LEGAL PROTECTION FOR CREDITORS TOWARDS CREDIT GUARANTEE IN INDONESIA

Palmawati Tahir
Professor of Law at University of Tirta Yasa, Serang-Banten

Abstract- Regulation towards credit guarantee needs to be improved in Indonesia. The reason is simply because there have been many credits that were not repaid by the debtors. The law to deal with this matter has been issued by the government. This paper aims at examining the law of credit guarantee is needed. It focused particularly toward definition fiduciary guarantee rights as outlined in the Law no. 42/1999 concerning Fiduciary and how we cope with problems associated with the stagnated credit repayment by the debtors. Methods to collect the data and information are by using secondary data published by the Ministry of Law and Human Right. In addition to the secondary data, the study also collect data and information by using interviews and Focus Group discussion with the experts including academicians, lawyers and other banking practitioners. This study argued that material objects guarantee is an absolute right over a particular object that is used temporarily if the debtor broken the agreement. This material object can be used for the debt repayment of a debt. Furthermore, material object guarantee (fiduciary objects) provides a special position to creditors, as it has preferential rights, namely the preference rights or droit de preference in making the settlement of receivables from the object which becomes objects guarantee. This study suggests that for fiduciary objects that have been clearly stated as collateral debt, creditors should monitor the object so as to avoid the cheating (fraud) by debtors. Finally, creditors who maintain and take assets as collateral should be in accordance with applicable law. This aims to avoid criminality acts. Thus, much remain to be done to improve ways in the Credit Guarantee Law in Indonesia.

Index terms- legal protection, credit guarantee, fiduciary, material objects,

I. INTRODUCTION

One of the legal issues in Indonesia that is still problematic and needs a prompt attention until now is the guarantee law. This guarantee law partly has a close connection with the law of banking. In the banking sector this associated with the function of banks as a collector and distributor of public funds. Of the banking activities, credit is one of the activities that need to be guaranteed. This is simply because the sources of credit are from the public as well as from the government budget. Hence, if the credit repayment is stagnated, this will further influence the bank liquidity in particular and government budget to sustain any government’s activities and the economy as whole in general.

As credit plays roles for the economy, the law to guarantee the credits that were provided by the banks and the non-bank institutions is no doubt important. However, as there have been many people in Indonesia who have the lack of responsibility to repay credit, the study aims at examining the law of credit guarantee is needed. It focused particularly toward definition fiduciary guarantee rights as outlined in the Law no. 42/1999 concerning Fiduciary and how we cope with problems associated with the stagnated credit repayment by the debtors.

Methods to collect the data and information are by using secondary data published by the Ministry of Law and Human Right. In addition to the secondary data, the study also collect data and information by using interviews and Focus Group discussion with the experts including academicians, lawyers and other banking practitioners. However, before details of the discussion are given, a brief review of the relevant law is addressed in section 2. Section 3 then discussed the results of the study. Finally, the concluding notes are drawn in section 4.

II. A BRIEF REVIEW OF THE RELEVANT LAWS

As mentioned at the end of Article 1132 of the Civil Code that: ‘the receivables is given priority if there is a law as the basis’. This statement partly suggests that the position of banks as a creditor can be accepted as long as it is agreed by debtors. Also, it is mentioned in the Article 1133 of the Civil Code that there will be privilege for mortgages and pawns. Similarly, at the article 1134 (2) it was stated that mortgages and Pawn have a higher position than other privilege debts, except it was mentioned
in the law. However, based on the law no. 42/1999 on Fiduciary (UUJF), the guarantee law does not only cover Pawn, Mortgages, accountability rights, but it also includes Fiduciary.

The definition of fiduciary has been mentioned in the Article 1(1) of the Fiduciary law. Fiduciary is defined as the transfer of ownership rights on a material object on the basis of trust with the condition that the material objects of the transferred ownership rights remain in the control of the owner of material objects. Concerning Fiduciary guarantee, it was described in the Article 1(2) of the law in that it was stated that: "Fiduciary is the right to have guarantee on any moving products or material objects whether they are tangible and intangible. This notion is further affirmed again in the Article 1 (4) of the law which reads as follows: "The material objects are everything that can be registered and unregistered objects, moving and non moving objects which have no mortgage.

Unlike mortgage, credit has different definition and purpose. Credit is defined as funds for the government to carry out economic development or for people to do productive activities. The banks then assist in the provision of these funds, which is conducted through business loans. This was regulated in the Act No. 7 of 1992 concerning Banking as amended by the Act No. 10 of 1998. In the Article 1 point 11 of this law, it was stated that: credit is the provision of money or bills that can be equated with it based on agreements between bank and other parties. The other parties or debtors should to repay the debt plus the interest rate after a certain period.

Based on the above definition, credit can be given by anyone who has the ability to do so through a loan agreement between the creditors on the one hand and the borrower (debtor) on the other. Once the agreement is agreed, there is an obligation for creditors to lend the agreed money to debtors with the promised to repay the money plus the interest by the debtor at the time agreed by both parties.

However, the above process is not always been the case. Many experiences showed that there have been debtors that are not able to repay the credit at the time specified. On the other hand, there have also been problems in that the debtors do not receive the amount of money that has been agreed by the banks or creditors. Due to these problems, the law of credit guarantee is important.

III. RESULTS AND DISCUSSION

The research confirms that material objects can be used as one way in guaranteeing the credits in case the debtors are unable to repay the credit according to the time agreement. This material object guarantee provides a special position to creditors. This indicates that creditors have preferential rights, namely the right to precedence (preference rights, droit de preference) than other creditors in making the settlement of receivables from objects that become the object of a guarantee. In the guarantees law, the holder of a material objects’ guarantees are creditors toward the right Mortgage, Pledge and Fiduciary.

However, since the reform (economic crisis) era in 1997/1998, attempts to seek breakthrough toward the solution to the problem of debts has been undertaken. These attempts are expected not only to be quick, but it also is able to avoid conventional litigation process. As the time goes, however, there have been many changes in the law from the private state into public state. This is shown, for instance, in the Law No. 4 of 1996 on Mortgage especially in the Articles 6 and 20 in which it was stated that: the certificate of encumbrance attached executorial title, so that the first holders have rights to sell the material objects through a public auction. This indicates that there have been changes of the law from private law (privaatrechtelijk) into public law (Publiekrechtelijk).

The same changes have also been the case with the law no. 42 of 1999 on Fiduciary. This Fiduciary Law changed into public law. The execution of fiduciary that was stipulated in the fiduciary law tends to take over the execution of the provisions of the Mortgage Rights. Given the role of credit on the one hand is very important in the provision of funds, and on the other side of the bank as an institution that provides credit, then it is necessary to have the legislation of laws to guarantee the credits that have been given will be repaid by the debtors according to the agreement. Due to this, fiduciary registration is considered important to provide legal certainty to the parties concerned, as well as granting the rights of fiduciary to creditors.

The above conditions is argued to be in line with the statement made by Mochtar Kusumaatmadja as he argued that the law as a social norm. It cannot be separated from the values prevailing in a society. In fact, it can even be said that the law is a reflection of the values prevailing in society. A good law is the law that in line with the living law in the community, which would be in compliance or is a reflection of the values prevailing in the society.
As material objects can be used as the credit guarantee, this means that the borrowers or debtors will have opportunity to obtain other loans / credit from the banks. If the debtor is again unable to repay the loan principal / loans and interest, the bank or the owner of capital can make the execution of collateral objects. The value of material objects is usually at the time of the estimates. The value of material objects is usually higher than the principal and unpaid interest.

In the case of payment of debt to creditors from the company's revenue, the calculation is quite different. In this context the payment of the debt should be paid by the company after calculating the amount of money needed to sustain the company. In other words, the debt payment cannot be deducted directly from the income of the company in debt. This measure is called in banking term as first way out.

Material object guarantee and individuals guarantee legally have a function and a means to cover the debt. This guarantee is needed to protect creditors to have certainty of repayment of debt from the debtor. This type of credit guarantee is argued to be very risky because once the credit has been in the hands of the debtor, the bank or creditor cannot know and cannot detect further the use and utilization of the money. Therefore, the banks or creditors should be very careful in giving loans or credits.

Agreement between the banks and the debtors can also be used as a way to guarantee credits given to debtors. This agreement is important to protect the banks in case the debtors are unable to repay the credits obtained from the bank. Using this agreement the banks can take action based on what has been agreed in the clauses of the contractual terms. The solution to this case is not regulated in the Banking Law.

Fiduciary as mentioned above can also be used to guarantee credits given to the debtors. The word fiduciary is derived from the word fides which means trust. This is another form for the guarantee of a moving object other than a pawn. Whilst fidusia is another term for the institution or so called fiduciere eigendoms overdracht (FEO), which means the property based on trust. In the history of fidusia grows as an agency deals with moving objects which is different with pawn institutions. The reason is simply because the use of the object guarantees remains in the hands of debtors as in the Article 1152 of the Civil Code, whilst the pawn institution the collateral object is in the hand of the creditor. Detail of the definition of fiduciary is mentioned in the article 1 (1) of the law no. 42/1999 in that it is stated that the fiduciary is the transfer of ownership of an object on the basis of trust with the proviso that the objects transferred ownership rights remain in the control of the owner of the object.

The transfer of ownership is defined as the transfer of ownership rights of the fiduciary giver to the recipient on the basis of fiduciary trust, provided that the material objects that become the object remains in the hands of fiduciary giver. Thus, debtors handed the possession of the objects to creditors. However, this possession of this objects can be in the hand of the debtors, so that debtors can still use it. Creditors will act as the owner, if the debtor does not fulfil its obligations. In this case the creditor can demand such objects as the owner, and even in the event of debtor being bankrupt, the right is still in the hand of debtor. This is called as fiducier.

Apart from the terms fidusia, there is also a term fiducia guarantee. In the article 1 (2) of the law no. 42/1999, this is deined as follows:

"Guarantee rights for moving objects both tangible and intangible and immovable objects such as building cannot be burdened by security rights as stipulated in Law No. 4 of 1996"

The subject of the fiducia guarantee is the giver and receiver of fidusia. Fidusia giver is an individual or corporate owner of the object which is the object fiduciary, while the fidusia receiver is an individual or corporation that has receivables which the payment is guaranteed by the fidusia. However, fidusia guarantee is usually covered by notarial deed and must be registered in order to get a fiduciary certificate as standardized by the government. This certificate is intended to protect the fiduciary providers and as the rights as stipulated in the Article 27 and Article 28 of the Fiduciary Law. This suggests that the right to take the settlement of receivables is preferred to the recipient of fiduciary, with a note that if the same object as object of fiduciary more than one, the privileges will be given to those who first enrolled in the Office of fiduciary.

IV. CONCLUDING NOTES

From the above observation, it can be concluded as follows. First, material objects guarantee is an absolute right over a particular object that is used temporarily if the debtor broken the agreement. This material object can be used for the debt repayment of a debt. Second, material object guarantee (fiduciary objects) provides a special position to creditors, as it has
preferential rights, namely the preference rights or droit de preference in making the settlement of receivables from the object which becomes objects guarantee.

This study suggests that for fiduciary objects that have been clearly stated as collateral debt, creditors should monitor the object so as to avoid the cheating (fraud) by debtors. Finally, creditors who maintain and take assets as collateral should be in accordance with applicable law. This aims to avoid criminality acts. Thus, much remain to be done to improve ways in the Credit Guarantee Law in Indonesia.

REFERENCES

[15] Iman Soepomo, 1976, Pengantar Hukum Perburuhan, Jakarta, Djambatan
[16] Indonesia, Undang-undang Nomor 4 tahun 1996 tentang Hak dan Tanggungan
[17] ________, Undang-undang Nomor 24 tahun 1999 tentang Jaminan Fidusia
[18] ________, Undang-undang Nomor 17 tahun 2003 tentang Keuangan Negara
[19] ________, Undang-undang Nomor 34 tahun 2007 tentang Kepailitan dan Penundaan Pembayaran Utang
[20] ________, Undang-undang Nomor 48 tahun 2009 tentang Kekuasaan Kekhasman
[22] Johanes Gunawan, Itikad Baik Dalam Hukum Kontrak Modern, makalah, Seminar tentang perkembangan Konsep Itikad Baik, Pusat Studi Hukum Universitas katolik Parahyangan, Bandung
[27] M. Yahya Harahap, 2005, Ruang Lingkup Permasalahan Eksekusi Bidang Perdata, Jakarta, Sinar Grafika
[34] Mariam Darus Badruzalman, 2000,Sistem Kodifikasi, Pembaharuans UUHPerdata Indonesia, Majalah Hukum Nasional Badan Pembinaan Hukum Nasional, Nomor 1


Mochtar Kusumaatmadja, 2006, Konsep-Konsep Hukum dalam Pembangunan, Bandung, Alumni


Munir Fuady, 2013, Hukum Jaminan Utang, Jakarta: Erlangga


Oey Hoey Tiong, 1985. Fidusia Sebagai Jaminan Unsur-unsur Perikatan, Ghalia Indonesia, Jakarta

Oey Hoey Tiong, 1985. Fidusia Sebagai Jaminan Unsur-unsur Perikatan, Cet. 2 Jakarta: Ghalia Indonesia


Roscoe Pound, 1962, Pengantar Filsafat Hukum, Penterjemah : Mohamad Radjah, Bhratara, Jakarta

R. Subekti, 1987, Hukum Perjanjian, Jakarta: Internusa


Sri Soedewi Masjhoen Sofwan, 1988. Fidusia Dalam Yurisprudensi, Mahkamah Agung, Jakarta


Subekti, 1984, Pokok-Pokok Hukum Perdata, PT Intermasa, Jakarta


Sunaryati Hartono, 1994, Naskah Akademis tentang Kontrak di Bidang Perdagangan, Jakarta: Badan Pembinaan Hukum Nasional Departemen Kehakiman

Surya Tjandra dan Jafar Suryomenggolo (penyunting), 2006, Makin Terang Bagi Kami. Belajar Hukum Perburuhan. Jakarta, Trade Union Rights Centre (TURC)


Sutari, 2000, Hukum Jaminan, Hak-hak Jaminan Kebendaan. Bandung, PT. Citra Aditya Bakti


Zulkarnain Sitompul, 2005, Problematika Perbankan, Books Terrace & Library, Jakarta