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Legal Protection Against The Guarantee (Bank) in the Agreement Bank Guarantee

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Abstract: The term self-guarantee warranty itself comes from the English word guarantee or guaranty which means guarantee or guarantee. In Dutch it is called borgtog. In the activity of providing banking services to customers, banks may provide bank guarantee services, as long as they do not contradict / violate the statutory regulations stipulated by Bank Indonesia regulations. The formulation of the problem of this research is how is the legal relationship between the guarantor (bank) and the guaranteed party (customer) in the bank guarantee agreement and how is the legal protection for the guarantor (bank) when there is default. The result of this research is that the legal relationship between the bank as guarantor and the guaranteed party in the bank guarantee is based on the contractual relationship in the bank guarantee issuance agreement signed by the bank as guarantor and the customer as guaranteed. Legal protection for bank guarantees due to default of the guaranteed party (applicant) is divided into preventive and repressive. Repressively, the bank that will issue a bank guarantee first examines the bona fides of the bank guarantee applicant by using the bank prudential principle and imposes a counter guarantee which functions as collateral in the provision of guarantees from the bank.

Keywords: Bank, Guarantee, Default.

1. Background

The occurrence of credit is based on an agreement, an agreement or agreement in terms of the Civil Code, namely an act by which one or more people bind themselves to one or more other people (Article 1313 of the Civil Code). The relationship between the two people is a legal relationship where the rights or obligations between the parties are guaranteed by law (DaengNaja, 2014). Types of credit agreements, formally juridical there are two types of credit agreements/granting bank guarantees used by banks in releasing their credit or in providing bank guarantees. Basically a bank guarantee is a guarantee agreement regulated in Article 1820 of the Civil Code (Hermansyah, 2005).

The term guarantee itself comes from the English word guarantee or guaranty which means guarantee or guarantee. In Dutch it is called borgtog. In the activity of providing banking services to customers, banks may provide services for providing bank guarantees, as long as they do not contradict/violate the laws and regulations contained in Bank Indonesia Regulations. In fact, by the bank, the provision of a bank guarantee is already a product or service offered in order to obtain income (fee). However, as we know that the bank business is very conservative (Malayu, 2011).

In granting a bank guarantee, the bank acting as the guarantor/guarantor will contain risks, so in issuing/issuing a bank guarantee, the bank will ask for a counter guarantee or counter guarantee to the guarantor which can be in the form of cash, time deposits, current accounts, documents. securities and assets. Bank credit agreements have several functions including: credit agreements function as principal agreements, meaning that credit agreements are something that determines the cancellation or non-cancellation of other agreements that follow it, for example, a guarantee binding agreement, a credit agreement serves as evidence regarding restrictions. rights and obligations between creditors and debtors and credit agreements serve as tools for monitoring credit.

The types of credit agreements/bank guarantees are credit agreements/granting bank guarantees made under the hands and credit agreements/granting bank guarantees made before a notary or authentic deed. Debt guarantee agreements are regulated in Articles 1820 to 1850 of the Civil Code. Underwriting is an agreement, in which a third party, for the benefit of the creditor, binds himself to fulfill his engagement (Article 1820 of the Civil Code) then it is clear that there are three parties involved in the agreement to guarantee the debt, namely the creditor, the debtor and a third party. The nature of the debt guarantee agreement is accesoir (additional) while the main agreement is a credit agreement or loan agreement between the debtor and the creditor (Salim, 2003).

Bank guarantee itself is essentially a guarantee in the form of a script issued by a bank which results in an obligation to pay the party receiving the guarantee if the guaranteed party is in default (Article 1 paragraph

(3) letter (a) Decree of the Board of Directors of Bank Indonesia No. 23/88/KEP/DIR dated March 18, 1991) or in other words a guarantee from the Issuing Bank to the Beneficiary that the Bank Guarantee Provider (Applicant) will fulfill its obligations. Referring to the nature of a bank guarantee, actually a bank guarantee is a derivative agreement (accessoir) in the form of a guarantee agreement (borghtocht) as regulated in the Third Book of Chapter XVI Articles 1820 to 1850 of the Civil Code (KUH Perdata). However, the provisions in the Civil Code only regulates general coverage and the legal consequences of an insurance. Therefore, a technical regulation is needed to be a guideline for banks in issuing bank guarantees, to answer these needs.

The Circular Letter of the Board of Directors of Bank Indonesia was issued regarding garage banks, where the last rule refers to Circular of the Board of Directors of Bank Indonesia No. 23/7/UKU dated March 18, 1991 concerning the Provision of Guarantees by Banks (hereinafter referred to as "SE BI") as implementing regulations of the Banking Law. Referring to the definition of a bank guarantee above, in the issuance of a bank guarantee there will be three parties involved, namely the Bank Guarantee Provider (Applicant), the Issuing Bank, and the Bank Guarantee Beneficiary (Beneficiary). To submit an application for the issuance of a bank guarantee, the Applicant submits an application to the Issuing Bank. Furthermore, the Issuing Bank, in accordance with the precautionary principle in banking regulations, will conduct an assessment of the bona fide and reputation of the Applicant.

As a contra, the bank guarantee can be covered by a guarantee deposit of 100% of the nominal value of the bank guarantee by the Applicant to the Issuing Bank, using the issuance facility with a guarantee deposit of less than 100% after the Issuing Bank has analyzed the creditworthiness of the Applicant, the existence of a counter guarantee issued by another bank or by provide other forms of guarantees in the form of corporate guarantees, land, buildings and machinery. Furthermore, for each issuance of a bank guarantee, the Applicant will be charged according to the provisions of each bank (Lee, 2009). Furthermore, if there is a default between the debtor and creditor, the bank guarantee as a transfer of debt obligations can use Article 1831 of the Civil Code or Article 1832 of the Civil Code. Article 1831 of the Civil Code (The guarantor is not obliged to pay the debtor, other than if the debtor is negligent, while the debtor's objects must first be confiscated and sold to pay off the debt (Neni, 2010).

Article 1832 of the Civil Code (The insurer cannot demand that the debtor's objects be confiscated and sold to pay off the debt. A bank guarantee agreement is a form of written agreement in which the bank has agreed to bind itself to the recipient of the guarantee in order to fulfill the guaranteed obligation within a certain period of time). certain conditions and with certain conditions in the form of payment of a certain amount of money, if the guaranteed party in the future does not fulfill its obligations to the guarantee recipient or there is a default. a principal agreement, namely an agreement whose fulfillment is borne or guaranteed by the guarantee agreement itself.

This is in accordance with Article 1821 BW. The bank guarantee agreement is also referred to as a guarantee agreement or borgtocht in accordance with Article 1820 BW, namely an agreement where a third party, for the benefit of the debtor, binds himself to fulfill the debt of the debtor, when the debtor is in default. In the guarantee agreement or borgtocht there is an obligation to fulfill the achievements of the guarantor (when the debtor is in default) stated in the accessoir agreement. Article 1 point 1 Decree of the Board of Directors of Bank Indonesia (SKBI) No. 11 / 110 / Kep / Dir / UPPB dated March 28, 1979 concerning the granting of guarantees by banks and the provision of guarantees by non-bank financial institutions, states: A guarantee is a document issued by a bank or non-bank financial institution that results in an obligation to pay the party receiving the guarantee. if the guarantee of the guaranteed party is in breach of contract (default). In a bank guarantee, there are three parties involved, namely first; guarantor: the party providing the guarantee (the bank), second; guaranteed party: guaranteed party (customer), third; the recipient of the guarantee (Mills, 2002).

Thus, it can be said that a bank guarantee is a written agreement in which the bank agrees to bind itself to the recipient of the guarantee in order to fulfill the guaranteed obligation within a certain period of time and with certain conditions in the form of payment of a certain amount of money if it is guaranteed in the future it turns out that it does not fulfill its obligations. guarantee recipients (Charlton, 2000). Article 1131 of the Civil Code states: "all objects, both existing and new ones that will exist in the future, become dependents for all individual engagements. And Article 1132 of the Civil Code states that "these objects are a mutual guarantee for all those who owe them, the income from the sale of these objects is divided according to the balance, that is, according to the size of the receivables of each, unless there is a reason between the debtors. -legitimate reasons take precedence. The problem that will be analyzed in this study is how the legal relationship between the guarantor and the guaranteed party in the bank guarantee agreement is and how is the legal protection for the guarantor in the event of a default.

2. Method

This research is a juridical-normative research. Data collection techniques in this study used library research and documents or archives, namely by collecting data related to the research needs to be studied, in addition to various books and other supporting legal materials. The analysis technique used was descriptive qualitative data.

3. Discussion

3.1 Legal Relations between the Guarantor (Bank) and the Guaranteed Party (Customer) in the Bank Guarantee Agreement.

The legal relationship between the guarantor (bank) and the guaranteed party (customer) in a bank guarantee is based on the contractual relationship in the Bank Guarantee Issuance Agreement signed by the bank as guarantor and the customer as guaranteed. The legal relationship between the bank as guarantor and the guarantor which was originally a Bank Guarantee Issuance Agreement will change to a Credit Agreement when the counter guarantee provided by the guarantor is lower than the value of the bank guarantee disbursed by the bank due to default.

This legal relationship is based on the Bank Guarantee Issuance Agreement which is signed by the bank as guarantor with the customer as guaranteed. With this legal relationship, an agreement arises that contains the rights and obligations between the guarantor and the guarantor. Bank guarantee as a form of accessoir agreement, its existence depends on the principal agreement that preceded it. Article 1821 BW has underlined by stating that there is no guarantee if there is no valid principal engagement. This has the consequence that the guarantee agreement can only be made or born after the main agreement has been made. A bank guarantee is a form of individual guarantee (persoonlijkezekerheid) which is subject to the terms of the BW, especially regarding "Insurance/Borgtoch"

In the provisions of Article 1820 BW, the parties to the guarantee are: (1) the debtor (debtor), (2) the debtor (creditor) and (3) a third party or guarantor. Meanwhile, the parties in a bank guarantee can be explained as follows: (1) the guaranteed party (customer/applicant), (2) the guarantor (the party with whom the guarantee is guaranteed to enter into an agreement and (3) the guarantor (the bank as guarantor).

In this regard, the bank guarantee must be stated firmly and should not be presumed, in the sense that the bank as a guarantor must state firmly that the bank will act as a guarantor with the guaranteed party. However, the firm statement does not have to be in writing or with an authentic deed. Pouring in written form is only to provide legal force from the aspect of proof. The relationship that occurs between the guaranteed party and the guarantee recipient and the guaranteed party with the bank occurs directly, while the relationship between the bank and the guarantee recipient occurs indirectly, meaning that the relationship only occurs with the submission of a claim from the guarantee recipient to the bank (Li Lam Yuan, 1997).

If a bank is willing to issue a bank guarantee, it means that the bank guarantees (guarantee) to fulfill a certain obligation or achievement if the guaranteed party in the future does not fulfill its performance (default) to the party receiving the guarantee as previously agreed. The rights and obligations of the bank as a guarantor are the right to obtain provisions and the right to confiscate objects owned by the guaranteed party which are used as counter guarantees if they are guaranteed to be in default or violate the provisions contained in the bank guarantee issuance agreement. Meanwhile, the obligation of the bank as a guarantor is to fulfill its performance by realizing a bank guarantee if the guaranteed party cannot fulfill its performance to the bank guarantee holder (Huyarso, 1980).

The rights and obligations of the guaranteed party or commonly called the Applicant as well as the guarantor, the guaranteed party also has the rights and obligations as stated in the bank guarantee issuance agreement. guaranteed default of the holder of the bank guarantee. Meanwhile, the obligation of the guaranteed party is the obligation to pay the annual fee determined by the guarantor and pay the security deposit whose value has also been determined by the guarantor, submit a counter guarantee in the form of movable or immovable objects. The meaning of counter guarantee is a guarantee given by the guarantor to the guarantor for the issuance of a bank guarantee by the guarantor. The types of counter guarantees can be in the form of: cash deposited with the bank as guarantor, frozen demand deposits, time deposits, and securities.

The binding of the counter guarantee is also distinguished by the form of the counter guarantee. If it is in the form of fixed objects such as land, then the binding is with mortgage rights in accordance with Law no. 4 of 1996 concerning Mortgage Rights on Land and the Objects on it. However, if in the form of movable objects, the binding is with a pledge which refers to Article 1150 of the Civil Code, but it is possible that the binding of the fixed object is with a mortgage because not all objects are still subject to the provisions of Law no. 4 of 1996 (Widjanarto, 1992).

3.2 Legal Protection for Guarantors (Banks) When Defaults Occur.

Legal protection of the interests of the Bank Guarantee is important to note if the guaranteed party (applicant), namely the contractor in the execution of his work, is in default or is in breach of contract, based on the previously required guarantee agreement, the work owner (beneficiary) has the right to withdraw the performance guarantee. As previously stated, the purpose of the performance guarantee is to provide security to the owner of the work, so that if the contractor defaults, his obligations will be covered by the guarantor of the issuing bank of the bank guarantee. The job owner hopes that the contractor will actually carry out the work given (Adrian, 2014).

Especially in the issuance of performance guarantees in the form of bank guarantees, where an assessment of guarantees/counter guarantees is required. The contractor will make every effort to complete the work in accordance with the provisions of the agreement to avoid losses on the capital invested in the project and the collateral that has been submitted to the bank (Sutarno, 2003). Preventive steps in the settlement of collateral claims that occur after a dispute can be in the form of preventive measures before the bank guarantee is handed over to the beneficiary, this is done so that the guarantor as the issuing bank of the bank guarantee can minimize losses that occur if the guaranteed party (applicant) defaults. . This preventive protection is divided into 2 (two), concerning the prevention used by banks before issuing bank guarantees, the first is about the application of the 5C principle in issuing bank guarantees to the guaranteed party (applicant) and the second is the detention of counter guarantees in the bank guarantee agreement (counter guarantee).

Repressive legal protection against bank guarantees for default of the guaranteed party (applicant) is to resolve disputes that have occurred or have occurred. In contrast to the form of preventive legal protection which is to prevent before the occurrence of a default. In an accessoir bank guarantee agreement, the form of repressive protection is in the form of an effort to resolve the default of the guaranteed party (applicant) to the contract for the procurement of goods and services. Protection of the bank's interests is important to note because if the debtor, namely the contractor, in the execution of his work, defaults or breaks his promise, based on the previously required guarantee, the owner of the work has the right to withdraw the performance guarantee.

As previously stated, the purpose of the performance guarantee is to provide security to the owner of the work, so that if the contractor defaults, his obligations will be covered by the guarantor. The owner of the work hopes that the debtor will actually carry out the work given. In general, repressive forms of protection by banks in the settlement of disputes over the disbursement of bank guarantees submitted by the recipients of guarantees can be resolved by paying a guarantee claim and litigation (the bank refuses to disburse the bank guarantee).

4. Conclusion

The legal relationship between the bank as guarantor and the guaranteed party in the bank guarantee is based on the contractual relationship in the bank guarantee issuance agreement which is signed by the bank as guarantor and the customer as guaranteed. With this letter of guarantee or bank guarantee, the bank can provide certainty and legal protection for the main agreement made between the guaranteed party (applicant) and the guarantee recipient (beneficiary) so that if in the future the guaranteed party (applicant) turns out to be injured promise or default.

Legal protection for bank guarantees due to default of the guaranteed party (applicant) is divided into preventive and repressive. In a repressive manner, the bank that will issue a bank guarantee first examines the bona fide of the applicant for a bank guarantee using the prudential principle of the bank (prudential principle) which is applied using the 5C principle (Character, Capacity, Capital, Collateral, Condition of Economy), and charges counter guarantee which functions as collateral in the provision of guarantees from banks. If it turns out that the guaranteed party (applicant) is in default, the beneficiary will submit a claim to the bank. The disbursement of the counterparty guarantee will be paid by the bank as the guarantor to the beneficiary in cash.

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