1337 of the Civil Code which expressly states that a cause is prohibited, if it is prohibited by law, or if it is against good decency or public order. Article 1338 Paragraph (3) of the Civil Code provides directions regarding: the freedom of parties to make agreements as long as they are carried out in good faith.

Credit is an understanding of the provision of money or bills that can be equated with it, based on a loan agreement or agreement between the bank and another party where the borrower is obliged to pay off the debt after a certain period of time with a predetermined amount of interest.¹⁴

In the sense of credit there are the words "agreement" or (overeenkomst). So credit is an agreement (verbintenis) and in law the meaning of the agreement is in a broad sense while the agreement is in the narrow sense, because the

¹⁴Ibid., p. 142.

agreement is part of the agreement. The link between the meaning of the credit agreement and the loan-replacement agreement include:¹⁵

1. If the loan agreement is a borrowing agreement whose object is any movable object that can be spent and generally regulated in the Civil Code, while the credit agreement is a loan agreement, the object is specifically⁴⁵¹what happened in the banking world and is contained in the Basic Banking Act.

2. The loan-replace agreement is a *lex generalis*, while the credit agreement is a *lex specialis*, so that the *lex specialis* law will apply in this relationship.⁴⁵¹*you are lex generalis.*

Whereas in the framework of legal certainty over payments in the credit agreement, the debtor is obliged to submit debt guarantees because in general the lender requires a debt guarantee before lending money to the borrower.

Meanwhile, the obligation to submit loan guarantees is also often regulated and subject to strict conditions by the lender's internal regulations and/or by applicable laws and regulations.¹⁶

Juridically, the guarantee function is the legal certainty of debt repayment in a debt agreement or the certainty of the realization of an achievement in an agreement, by entering into a guarantee agreement through guarantee institutions known in Indonesian law.

That, as the author stated above, the credit agreement is very close to debt guarantees as well as at Bank Lampung, the West Lampung branch in providing credit to debtors.

As the problem arises when the debtor defaults on a credit agreement with a motorized vehicle guarantee in which the debtor does not make achievements on debt payments and pawns credit guarantees to third parties.

Such a problem creates uncertainty about credit payments from the debtor because apart from the debtor defaulting on credit payments and credit guarantees cannot be used as credit payments because they have moved to a third party.

Regarding legal issues and the execution of the credit guarantee, the West Lampung branch of Bank Lampung uses the following solution:

1. Requiring the debtor to provide a replacement guarantee equivalent in value.¹⁷

The solution to the replacement of credit guarantees is based on the law as stated in Articles 1131 and 1132 of the Civil Code, namely all assets of the debtor, both movable and immovable, both existing and those that serve as collateral for fulfilling their debts to creditors.

¹⁵Ibid., p. 144.

¹⁶Results of interview with Jimmy Wijaya Marketing Staff and Account Officer of Bank Lampung West Lampung branch on 2 August 2022

¹⁷Results of Interview with Head of West Lampung Bank Branch on January 20, 2016.

The purpose of the article is very clear that there is legal protection for creditors, in this case the Lampung West Lampung branch of the Bank, to obtain legal certainty that the debtor's debt will be paid.

2. Obliging debtors to pay off their debts

In the credit agreement as discussed above, there is a standard clause in which the debtor is obliged to make payments on credit or debt to creditors, so there is no reason for the debtor not to make credit/debt payments on the grounds that the collateral object has been mortgaged to a third party. Even though the credit guarantee is a certainty for the debtor's credit, when the debtor defaults by providing collateral to a third party so that the collateral object cannot be executed as a form of debt payment, the debtor's obligations must still be carried out.

This is in accordance with the definition of debt and credit which is the same as the loan agreement in Article 1721 of the Civil Code which reads: "borrowing is an agreement in which one party gives the other party a certain amount of goods and uses them on condition that the latter will return the same amount from the same kind of condition

Which in this debt is agreed with an agreement as meant in Article 1313 of the Civil Code reads: "Agreement is an act by which one or more parties bind themselves to one or more people." One thing is an achievement. Achievements can be in the form of: (1) Agreeing on how to give/share something (2) Doing something (3) not doing something.

The agreement requires as meant in Article 1320 of the Civil Code, namely:

1. Their agreement is binding.

Their binding agreement occurs freely or with freedom. This freedom of agreement can occur explicitly (saying words/in writing) or silently (with an attitude/gesture). An agreement is said not to fulfill the elements of freedom if it contains one of the 3 (three) elements below, namely:

a. The element of coercion (dwang)

Coercion is coercion on the body, coercion on the soul, and other coercion prohibited by law.

b. The element of dwelling

Errors occur in 2 (two) possibilities, namely errors in persons (legal subjects) and errors in goods (legal objects).

c. The element of deception (bedrog)

If a party intentionally provides incorrect information. An agreement that does not contain freedom of agreement because there is an element of coercion and/or an element of error, and/or an element of fraud can be demanded for cancellation up to a period of 5 years as referred to in Article 1454 of the Civil Code.

2. The ability to make an engagement.

A person is said to be legally competent if he is at least 21 years old, or if he is not yet 21 years old but has been married. In addition, a person may not be

placed in custody (curatele), that is, a person who is an adult but is deemed incapacitated because of drunkenness, madness, or extravagance. For more details, see the provisions of Article 1330 of the Civil Code which also need to be linked to Article 330 of the Civil Code.

3. A certain thing.

Provisions regarding certain matters concerning legal objects or regarding objects. In making an agreement between legal subjects it concerns the object, whether it concerns tangible, intangible, movable or immovable objects. Certain things regarding objects by the parties are usually confirmed in the agreement regarding the type of goods, the quality and quantity of the goods, the factory made and from which country, the number of goods, the color of the goods, and so on.

4. A lawful cause (halal cause)

Because what is lawful/halal causes implies that the object (legal object) which is the subject of the agreement must be attached to certain rights and are permitted according to law so that the agreement is strong. The terms of the agreement of those who are bound and the terms of ability to make an agreement are referred to as subjective conditions, namely conditions for the legal subject or person. The conditions for a certain thing and the conditions for a lawful cause are objective conditions, namely the requirements for legal objects or objects.

Therefore, when the credit agreement is in accordance with and does not violate the provisions of these provisions, the debtor must still carry out his obligations in paying debts to creditors.

Settlement of these obstacles is not a settlement through legal channels, but only an agreement legal approach with the kinship route with the consideration that resolving legal channels requires high costs and takes a very long time and is not balanced between 453ka na issued with the value of the collateral object, this is done because on the other hand for credit guarantees using motorized vehicle guarantees at Bank Lampung West Lampung branch does not use fiduciary guarantees making it difficult to execute parate.

3.3. Example of Fiduciary Guarantee Deed

NOTARY PUBLIC

ABDILLAH SALIM AL RASYID, SH, M.Kn

WORKING AREA OF WEST LAMPUNG REGENCY

SK. MINISTER OF LAW AND HAM NO.C511.HT.03.01

November 20, 2001

Jl. Raden Intan No. 22 Way to Confess -Liwa, LAMPUNG BARAT

Tel/Fax: (024) 3501321 / 08232330000

FIDUCIARY GUARANTEE DEED

Number : 09/2013.
Second Sheet

- On this day, Tuesday 4th August 2022 -----

- Faced with me ABDILLAH SALIM AL RASYID, Bachelor of Law, Master of Notary, Notary in Lampung, in the presence of witnesses known to me, Notary, whose names will be mentioned at the end of this deed:

I. - hereinafter referred to as the FIRST PARTY or FIDUCIARY PROVIDER; -----

II.1.

- hereinafter in this deed will also be referred to as the SECOND PARTY --- or FIDUCIARY RECIPIENT, -----

4. Conclusion

The implementation of credit guarantees mortgaged to third parties at Bank Lampung Barat is a debtor with a car as the object of credit guarantee, but without the knowledge and approval of Bank Lampung, the West Lampung branch, the debtor pawns the car as the object of the credit guarantee to a third party. Legal problems and solutions in credit guarantees mortgaged to third parties at Bank Lampung West Lampung branch is that there is no legal certainty regarding the right to a car as an object of credit guarantee by Bank Lampung West Lampung branch because the debtor transfers the object of collateral to a third party so that he cannot the execution of a car as an object of collateral by the West Lampung branch of Bank Lampung even though the debtor has defaulted on his credit, while the solution to the legal problem is (i) Obliging the debtor to provide a replacement guarantee of equivalent value. (ii) Obliging debtors to repay their debts.

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