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Comparison Of Execution In Bank Guarantee And Fiduciary

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Abstract

The types of guarantee institutions as known in the Indonesian legal system, can be classified according to the manner in which they occur, according to their nature, according to their object, according to their controlling authority. If there is a default, execution will be carried out on the object of the guarantee. Execution is one attempt from one of the winning side to get what is due with the help of law. Bank Guarantee and Fiduciary have differences in the implementation of their execution in the event of a default.

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A. Introduction

The guarantee institution is classified as a neutral field of law that does not have a close relationship with the spiritual and cultural life of the nation. So that against such a law there is no objection to being regulated immediately. Lately the law of guarantees is popularly called The Economic Law (economic law), Wiertschafrecht or Droit Econonique which has the function of supporting economic progress and development progress in general.[1]The word "guarantee" in the Laws and Regulations can be found in article 1131 of the Civil Code and its explanation article 8 of Law No. 7 of 1992 as amended by Law No. 10 of 1998 concerning Banking, but in both regulations does not explain what is meant by guarantee. But it can be known that a guarantee is related to debt problems, where in the loan and loan agreement the creditor asks the debtor to provide collateral in the form of a number of assets for debt repayment, if the debtor does not pay off the debt within the agreed time. The value of a guarantee given to creditors usually exceeds the credit value, this is done by the creditor so that he is protected from losses.[2]

So, when there is a credit jam, the bank can use or sell the credit guarantee to pay or cover bad credit. The purpose of the credit guarantee here is to protect the bank from delinquent customers, because only a few customers can afford but do not pay their credit. The point is that the credit guarantee here is tied by the debtor to the creditor with the debt owned by the debtor's asset guarantee, so that the debtor does not run away from his debt. The payment of debt with collateral is by auction as stipulated by applicable regulations, and if there is residue from the auction, it is returned to the debtor. In principle, the collateral must belong to the debtor, but the law also allows property belonging to third parties to be used as collateral, provided that the party concerned gives up the goods to be used as collateral for the debtor's debt. , so that it can be concluded that the guarantee is a debt payment by the debtor to the creditor if in the future there is a bottleneck in the payment of the debtor's debt with a number of assets belonging to the debtor in accordance with the agreement that has been made according to applicable laws and regulations.[3] Basically, guarantees are divided into two categories, namely, Individual guarantees give rise to individual rights, so there is a special legal relationship between creditors and people who guarantee the repayment of debtors (guarantors). From this comes the term, Individual guarantee / borgtocht / personal guarantee (in case the guarantor is an individual), Company guarantee

[1] Tutik, T. T. (2008). *Hukum Perdata dalam Sistem Hukum Nasional*. Jakarta: Kencana.
[2] Kasmir. (2004). *Manajemen Perbankan*. Jakarta: PT. Raja Grafindo Persada.
[3] Supramono, G. (2013). *Perjanjian Utang Piutang*. Jakarta: Kencana.

(in the event that the guarantor is the company), Individual assurance comes from *the word persoonlijke zekerheid.* There is also a mention with the term immaterial guarantee. Individual guarantee is the guarantee of a person from a third party who acts to guarantee the fulfillment of the obligations of the debtor. The definition of individual guarantees can also be seen from various views and opinions of experts. Sri Soedewi Masjchoen Sofwan, defines immaterial guarantees (individuals) as: "Guarantees that give rise to direct relationships with certain individuals, can only be maintained against certain debtors, against the assets of debtors in general" Soebekti defines individual guarantee as: "An agreement between a debtor (creditor) and a third, which guarantees the fulfillment of the debtor's obligations (debtor).[4]It can even be held outside (without) the debtor". [5]Material Guarantee or in legal terms called zakelijke zekerheid, This guarantee is an absolute right to a certain object, in the form of part of the debtor's or guarantor's property, thus giving preference to creditors over other creditors over the object.

Property is a guarantee whose object is in the form of goods, both movable and immovable, specifically intended to guarantee the debtor's debt to creditors if in the future the debt cannot be paid by the debtor. The pledged goods belong to the debtor and as long as they are collateral for the debt cannot be transferred or transferred by either the debtor or creditor. If the debtor defaults on his debt, the object of the guarantee cannot be owned by the creditor, because the guarantee institution does not aim to transfer title to an item. Material guarantees consist of, Fixed objects (immovable) For example: land and other objects that are a unity with the land. This type of object will be burdened with the Right of Liability in accordance with Law No. 4 of 1996 concerning the Right of Liability along with other objects contained on it, Moving objects the object is burdened with three types of guarantees.

The occurrence of credit is based on the existence of an agreement, an agreement or agreement in the terms of the Civil Code, which is 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 two persons is a legal relationship in which the rights or obligations between the parties are guaranteed by law.[6] Types of credit agreements, formally juridical there are two types of credit agreements / bank guarantee that banks use 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. The term warranty itself comes from the English guarantee or guaranty which means guarantee or guarantee. In Dutch it is called borgtog. In providing banking services to customers, banks can provide bank guarantee services, as long as they do not contradict / violate laws and regulations including Bank Indonesia regulations. In fact, by the bank the provision of this bank guarantee is already a product or service offered in order to get income (fee). However,as we know, the bank business is very conservative[7]

The types of credit agreements / bank guarantees are credit agreements / bank guarantees made under the hands and credit agreements / bank guarantee 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, where a third party, for the benefit of creditors, binds itself to fulfill its binding (Article 1820 of the Civil Code) so it is clear that there are three parties involved in the debt guarantee agreement, namely creditors, debtors and third parties. The nature of the debt guarantee agreement is accesoir (additional) while the main agreement is a credit agreement or money loan agreement between the debtor and creditor. Bank guarantee itself is essentially a guarantee in the form of a letter issued by the bank which results in an obligation to pay to the party receiving the guarantee if the guaranteed party defaults (Article 1 paragraph (3) letter (a) of the Decree of the Board of Directors of Bank Indonesia No.

[4] Subekti. (1997). *Hukum Acara Perdata.* Bandung: Bina Cipta.
[5] H.S, S. (2003). *Hukum Kontrak.* Jakarta: Sinar Grafika.
[6] Naja, H. D. (2005). *Hukum Kredit dan Bank Garansi.* Bandung: PT. Citra Aditya Bakti.
[7] Pujayanti, P. N., & Bagiastra, i. N. (t.thn.). *Kedudukan Bank Dalam Pemberian Bank Garansi.* Universitas Udayana.

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 his obligations. Referring to the nature of the bank guarantee, the bank guarantee is actually a derivative agreement (accessoir) in the form of a guarantee agreement (borghtocht) as stipulated in the Third Book Chapter XVI Articles 1820 to Article 1850 of the Civil Code (Civil Code). However, the provisions in the Civil Code only regulate the subject of coverage in general and the legal consequences of an insured. Therefore, a technical rule is needed to be a guideline for banks in issuing bank guarantees, to answer these needs. A bank guarantee agreement is also referred to as a guarantee agreement or borgtocht in accordance with Article 1820 BW which is an agreement whereby a third party, for the benefit of the debtor, binds himself to fulfill the debtor's debtor, while the debtor defaults. In the underwriting agreement or borgtocht there is an obligation to fulfill the performance of the insurer (when the debtor defaults) stated in the accessoir agreement, The 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 and with certain conditions in the form of payment of a certain amount of money, If the guaranteed party in the future turns out not to fulfill its obligations to the recipient of the guarantee or there is a default. The provisions mentioned above indicate that the underwriting is an accessoir agreement, that is, because the underwriting depends on the existence of a principal agreement, namely an agreement whose fulfillment is borne or guaranteed by the underwriting agreement itself[8]

Credit Agreement / Bank Guarantee For a release of credit and / or bank guarantee by the bank to its customer, it will always first begin with a request by the customer concerned. If the bank considers the application feasible to be given, in order to carry out the release of credit and / or bank guarantee, it must first be by holding an agreement or agreement in the form of a credit agreement and / or guarantee agreement. One of the clear bases for banks regarding the necessity of a credit agreement is from Article 1 paragraph (12) of Law Number 7 of 1992 concerning Banking. Fiduciary guarantee according to article 1 point (2) is "fiduciary guarantee is the right to movable objects, both tangible and intangible, and immovable objects, especially buildings that cannot be encumbered with Dependent Rights as referred to in Law Number 4 of 1996 concerning Dependent Rights (Law No. 4 of 1996 concerning Dependent Rights) which remain in the control of the Fiduciary, as collateral for the repayment of certain debts, which gives the Fiduciary a preferred position over other creditors. This Fiduciary binding agreement begins with the existence of receivables between the creditor and the debtor where this agreement aims to anticipate if the creditor defaults to pay off its debts. This fiduciary agreement is usually stated in the form of a notarial deed, in order to convince the party concerned in carrying out an agreement. In this fiduciary, the debtor surrenders a movable property by ownership rights and the debtor retains control of the goods. Fiduciary Guarantee is assesoir which means that the guarantee agreement will always follow the principal agreement, when the principal agreement is deleted / void, the guarantee agreement will automatically be deleted / void as well. J. Satrio suggests that the assesoir agreement is an agreement that is born of transfer and ends/deletion depending on the main agreement.[9] Fiduciary guarantee institutions regulated in Law No. 42 of 1999 concerning Fiduciary Guarantees (Law No. 42 of 1999 concerning Fiduciary Guarantees), in principle fiduciaries can also be said to be liens which have the nature of material rights. fiduciary guarantees concern all movable and fixed objects that cannot be encumbered by the Liability and its mortgage, fiduciary guarantees of its delivery in the form of constitutum possessorium (transfer of property from the debtor to the creditor where the given object remains in the real power of the debtor).

[8] Koto, I., & Faisal. (2021, November). Penerapan Eksekusi Jaminan Fidusia Pada Benda Bergerak Terhadap Debitur Wanprestasi. *Journal of Education, Humaniora and Social Sciences (JEHSS), 4*(2), 775.

[9] Satrio, J. (1996). *Hukum Jaminan dan Hak-Hak Jaminan Pribadi.* Bandung: Citra Aditya Bakti.

The purpose of the fiduciary guarantee agreement made by the creditor with the debtor is for the creditor to guarantee the repayment of the debtor's receivables if it defaults, while for the debtor to still be able to control and enjoy the benefits of the fiduciary guarantee object because what is handed over is only ownership rights in trust. The purpose of making a consumer financing agreement with a fiduciary guarantee is in accordance with the provisions of the UUJF and is in accordance with the criteria of cause or cause that is not prohibited because the purpose does not conflict with the law, the purpose does not conflict with decency, and also the purpose does not conflict with public order.

B. Literatur Review

Execution is usually the execution of a court decision or deed obliging creditors to repay their debts through the sale of certain assets belonging to the debtor.[10] Default is a term derived from the Dutch, "wanprestatie", meaning "bad performance". This term is used to describe the attitude of a person who does not fulfill or does not fulfill the responsibilities stipulated in the agreement made. between debtors and creditors. Non-fulfillment of obligations by the debtor due to 2 (two) possibilities, namely:

1. Debtor errors, whether done intentionally not fulfilling obligations or caused by negligence.
2. There are conditions of force (overmarcht), force majeure, which occurs beyond the ability of the debtor. The debtor in this case is innocent.[11]

A bank guarantee agreement is a written agreement in which the bank agrees to bind itself to the recipient of the guarantee to fulfill its guaranteed obligations within a certain period of time and with certain conditions, in the form of payment of a certain amount of money, if the guaranteed party in the future turns out not to fulfill its obligations to the recipient of the guarantee or there is a default.

C. Methods

This paper is prepared using normative juridical methods, with a statutory approach, and conceptually, for this approach, several primary legal materials are used, namely laws and regulations relevant to the object of study, especially Law Number 42 of 1999 concerning Fiduciary Guarantees and Decree, [12]of the Board of Directors of Bank Indonesia No. 23/88/KEP/DIR dated March 18, 1991 and Article 1820 of the Civil Code, which is supported by secondary legal materials in the form of books that contain explanations related conceptually and theoretically to the object of study, and to find answers to problems in this study.

D. Results and Discussion

Based on the provisions of Article 8 of Law Number 7 of 1992 as amended by Law Number 10 of 1998, that based on the provisions in this article, the bank can provide credit to whomever it wants, provided that the bank wishes the ability and ability of the debtor to pay off the debt as agreed, meaning that credit can be provided even without being accompanied by collateral or additional guarantees provided that the bank believes to the ability and ability of the debtor to pay off his debt. The value of a guarantee given to creditors usually exceeds the credit value, this is done by the creditor so that he is protected from losses. So, when there is a credit jam, the bank can use or sell the credit guarantee to pay or cover bad credit. The purpose of the credit guarantee here is to protect the bank from delinquent customers, because only a few customers can afford but do not pay their credit. The point is that the credit guarantee here is tied by the debtor to the creditor with the debt owned by the debtor's asset guarantee, so that the debtor does not run away from his debt. (Kasmir, Manajemen Perbankan, 2004, p. 80). In general, there are four efforts that banks can take to deal with non-performing loans in the event of debtor default, including:

[10] Koto, I., & Faisal. (2021, November). Penerapan Eksekusi Jaminan Fidusia Pada Benda Bergerak Terhadap Debitur Wanprestasi. *Journal of Education, Humaniora and Social Sciences (JEHSS), 4*(2), 775.
[11] Saliman, A. R. (2004). *Esensi Hukum Bisnis Indonesia*. Jakarta: Kencana
[12] Heriawanto, B. K. (2019, Maret - Agustus). Pelaksanaan Eksekusi Objek Jaminan Fidusia Berdasarkan Title Eksekutorial. *Legality, 27*(1), 54.

a. Credit restructuring efforts or business restructuring that can be taken through the 3Rs (*rescheduling, reconditioning, restructuring*).
b. Banks can make direct collections using the authority of execution parate based on the agreement to bind collateral.
c. The bank may seek the court's assistance to carry out the execution.
d. The bank can file a civil lawsuit against the debtor through the court.

The agreement in the Banking Credit Agreement must be made in written form. This provision is contained in the Explanation to Article 8 of Law Number 10 of 1998 concerning Amendments to Law Number 7 of 1992 concerning Banking, which requires banks as credit providers to make written agreements. The requirement for banking agreements to be in written form has been stipulated in the main banking regulations by Bank Indonesia as referred to in Article 8 paragraph (2) of the Banking Law. According to Badriyah Harun, the main provisions stipulated by Bank Indonesia are:

1) The provision of credit or financing based on sharia principles is made in the form of a written agreement;
2) The Bank must have confidence in the ability and ability of the debtor customer which among others is obtained from a careful assessment of the character, ability, capital, collateral, and business prospects of the debtor customer.
3) The obligation of banks to develop and implement procedures for providing credit or financing based on sharia principles;
4) The obligation of banks to provide clear information regarding credit or financing procedures and requirements based on sharia principles;
5) Prohibition of banks from providing credit or financing based on sharia principles with different requirements to debtor customers and/or affiliated parties; Dispute resolution.[13]

Conclusions

Based on the above description, it can be concluded that the Criminal Procedure Code (KUHAP) has been an integral part of Indonesia's criminal legal system for 42 years through Law Number 8 of 1981. Several Constitutional Court decisions that upheld examinations of criminal procedural law with unconstitutional and conditionally unconstitutional verdicts include: 102/PUU-XIII/2015, 103/PUU-XIV/2016, 130/PUU-XIII/2015, 21/PUU-XII/2014, 33/PUU-XIV/2016, 65/PUU-VIII/2010, 65/PUU-IX/2011, 34/PUU-XI/2013. Therefore, it is necessary to amend the Criminal Procedure Code (KUHAP) by considering previous Constitutional Court decisions.

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[13] Risa, Y. (2018). Perlindungan Hukum Terhadap Kreditur Atas Wanprestasi Debitur Pada Perjanjian Kredit dengan Jaminan Hak Tanggungan. *Jurnalilmiah*.

H.S, S. (2003). *Hukum Kontrak*. Jakarta: Sinar Grafika.

7 Risa, Y. (2018). Perlindungan Hukum Terhadap Kreditur Atas Wanprestasi Debitur Pada Perjanjian Kredit dengan Jaminan Hak Tanggungan. *Jurnalilmiah*.

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23 Kasmir. (2014). *Bank dan Lembaga Keuangan lainnya*. Jakarta: PT. Raja Grafindo Persada.

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Supramono, G. (2013). *Perjanjian Utang Piutang*. Jakarta: Kencana.

15 Satrio, J. (1996). *Hukum Jaminan dan Hak-Hak Jaminan Pribadi*. Bandung: Citra Aditya Bakti.

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1 Koto, I., & Faisal. (2021, November). Penerapan Eksekusi Jaminan Fidusia Pada Benda Bergerak Terhadap Debitur Wanprestasi. *Journal of Education, Humaniora and Social Sciences (JEHSS), 4*(2), 775.

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