VOL. 04, NO. 01, 2024 (184-190)

JIEE:
Jurnal Ilmiah Ekotrans & Erudisi

EISSN: 2777-0184
PISSN: 2797-2259

Legal Certainty Regarding Buyback Guarantees in Banking Agreements

Helfira Citra[1*], Sry Wahyuni[2], Engrina Fauzi[3], Adbaida[4]

[1,2,3]*Faculty of Law, Universitas Dharma Andalas, Indonesia*
** Corresponding author: helfiracitra@gmail.com*

ARTICLE INFO

Article history:
Received 01 April 2024
Received in revised form 27 May 2024
Accepted 29 May 2024

Keyword:
Housing, Banking and Credit Agreements

ABSTRACT

Indonesia is in the development stage in all areas, including facilities and infrastructure in the form of construction and rehabilitation of roads, bridges, public housing, office buildings and public facilities. Meanwhile, development in the spiritual sector includes government development in the fields of education, religion, social, culture and politics. The government always strives for development to be carried out in an optimal manner, whether with short-term, medium-term or long-term development. The desire for a residence is a person's (personal) achievement where it is a personal priority for each individual, some people may consider that the quality of a human's life is incomplete if they do not have a residence or private residence. In this way, a residence or house is not just a place to shelter, but everyone wants their residence/home to have elements of comfort and security, various public and social facilities and adequate facilities and infrastructure. What is an obstacle for every individual here is the limitation in getting ideal housing? Thus, the discussion regarding housing/settlement is of concern to both parties, not just to the dominance of the individual. The parties involved in this include consumers (debtors), developers (developers) and the bank as creditor.

INTRODUCTION

Clothing, sustenance, and habitation are fundamental necessities for human existence across historical epochs; individuals critically require all three elements to sustain their lives (Saputra & Mulia, 2021). In contemporary society, human requirements extend beyond the mere acquisition of attire and nourishment; individuals increasingly compete to fulfill their housing needs as a metric of their overall well-being (Mulia & Putri, 2022). The concept of 'board' as synonymous with a dwelling appears to be an elusive aspiration for specific segments of the lower middle class. Consequently, in light of the demand above for housing, a significant business opportunity emerges for property entrepreneurs or developers to assist consumers desiring homeownership but lacking the means for outright purchase. A plethora of solutions are proffered by stakeholders within the property and banking sectors, one notable option being the acquisition of a residence through KPR (Home Ownership Credit); however, numerous prerequisites must be

[1]*helfiracitra@gmail.com*
©2024. Helfira Citra. Published by Jurnal JIEE

satisfied by the applicant or consumer. In particular, the character of banking institutions as credit providers for the populace and commercial entities remains intrinsically linked to Article 1320 of the Civil Code in the execution of their business endeavors; moreover, banking operations are underpinned by legal frameworks established through Banking Law and other pertinent regulations, thereby endowing the banking sector with a distinctive nature when engaging in cooperation or contractual agreements (Nurwullan et al., 2020).

Numerous solutions are proffered by real estate and banking stakeholders, one of which encompasses the opportunity to acquire residential property via Home Ownership Credit (KPR); however, prospective applicants or consumers must fulfill many conditions. In particular, the essence of banking operations as a credit provider for individuals and enterprises remains intrinsically linked to Article 1320 of the Civil Code in executing its business endeavors. Furthermore, the banking sector operates under a legal framework encompassing banking law and various other regulations, which imparts a distinctive character to banking institutions when engaging in cooperative ventures.

Factual and actual, after the fulfillment of the stipulated requirements, the Consumer does not promptly submit a mortgage application sanctioned by the Bank as a financial institution; there exist numerous regulations that must be adhered to by both the Consumer and the Developer about specific criteria or stipulations set forth by the Bank, which must be complied with and articulated within the contractual agreement between the Bank and the Developer as well as the Consumer. A principal supporting element, which serves as a cornerstone to ensure the seamless execution of the credit application process and the collaborative endeavor, is the provision of a Buyback Guarantee instrument offered by both the Developer and the Bank within the cooperation contract that is to be established.

When a developer associated with a firm operating within the real estate sector engages in collaborative efforts with a financial institution, particularly regarding the marketing of residential units via a Home Ownership Credit (KPR) facility directed toward consumers, both the developer and the financial institution are obliged to establish a formal cooperation agreement that delineates the specifics encapsulated within the contractual clauses. Among the provisions articulated within these clauses is the stipulation that the developer shall furnish guarantees as outlined in the cooperation agreement, which encompasses the Buyback Guarantee. It is well-established that collateral can exist in both material and individual forms, including instruments such as a debt guarantor or borscht (Personal Guarantee), a corporate guarantee, an obligation agreement, and a bank guarantee (Anadi, 2019).

RESEARCH METHODS

In this scholarly discourse, through the lens of empirical legal research, one can discern the methodologies employed by housing and settlement developers (from now on referred to as 'developers') in the execution of housing and settlement provision, wherein they implement strategic frameworks and economic principles alongside consumer satisfaction metrics in their operational endeavors, all aimed at actualizing the settlement processes that have been mutually consented to by consumers and financial institutions (Atikah, 2022). Nonetheless, before delving into the practical applications of these strategies, it is imperative first to comprehend the regulatory framework governing the concept of contractual agreements or

agreements established between the housing and settlement developers (developers) and financial institutions by the stipulations of pertinent legal statutes and regulatory guidelines. Furthermore, this discourse may employ qualitative research methodologies to elucidate the underlying significance of the regulatory framework in terms of the concept of agreements.

RESULTS AND DISCUSSION

Home Ownership Credit

The elevated demand for residential properties and housing presents a lucrative business opportunity for enterprises operating within the housing sector (developers) to construct residences that fulfill the community's requirements. The challenge of acquiring a home is notably complex due to the substantial financial investment it necessitates, and to mitigate this issue, individuals seeking to purchase a home may opt for either outright cash payment or installment plans. For individuals unable to make a cash payment, home ownership can be attained through credit facilitated by a banking institution, a process commonly referred to within the community as Home Ownership Credit (KPR). KPR represents a viable mechanism for individuals to acquire a home, aside from purchasing it outright or through installment agreements. The concept of home ownership credit fundamentally denotes the act of borrowing funds to procure a residence from an individual via a banking institution, or it may also be described as a transaction involving the exchange of property.

In the Civil Code, it is unequivocally stipulated that within the domain of commercial transactions involving the purchase and sale of goods, contingent upon a prior agreement, it is permissible for the vendor to repurchase the Buyback Guarantee as well as the subsequent development of the commodities sold to the purchaser, while being mandated to reimburse the complete original purchase price along with any associated costs incurred by the buyer by applicable legal provisions. This chapter does not elucidate the rationale behind the seller's decision to reacquire the goods previously sold; however, one can infer from this regulation that the seller is entitled to repurchase the goods he has sold.

In the Civil Code, numerous provisions can be categorized as guarantee law. The provisions related to guarantee law within the Civil Code are delineated in the Second Book, which addresses the foundational principles of guarantee law and guarantee institutions (such as Pawn and Mortgage), and in the Third Book, which pertains to debt guarantees (M Bahsan SH, 2020). In her scholarly work entitled "Guarantee Law in Indonesia: Main Principles of Guarantee Law and Individual Guarantees," Prof. Dr. Sri Soedewi Masjchoen Sofwan, S.H. classifies guarantees into two distinct categories: material and individual. According to Sri Soedewi, the individual guarantee is commonly referred to in practice as borscht or guarantee. Guarantees are codified within the Civil Code (KUHPer) (Soedewi & Sofwan, 2001). Notably, the KUHPer does not contain any explicit provisions that articulate a definition or state that borscht constitutes a guarantee. The regulations governing this guarantee are encapsulated in Articles 1820 through 1850 of the KUHPer. The meaning of guarantee is articulated in Article 1820 of the Civil Code, which states, "An agreement in which a third party, for the benefit of the creditor, binds himself to fulfill the debtor's obligations if the debtor does not fulfill his obligations."

Examining the Buyback Guarantee agreement, in terms of its classification as a guarantee guarantee, must inevitably engage with the fundamental components of guarantee as articulated in Article 1820 of the Civil Code. The components above

will be elaborated upon in detail as follows (Nadjamuddin, 2012):

Guarantee is an agreement

The buyback guarantee constitutes a contractual agreement. The concept of an agreement, as delineated in Article 1313 of the Civil Code, is characterized as "an act by which one or more persons bind themselves to one or more persons." In the domain of financial activities, this operation starts with the formalization of a credit agreement between the debtor and the financial institution, followed by a buyback guarantee arrangement involving the creditor and an outside entity. By the definition of an agreement as articulated in Article 1313 of the Civil Code, the developer or dealership entity commits to the Bank to repurchase the goods acquired by the debtor from the developer in the event of the debtor's default toward the creditor, thereby creating a legal relationship that connects the third party to the agreement formulated between the debtor and the creditor. The fundamental purpose of the buyback pledge is to verify that the borrower can satisfy their fiscal duties to the creditor.

Borg is a third party

The guarantor in a buyback guarantee agreement is a third party; the third party, in this case, is a legal subject, either a human or a legal entity. The existence of a third party guarantees the fulfillment of the debt when the debtor defaults. In a guarantee in the form of collateral, the fulfillment of the performance can only be maintained against certain people, namely the debtor or the guarantor. It should be emphasized here that the creditor's position towards the third party is only as a concurrent creditor (when the debtor has defaulted) because no third-party assets are pledged as collateral for the debt. This has legal implications because the creditor cannot execute third-party assets as debt repayment. All the creditor can do in a buyback guarantee agreement is ask the third party to buy back the goods that the debtor has purchased from the third party so that the debtor can pay off the debt to the creditor.

Guarantee is given for the benefit of creditors

When a debtor cannot fulfill their duties to a creditor—identified as a financial entity or banking organization—it can significantly influence the financial soundness of the relevant institution. For instance, the immediate repercussions of defaulted loans on a banking institution manifest in the deterioration of its economic health and the increased necessity for Asset Write-Off Provisions (PPA), which diminishes the institution's profitability. According to Article 10 of the Bank Indonesia Regulation Regarding the Evaluation of the Quality of General Bank Assets, the buyback guarantee agreement offers advantages to creditors when the debtor fails to meet their commitments as outlined in the credit agreement. The guarantor within the buyback guarantee framework is responsible for repurchasing the assets acquired by the debtor, with the financing for such purchases originating from bank loans, thus preventing the credit from becoming problematic or inoperative. In essence, the buyback guarantee agreement is instituted to safeguard the interests of creditors.

Overview of Banking Agreements

Each credit that has received approval and mutual consent between the creditor and the credit recipient must be articulated in a formalized agreement, specifically a credit agreement. Article 1313 of the Civil Code delineates an agreement as an act whereby individuals bind themselves to one or more individuals. This agreement emerges as a legal relationship between the two parties who establish it, which is an obligation. A legal relationship constitutes an association

engenders legal consequences safeguarded by law or statute. Should one side neglect to uphold its responsibilities and rights, the affected party is entitled to seek judicial recourse. The obligation refers to a legal linkage connecting two parties, enabling one to pursue a specific adherence from the other, who must then respond to that expectation. The requester in this situation is called the creditor, and the party required to comply is labeled the debtor (Hernoko, 2010).

The concept of a credit agreement is not explicitly recognized within the framework of Banking Law; however, the definition of credit as articulated in Banking Law incorporates the terminology of agreement or loan agreement. This language underscores the notion that a credit relationship constitutes a contractual framework (a relationship predicated on an agreement) expressed through the medium of a loan. The credit agreement itself is synonymous with a loan agreement. Article 1754 of the Civil Code articulates: "A loan agreement is an agreement whereby one party provides another party with a specified quantity of goods that are depleted through utilization, contingent upon the latter party's obligation to return an equivalent quantity of goods of the same type and condition." While the credit agreement is fundamentally derived from the loan agreement, it diverges from the agreement delineated in the Civil Code. The distinctions between a loan agreement and a credit agreement manifest in several dimensions, including (Sembiring, 2000):

a. Credit agreements are invariably established with a specific intent, typically associated with a developmental initiative; in most instances, the credit agreement delineates the intended application of the funds to be disbursed. In contrast, loan agreements do not encompass such stipulations, allowing the borrower considerable discretion in utilizing the funds received.
b. The loan terms clearly state that the creditor should be a banking institution or a qualified financial entity, preventing individuals from holding this position. Conversely, within the context of the loan agreement, the issuance of loans may indeed be conducted by private individuals.
c. The regulations governing credit agreements differ significantly from those governing loan agreements. In the context of loan agreements, the overarching provisions outlined in Book III and Chapter XIII of Book III of the Civil Code are applicable. Conversely, concerning credit agreements, the relevant legal framework encompasses the provisions established by the 1945 Constitution, directives pertinent to the economic sector, the general provisions of the Civil Code—particularly those articulated in Book III—the Banking Law, the Government Policy Package aimed at the financial industry with a specific focus on the banking domain, the Bank Indonesia Circular Letter (SEBI), along with various other pertinent regulations.
d. The credit contract states that the loan's repayment must occur together with interest, financial rewards, or profit-sharing conditions. Conversely, the loan agreement's stipulations specify that repayment may occur solely through interest, which is contingent upon mutual consent.
e. For any credit deal, a lender must firmly believe in the borrower's ability to honor repayment terms, which is supported by collateral that covers both concrete and abstract assets. Conversely, within the framework of a loan agreement, collateral serves as a guarantee for the assurance of debt

repayment, an arrangement contingent upon mutual consent.

Legal subjects fundamentally comprise individuals (persons) and legal entities (rechtpersoon) such as Limited Liability Companies (PT). Within the context of a credit agreement, multiple parties are engaged, specifically the creditor and the debtor. The creditor typically manifests as a financial institution, such as a bank or a leasing company. In contrast, the debtor represents a legal subject functioning as either an individual or an entity with the rights and responsibilities to execute a legal act, whether unilaterally or bilaterally. The annulment or cessation of the credit agreement is governed by the stipulations articulated in Article 1381 of the Civil Code, which pertains to the cancellation of obligations (Patrik, 1994).

Nonetheless, several more prevalent justifications exist in practical applications, including payment, subrogation, debt renewal (novation), and debt encounter or compensation. Payment constitutes the debtor's voluntary duty to satisfy the established agreement's terms. Subrogation, as delineated in Article 1400 of the Civil Code, entails substituting the creditor's rights by a third party discharging the debt owed to the creditor. Debt renewal or novation involves formulating a new credit agreement that supersedes the previous credit agreement, resulting in the latter's termination. Article 1413 of the Civil Code delineates three mechanisms through which novation transpires, specifically the establishment of a new deal to replace the prior creditor with a new creditor, the substitution of the former debtor with a new debtor, or the renewal or modification of the object or content of the agreement. This object modification occurs when an alternative obligation replaces a specific debtor obligation. Furthermore, the concept of debt encounter or compensation, as regulated by Article 1425 of the Civil Code, refers to a scenario wherein the creditor and debtor reconcile their debts and receivables, culminating in the termination of the credit agreement. Consequently, these factors constitute the legal foundation that governs the cessation of credit agreements in quotidian practice.

CONCLUSION

In providing credit, financing, and ancillary services, banking institutions may utilize their equity, capital sourced from external entities, or by issuing novel payment instruments manifesting as demand deposits. This provision elucidates the function of banks as intermediary entities that facilitate the connection between parties possessing surplus funds and those experiencing a deficit in financial resources while adhering to the principle of prudence. Credit assumes a pivotal role within the economic framework, as it possesses the capacity to assist individuals or corporate entities facing financial adversity in the expansion of their operations. It is anticipated that the credit extended will catalyze economic activities and enhance the quality of life within the community. The interests and advantages expected by the community and banking institutions are encapsulated in two principal activities, specifically the acceptance of deposits and the provision of loans. Depositors seek returns in the form of interest, whereas banks generate profits by allocating these funds in the guise of credit.

LIMITATION

This investigation's foremost constraint is its dependence on secondary data and qualitative analytical methods, which may inadequately encapsulate the intricate practicalities and variabilities inherent in the execution of buyback guarantees within banking contracts. The research is also confined to a particular legal and regulatory framework in Indonesia, potentially restricting the

applicability of its conclusions to other legal environments characterized by diverse regulatory structures and financial practices. Also, the examination does not sufficiently engage with factual data from relevant stakeholders, including financial organizations, property creators, or customers, which could enhance the overall insight into the difficulties and operational aspects regarding introducing buyback guarantees. In addition, the study's concentration on legal interpretations may neglect the broader economic and behavioral influences that affect the efficacy and enforcement of such guarantees.

IMPLICATION

The results of this investigation possess considerable ramifications for both legal professionals and policymakers engaged in the banking and real estate domains. For legal professionals, the research emphasizes the necessity of ensuring that buyback guarantee provisions are unequivocally articulated and enforceable within credit agreements to safeguard the interests of creditors and debtors. Policymakers ought to contemplate revising or enhancing regulations governing buyback guarantees to more effectively protect the interests of financial institutions while fostering equity and transparency in credit agreements. Furthermore, for banks and developers, this research accentuates the imperative for establishing more rigorous risk management strategies and collaborative frameworks that address the potential challenges associated with buyback guarantees, particularly in instances of debtor default. Ultimately, the investigation contributes to the ongoing dialogue regarding enhancing legal certainty and efficiency within banking agreements, particularly in rapidly evolving markets such as Indonesia.

REFERENCES

Anadi, Y. R. (2019). Kekuatan Hukum Akta Buy Back Guarantee Dengan Kuasa Menjual Bagi Pihak Developer. *Jurnal Hukum Dan Kenotariatan*, *3*(1), 115–125.

Atikah, I. (2022). *Metode Penelitian Hukum*.

Hernoko, A. Y. (2010). *Hukum perjanjian asas proporsionalitas dalam kontrak komersial*. Kencana.

M Bahsan SH, S. E. (2020). *Hukum Jaminan dan Jaminan Kredit Perbankan Indonesia*. Rajawali pers.

Mulia, R. A., & Putri, R. P. (2022). Pengaruh Tingkat Kemiskinan dan Produk Domestik Regional Bruto Terhadap Kesejahteraan Masyarakat. *Jurnal Ilmiah Ekotrans & Erudisi*, *2*(1), 22–33.

Nadjamuddin, A. (2012). Aspek Hukum Akta Buy Back Guarantee dan Implikasinya Bagi Lembaga Perbankan. *Jurnal Penelitian Hukum*, *1*(3), 1–12.

Nurwullan, S., Siregar, H. F., & Fania, F. (2020). Aspek Yuridis Resiko Perbankan Sebagai Penyalur Kredit Perspektif Asas Konsensualisme Dalam Berkontrak (Suatu Telaah Normatif Terhadap Instrumen Payment Guarantee). *Pamulang Law Review*, *3*(1), 39–48.

Patrik, P. (1994). *Dasar-dasar hukum perikatan:(perikatan yang lahir dari perjanjian dan dari undang-undang)*. Mandar Maju.

Saputra, N., & Mulia, R. A. (2021). The Influence of Competence, Work Environment and Achievement Motivation on the Performance of Civil Servants at the Padang City Regional Secretariat. *Scientific Journal of Ecotrans \& Erudisi*, *1*(1), 1–24.

Sembiring, S. (2000). *Hukum Perbankan*. Mandar Maju.

Soedewi, S. M. S., & Sofwan, M. (2001). Hukum Perdata: Hukum Benda, cet. 5. *Yogyakarta: Liberty*.