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Implementation of Credit Agreements Through the Binding of Guarantee Agreements (*Borgtocht*) for the Object of the Mortgage Right

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Abstract. *As a credit provider, banks are required to establish policies to maintain a balance in order to obtain profits and ensure that all their credit can be settled in good faith from the debtor. This research is empirical legal research with an empirical juridical approach, namely research that examines how legal provisions regarding credit agreements are applied in practice in the banking environment. Researchers seek to determine the conformity between applicable legal provisions and the practice of implementing credit agreements through binding guarantee agreements, as well as identifying various factors that influence the effectiveness of their implementation. Guarantee Agreements at Bank Sultra are still used as additional collateral, basically only as an additional assurance that the credit will run well due to the guarantor's control over the health of the debtor's business.*

Keywords: *Agreement; Credit; Guarantee; Mortgage.*

1. Introduction

According to Article 8 paragraph (1) of Law Number 10 of 1998 concerning Amendments to Law Number 7 of 1992 concerning Banking, it is emphasized that in providing credit or financing based on Sharia Principles, Commercial Banks are required to have confidence based on in-depth analysis of the intentions and capabilities and ability of the Debtor Customer to repay his debt or return the financing in accordance with what was agreed.

According to the article 27 paragraph (1) of the 1945 Constitution - Equality of the parties "All citizens have equal standing before the law and government..." The philosophy of this article reflects the principle of equality before the law. In an agreement, each party basically has the same legal standing and must receive fair legal protection. This means that an agreement should not be made by exploiting the powerlessness or weaker position of one of the parties. The freedom to make an agreement must remain within the framework of justice and equality.

Regarding collateral, it can be in the form of objects or people. The discussion of personal guarantee rights cannot be separated from guarantee law, which regulates debtor's debt guarantees against creditors, which also regulates special guarantee rights (*zekerheidsrechten*), which give a creditor a position of priority over other creditors (who do not have special rights). These special guarantee rights include material guarantee rights (*zakelijke zekerheidsrechten)* and personal guarantee rights (*personlijk zekerheidsrechten).*

As a lender, a bank is required to establish policies to maintain a balance between profitability and ensuring that all loans are settled in good faith by the debtor. Therefore, the bank will require collateral, including third-party collateral, such as a personal guarantee, to guarantee all assets to ensure the smooth flow of credit received by the debtor, thereby minimizing the risk of default by the debtor on installment payments to the bank.

This research is expected to contribute to the development of legal science, especially in the field of civil law and banking law regarding the implementation of credit agreements and guarantee agreements, including practical benefits. This research is expected to be an evaluation material to improve the process of binding guarantee agreements at Bank Sultra, providing a good understanding for the parties concerned so that they can know the rights and obligations in credit agreements accompanied by guarantees, can be a reference and better understanding for further researchers in the same field.

2. Research Methods

The approach used in this research is a juridical-empirical approach. Data collection methods include literature studies, interviews, documentation, and observation. Data analysis uses qualitative analysis methods.

3. Results and Discussion

3.1. Implementation of the guarantee agreement as a guarantee mechanism at the Southeast Sulawesi Regional Development Bank

In relation to bank lending activities, debt security is referred to as credit guarantee or collateral. Credit guarantees are generally required for granting credit, given that lending is a high-risk activity in the banking industry. Therefore, credit guarantees play a crucial role in securing the repayment of bank funds disbursed to borrowers through credit.

Bank as a business entity that provides credit Debtors are required to take security measures to ensure their loans can be repaid. Loans that are not repaid, either in whole or in part, will constitute a loss for the bank. A relatively large loss will impact the bank's health and the continuity of its operations. Therefore, any loan, no matter how small, must be secured in accordance with prudent principles. Generally, credit security can be achieved through credit analysis and the application of applicable legal provisions.

The function of credit guarantees to secure repayment of a new loan only emerges when the loan is declared non-performing. As long as the debtor has repaid the loan, the collateral will not be disbursed. In this case, the collateral will be returned to the debtor in accordance with legal provisions and the credit agreement. The function of credit guarantees to secure repayment of a loan is closely related to the interests of banks that channel funds to debtors who are often considered risky. With the existence of credit guarantees controlled and bound by the bank in accordance with the provisions applicable law, the implementation of this function will be carried out when the debtor defaults.

A surety bond is a personal guarantee that creates a direct relationship with a specific person. This personal guarantee can only be enforced against a specific debtor. This personal guarantee is based on the principle of equality, meaning it does not differentiate between receivables that occurred first and receivables that occurred later. Both have equal status with respect to the guarantor's assets and do not pay attention to the order of occurrence. A surety bond is an agreement between a creditor and a third party that guarantees the fulfillment of the debtor's obligations.

The general uses of collateral in banking practices at Bank Sultra are as follows.

1) Gives the bank the right and authority to obtain repayment from the proceeds from the sale of the collateral if the debtor defaults, namely does not repay the debt within the time specified in the credit agreement.

2) Ensure that the debtor participates in transactions to finance his business so that the possibility of leaving his business or project to the detriment of himself or his company can be prevented or at least the possibility of doing so can be minimized.

3) Encourage debtors to fulfill credit agreements, especially regarding repayment in accordance with the agreed terms so that they do not lose the assets pledged to the bank.

Thus, it can be taken as a guideline that the collateral items received by the bank/creditor must fulfill the following:

a. The credit guarantee can be legally binding in accordance with applicable laws and regulations. Therefore, if the debtor later defaults, the creditor has complete and complete evidence to take legal action.

b. The guarantee must be, necessary and executable, the credit guarantee can be easily sold or cashed to pay off the debtor's debt.

Because the guarantee institution has the task of facilitating and securing the provision of credit, several criteria for good (ideal) guarantees can be put forward as follows.

a. which can easily help obtain credit by parties who need it;

b. which does not weaken the potential (strength) of the credit seeker to carry out (continue) his business;

c. which provides certainty to the creditor, in the sense that the collateral is available at all times for execution, that is, if necessary, it can be easily cashed in to pay off the debt of the credit recipient (taker).

Underwriting Agreement (*Borgtocht*) at Bank Sultra is still used as additional collateral, either in the form of a corporate guarantee or a personal guarantee. The Guarantee Agreement (*Borgtocht*) is one form of credit guarantee binding. The implementation of the Guarantee Agreement (*Borgtocht*) at Bank Sultra as additional collateral is in accordance with Bank Indonesia policy. Acceptance of collateral in the form of a Guarantee (*Borgtocht*) is essentially only an additional assurance that the credit will run smoothly due to the guarantor's control over the debtor's business health.

With the existence of a guarantee of insurance (*Borgtocht*) in the form of *corporate guarantee* Both personal guarantees and collateral can act as controls on the debtor's business continuity. While the guarantor is willing to pledge their assets for the benefit of another debtor, they don't want their assets wasted on an unviable or unhealthy business. Therefore, the guarantor, while providing additional collateral, can also serve as a tool for the creditor to monitor the debtor's business continuity.

The Guarantee Agreement (*Borgtocht*) at Bank Sultra has not been formalized in an authentic/notarial deed. The Guarantee Deed or *Borgtocht* Deed can be formalized in a private or authentic deed, as the law does not require or formally specify the form of the *Borgtocht* deed. However, a *Borgtocht* deed, if formalized in a notarial deed, can better guarantee the truth and completeness of its contents and can guarantee its evidentiary power as an authentic deed. With an authentic deed, the Bank does not need to formulate the *Borgtocht* deed itself but rather entrusts it entirely to a notary who is experienced and knowledgeable in drafting *Borgtocht* deeds.

The series of legal actions for the Guarantee Agreement (*Borgtocht*) requires several stages as follows:

1) The first stage Signing of the Credit Agreement

The first stage is preceded by the creation of a principal agreement in the form of a credit agreement between the lender (creditor) and the borrower (debtor). Banking law does not specify the form of a credit agreement, so a credit agreement can be made by a private deed or an authentic deed made by and before a notary. However, in practice at Bank Sultra, credit agreements are always made in the form of a notarial deed. Considering the amount of credit disbursed by Bank Sultra is a small to large credit amount. The creation of a principal agreement in the form of this credit agreement is in accordance with the accessory nature of the guarantee agreement (*Borgtocht*). The guarantee agreement is a follow-up to the principal agreement that creates an obligation for the debtor to repay the debt. So *Borgtocht* is only born or exists after the credit agreement is in place.

2) Second Stage Signing of the *Borgtocht* Deed

After the first stage of drawing up a credit agreement is completed, the second stage is followed by the drawing up of a Guarantee Agreement (*Borgtocht* deed) between the Creditor and a third party who binds themselves as the Guarantor of the debt. A Third Party is anyone (not the debtor) who meets the legal requirements and is willing to bind themselves as a Guarantor who guarantees the repayment of the debtor's debt if the debtor defaults. Third Parties who are willing to bind themselves as Guarantors are usually individuals or corporations who have business relationships and interests with the debtor. This relationship can arise from family ties, friendships, and business relationships. Business or economic interests can arise because the debtor and the third party both have business/economic interests to advance the company. For example, a company borrows credit from a Bank whose Commissioner or Director or Shareholder or another company within its group acts as Guarantor. The Guarantee (Borgt) is given in a personal capacity, by the Commissioner or Director or Shareholder, and not in their capacity as a company organ.

To strengthen the interests and position of the Creditor, the *Borgtocht* deed made with an authentic deed/notary deed must contain the following provisions:

1) The complete identity of the Guarantor includes full name, place of residence or domicile, religion, date of birth, marital status and occupation.

2) In the *Borgtocht* agreement, the number and date of the credit agreement must be stated and the data from this credit agreement must be used:

a). to prove that the *Borgtocht* agreement exists because there is a credit agreement as the main agreement that gives rise to the *Borgtocht* agreement *b).* to confirm that the Guarantor hassigning the *Borgtocht* deed truly guarantees the debt according to the credit agreement outlined in the *Borgtocht* deed.

3) The Guarantee Value refers to the amount of the debt being guaranteed, whether the principal or some or all of the interest. The amount of the guaranteed debt depends on the agreement between the Guarantor and the Creditor, as stipulated in the guarantee agreement.

4) Description or explanation regarding the wife's consent, if the guarantor is her husband. Consent from the husband if the wife is the guarantor. If the guarantor is A limited liability company (Limited Liability Company) or other legal entity must obtain approval from its commissioners or shareholders in accordance with the provisions of its Articles of Association. Technically, approval from the spouse or the commissioners or shareholders can be obtained in two ways:

a) First, the party providing the agreement together with the guarantor signs the *Borgtocht* deed.

b) Both parties who provide consent can make a written letter of consent which is an attachment to the deed of *Borgtocht*.

5) There are promises from the guarantor which are stated in the *Borgtocht* deed, including:

a) An affirmation from the guarantor that releases the special rights that a guarantor has to demand that the creditor sell the debtor's assets or collateral first. If the proceeds from the sale of the assets If the debtor's assets are insufficient to pay off the debt, then the guarantor is responsible for paying off the shortfall.

b) An affirmation from the guarantor that releases the privileges that a guarantor has to demand from the creditor to divide the debt or divide the debt.

c) The guarantor's promise is not to ask the creditor to be dismissed from his position as guarantor, because the creditor's actions could result in the guarantor not being able to exercise his rights obtained from subrogation, such as exercising mortgage/encumbrance rights and other rights that were originally owned by the creditor.

d) Undivided promise. This promise occurs when the guarantor dies. If the guarantor dies, the guarantor's obligations are legally transferred to his heirs because the deceased's inheritance includes liabilities (obligations, debts) and assets (receivables and assets). If there is more than one heir, the heir who continues the guarantor's obligations has the right to ask the creditor to determine the amount/portion of the liability for each heir. Legally, with the death of the guarantor, the creditor can demand that each heir fulfill all of his debts without dividing them among each heir. In order for the creditor to demand all of his debts from each heir, the undivided promise must be confirmed in the deed of *Borgtocht*.

This is different with collateral. Even if the owner of the collateral dies, the creditor still has the right to fulfill the debt from the sale of the collateral without being affected by inheritance laws.

e) A promise from the guarantor that there is irrevocable power of attorney to exercise the right of regress.

What if the guarantor has only paid part of the debt, but not the entire debt? If this occurs, both the creditor and the guarantor have the same right to demand repayment from the debtor, namely:

1) The creditor has the right to demand that the debtor pay the shortfall.

2) The guarantor, based on the right of recourse, can demand that the debtor repay the amount that has been paid to the creditor, including costs.

Because the Creditor and the Guarantor both have the right to demand payment from the debtor, the position of the Creditor and the Guarantor is the same as concurrent Creditors towards the debtor. To maintain the Creditor's preferential rights from the possibility of such a condition occurring (the Guarantor only pays partially), the *Borgtocht* deed must be emphasized regarding the Guarantor's promise to provide irrevocable power to exercise the right of recourse. By including this promise, if such a condition occurs, the Creditor still has preferential rights in demanding the remaining payment from the debtor.

A. Based on the results of research at Bank Sultra, it can be seen that the obstacles that arise in the practice of guarantee agreements (*Borgtocht*) are:

1) The guarantee (*Borgtocht*) is general in nature so that it does not give rise to preference rights for the creditor regarding certain goods belonging to the guarantor;

2) The guarantor is still free to transfer or sell his assets;

3) It is difficult to know the credibility of the guarantor;

4) It is difficult to know how much and to whom the person concerned is responsible;

5) Execution/collection must be through a lawsuit, if the guarantor refuses to pay;

6) The Insurer can still use privileges to circumvent those privileges if they are not waived.

Considering its position as a non-preferred creditor, the bank, in determining whether someone can be made a guarantor for its debtor, can undertake the following efforts:

a. Banks as creditors really pay attention to the character ofThe guarantor's reputation for underwriting the debts of the guaranteed debtors is also important. Banks typically assess the guarantor's financial condition and reputation, as well as other factors, such as whether the guarantor is part of the management of the business. For example, the personal guarantee is provided by the President Commissioner of the debtor's Limited Liability Company.

b. To avoid difficulties in the future due to the special rights of the guarantor, the following steps will be taken:

a) The waiver of the guarantor's privileges must be expressly stated in the guarantor's deed;

b) The day/date of the guarantee agreement must be made on the day/date after or at least the same as when the debt letter was made;

c) For personal guarantees, there must be the consent of the husband/wife, whereas for corporate guarantees, the signing of the guarantee deed must be carried out by parties who can legally bind the company with other parties.

Based on the research results, it can also be seen that as a guarantor, the guarantor cannot be bound by material guarantees, such as mortgage rights on his own property. Based on the provisions of Articles 1820-1821 of the Civil Code, the characteristics of A guaranty agreement is a supplementary agreement that accompanies the principal agreement. The principal agreement, made by the guarantor (in this case the debtor) and the guarantor (the bank as creditor), forms the basis for a bank guarantee. The rights arising from a guaranty are contractual and not property rights. Therefore, the creditor's position in this case is preferential, the guarantor cannot be presumed, and the guarantor is the target after the debtor.

If the debtor breaks his promise, the Guarantor who has bound himself is obliged to pay the debtor's debt to the Creditor. The creditor immediately charges the Guarantor for compliance Obligations as a Guarantor. Creditors can collect directly from the Guarantor if, in the Guarantor agreement (*Borgtocht*), the Guarantor has expressly waived the privilege of demanding that the debtor's assets be seized at auction first. However, if the Guarantor does not voluntarily pay the debtor's debt to the Creditor.

4. Conclusion

The conclusion of this study is that the Guarantee Agreement (*Borgtocht*) at Bank Sultra is still used as additional collateral, either in the form of a corporate guarantee or a personal guarantee. The implementation of the Guarantee Agreement (*Borgtocht*) at Bank Sultra as additional collateral is in accordance with Bank Indonesia's policy. Acceptance of collateral in the form of a Guarantee (*Borgtocht*) is basically only an additional assurance that the credit will run well due to the guarantor's control over the debtor's business health. Considering its position as a non-preferred creditor, the bank in determining whether someone can be a guarantor for its debtor can make efforts, among others, the Bank as a creditor must really pay attention to the character of the guarantor, including his reputation in guaranteeing the debts of the guaranteed debtors. Suggestions for the proper implementation of the guarantee agreement and the ability to provide credit security efforts for Bank Sultra as a creditor, it is necessary to pay attention to the process and procedures for making a guarantee deed so that it can be effectively used as additional collateral. Considering the many obstacles in its execution, the bank in determining Since a person can be used as a guarantor for their debtor, the Bank, as the creditor, must pay close attention to the guarantor's character, including their reputation for underwriting the debts of the debtors they guarantee. Bank Sultra, when drafting a guarantor agreement (*Borgtocht*), should preferably do so in the form of a notarial deed, as this guarantees the accuracy and completeness of the contents of the *Borgtocht* deed and can guarantee its evidentiary power as an authentic deed.

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