

Ideal Construction On Credit Agreement With Fiduciary Guarantee Based On Justice Value

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Abstract: The purpose of this study is to examine and analyze the construction of credit agreement with Fiduciary Guarantee, and Factors affecting the occurrence of the transfer of fiduciary collateral to third parties, as well as the Ideal Construction of a credit agreement with a Fiduciary Guarantee based on justice value. The method used in this study was sociological juridical, the data used were primary and secondary data, the data were analyzed by using descriptive analytical. Research results show that: the deed construction credit agreement cannot be separated from the fulfillment of Article 1320 Civil Code, Article 1321 Civil Code. The influencing actors that take a part on the switching of fiduciary security objects to the third parties are: the debtor does not understand in detail the content of the credit agreement, the absolute preference principle, the creditor put forward the principle of legal duty in the return and development of business capital because the creditor also as the party fiduciary guarantee, Appraisal is still patterned as a static machine and the high cost of execution. The ideal Construction of a credit agreement with a fiduciary guarantee based on justice value places the position of the debtor and creditor in a balanced and well-meaning position, fair appraisal and equal execution cost.

Keywords: *Legal Construction; Credit Agreement; Fiduciary Guarantee; Justice Value.*

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I. Introduction

In the development globalization is not only about economic factors, but it also grows and enters the wide area and covers various aspects, including economic and legal aspects (Mashdurohatun & Mansyur, 2017). The Bank serves as a Financial Intermediary with its main efforts to collect and channel public funds and provide other services that are commonly conducted by Banks in payment traffic. Both functions cannot be separated. As a business entity, the Bank always tries to gain the maximum profit from its business. Conversely, as a

financial institution, banks have an obligation to maintain the stability of the value of money, encourage economic activity, and expansion of employment opportunities (Djoni & Rachmadi, 2012).

Fuady (2002) confirmed that there are some elements of credit, including the existence of agreement between the creditor and the debtor called the credit agreement, the existence of the parties, namely the creditor as the party that provides loans, such as banks, and the debtors, the one who need money loan/goods or services, trust

from creditors that the debtors are willing and able to pay/install credit, the existence of the ability and promise to pay debts from the debtor, the existence of a given amount of money/goods/services by the creditor to the debtor, the repayment of any amount of money/goods or services by the debtor to the creditor, accompanied by reward/interest or profit sharing and a time difference between crediting by creditors and credit repayment by debtors.

Warranty is a means of protection for the security of the creditor that is the certainty of debt repayment from the debtor or business implementation of an achievement by the debtor or by the guarantor of the debtor (Hasan, 1996). On the other hand, the collateral is an additional guarantee which is submitted by the debtor to the Bank, in the framework of granting credit or financing facilities based on prudential principles. It is in accordance with the provisions referred to in Article 1 number 23 of Law Number 10 of 1998 concerning Amendment to Law Number 7 of the year 1992 on Banking. With the enactment of Law No. 42 of 1999 on Fiduciary Guarantee is intended to accommodate the needs of the public regarding the regulation of Fiduciary Guarantee as one of the means to assist business activities and to provide legal certainty to the parties concerned, and to facilitate those who use them, especially for Fiduciary Givers (Badriyah et al., 2019).

Fiduciary as collateral, is given in the form of agreement. Usually in lending money, the creditor specifies in the agreement that the debtor must deliver certain goods as collateral for his debt repayment. Therefore, if there is a default on the debtor, creditor will execute the debtor's guarantee through the auction in general or in another way in accordance with the legislation. In practice there are some cases of debtor does not pay the debt, committed a crime of embezzlement so as to harm the creditors, resulting in criminal and civil lawsuits against the debtor (Siti et al., 2017). The law was created for man in the form of rules that contain commands, prohibitions and addressed to all members of society. In addition, the law also regulates relationships among members of the

public, among the legal subjects. The subject of the law is that everything that can obtain the rights and duties of the law is only human. Man by law is recognized as a person of rights and duties, as subject or as person (Mashdurohatun, 2017). Thus, it is interesting to conduct in-depth research and study on the Construction of Deed of Credit Agreement between Creditor and Debtor With Fiduciary Guarantee, Factors Affecting the Switching of Fiduciary Guarantee Objects to a third party, and ideal Deed Construction of Credit Agreement between Creditor and Debtor With Fiduciary Guarantee in justice-based.

II. RESULT

In the provision of Article 1313 of the Civil Code, it formulates that "an agreement is an action between one or more persons commit themselves to one or more persons". In the formulation of Article 1313 of the Civil Code does not mention the purpose of entering into an agreement, so that the binding parties are not clear for to use for (Abdulkadir, 2000).

The Agreement is a legal relationship in the field of wealth based on an agreement between the subject of the law with each other, and among them (the parties/subjects of the law) the other is obliged to carry out its performance in accordance with the agreement of the parties and cause legal consequences (Raharjo & Seda, 2009). An agreement is an event in which a person promises to others or where two persons promise to do something, from this event a legal relationship arises a legal relationship between the parties called the bond (Sutarno, 2004). Ahmdi Miru (2012) also believes that this contract or agreement is a legal event in which a promise to another person or two promises to do or not to do something.

Through the agreement, there is an engagement or legal relationship that creates rights and obligations to each of the contracting parties. In other words, the parties are bound to abide by the agreement they have made. In this case the function of the agreement is the same as the legislation, but it is

only applicable to the author only. Legally the treaty can be enforced through the Court. The law provides sanctions against the offender or breach of the promise (default) (Ali & Nathaniela, 2009). For the party that fails to implement something that has been agreed, the other party may use the authority of the court institution to execute the agreement and obtain redress or other remedies (Dirdjosisworo, 2003).

The Bank serves as a Financial Intermediary with its main efforts to collect and channel public funds and provide other services that are commonly conducted by Banks in payment traffic. Both functions cannot be separated. As a business entity, the Bank always tries to gain the maximum profit from its business. Conversely, as a financial institution, banks have an obligation to maintain the stability of the value of money, encourage economic activity, and expansion of employment opportunities (Djoni & Rachmadi, 2012). On this special guarantee (material security) the debtor agrees to the creditor on certain goods specially designated as debtors' debt guarantees. In addition, the guarantee can be the form of goods, special guarantees can also be people. Although it may be a person, but ultimately the property of the person concerned can be seized and sold auction for debt repayment. As with any general agreement, to enter into a special warranty agreement, the terms of the treaty must also be promised on that matter. Only then, it is made a guarantee agreement that is *accessoire*. Warranty is a means of protection for the security of the creditor that is the certainty of debt repayment debtor or business implementation of an achievement by the debtor or by the guarantor of the debtor (Hasan, 1996). On the other hand, the collateral is an additional guarantee which is submitted by the Debtor to the Bank, in the framework of granting credit or financing facilities based on prudential principles. In accordance with the provisions referred to in Article 1 number 23 of Law Number 10 of 1998 concerning Amendment to Law Number 7 of the year 1992 on Banking. With the enactment of Law No. 42 Year 1999 on Fiduciary Guarantee is intended to accommodate

the needs of the public regarding the regulation of Fiduciary Guarantee as one of the means to assist business activities and to provide legal certainty to the parties concerned, and to facilitate those who use them, especially for Fiduciary Givers.

Fiduciary as collateral is given in the form of agreement. Usually in lending money, the creditor specifies in the agreement that the debtor must deliver certain goods as collateral for his debt repayment. Therefore, if there is a default on the debtor, creditor will execute the debtor's guarantee through the auction in general or in another way in accordance with the legislation. In practice there are some cases of debtor default (default), committed a crime of embezzlement so as to harm the creditors, resulting in criminal and civil lawsuits against the debtor.

The granting of credit must be granted based on a loan agreement, but no further provisions concerning the nature of the loan agreement. In practice, credit agreements are often a standard agreement (Fuady, 1996). Banks usually have their own form and here and there changes are made as necessary. However, all terms and conditions (terms and conditions) are standard. In this case, the debtor is only in a position to accept or not the credit agreement. When receiving all terms and conditions in the credit agreement, the debtor must sign it. Conversely, if the debtor refuses, he does not need to sign the credit agreement.

Article 1338 Paragraph (1) of the Civil Code reflects the principle of freedom for the parties to determine the contents of the agreement. However, there are still disagreements over whether the standard agreement meets the principle of consensus and the principle of freedom of contract or not (Sastrawidjaja, 2005). Agreements with standard clauses are deemed not to fulfill the principle of freedom of contract because it is made by one party, so that the other party cannot express their will freely.

According to Syahdeini (1993), freedom of contract which became a general principle of agreement can only be achieved if the parties involved have a balanced bargaining power (*gelijkwaardigheid van*

partijen). This is important, so that the implementation of the agreement can provide appropriate, fair and justice results. The unbalance of the position between the parties occurs when a stronger party can impose its will on the weaker party, so that the weaker party follows the terms of the contract that is presented to it. In the credit agreement, this position imbalance can be seen from the form of the credit agreement itself that has been prepared in such a way that the borrower's clients only need to read and sign the agreement. Because bank credit agreements are generally in the form of standard agreements, the banks tend to pay attention only to the interests of banks in determining the rights and obligations to the parties (Syahdeini, 1993). In this case, banks pay less attention to the interests of borrowers.

In relation to the bank credit agreement, the standard agreement has generally been prepared unilaterally by the bank. Syahdeini (1993) sees a broader sense of the standard agreement. The standard agreement is an agreement that almost all of its requirements have been standardized so that the other party can no longer negotiate or request changes to the clauses. The standard term refers not to the treaty form, but to the clauses. Based on this understanding, although the credit agreement is made by a notary, but it still adopts the clauses presented by one of the parties, while the other party has no chance to negotiate, the notarial agreement can also be classified as a standard agreement.

Nevertheless, the validity of the standard agreement is unnecessary in view of the community's need for the condition to run its business. The business world cannot run without default agreement (Syahdeini, 1993). The imbalance of position between the bank and its debtor customers does not necessarily conflict with the principle of freedom of contract. This is due to the role of the bank itself which not only carries the interests of society, but also as part of the monetary system. Consideration, the bank must also maintain its interests or existence in implementing government policy in the monetary field. For example, bank policy rejects

the agreed withdrawal of credit for consideration of bank liquidity under threat so that the bank is not liable to the loss of its debtor's customers as a result of the credit rejection. In this case, the actions of the bank cannot be regarded as contrary to public order and justice because the bank in this case is actually maintaining its existence.

In an agreement contained several principles in it, among others, the principle of good faith, namely a principle described by Article 1338 paragraph (3) Civil Code which reads: Every person who makes an agreement must be done in good faith. This principle of good faith can be distinguished between subjective good faith and objective good faith. Good faith in the subjective sense can be interpreted as the honesty of a person in doing a legal act that is what lies in the attitude of one's inner when held legal action. While good faith is in an objective sense, it means that the execution of a covenant must be based on the norms of merit (*billijkheid*) and the norm of propriety (*redelijkheid*) or something that is perceived as appropriate and appropriate in society.

Circular Letter of Financial Service Authority Number 13/SEOJK.07/2014 on Standard Agreement, this standard agreement is aimed at a balanced position between the creditor and the debtor so as to achieve justice in the agreement. The Circular Letter of the Financial Services Authority states in the number rum I. On the General Provisions that the standard agreement is a written agreement set unilaterally by the PUJK (Business Service Actors) and contains a standard clause concerning the content, form, and manner of manufacture and No. II of the Clause in the Standard Agreement, the 1st that PUJK is required to meet the balance, fairness and fairness in making agreements with consumers. that in the case of PUJK designing, formulating, establishing and offering the Standard Assessment, PUJK shall be obligated to base on the provisions of the applicable above. The third that the clauses in the Prohibited Standard Treaty are those which contain: a. The exoneration/*eksemsi* clause is the content of which adds the rights and/or reduces the PUJK obligation,

or reduces the rights and/or adds to the consumer's obligation, b. Misuse of the Society is a condition in the Standard Agreement that has an indication of misuse of the circumstances (Lathif & Habibaty, 2019). Article 1338 Paragraph (3) of the Civil Code states: agreements shall be executed in good faith. With the inclusion of good faith in the execution of the treaty means that we must not interpret the covenant. Based on justice and propriety. According to Pitlo in Purwahid Patrik (1994), that the treaty is not only determined by the parties in the formulation of the agreement but also determined by good faith, so good intentions also determine the contents of the agreement.

The person who will make the agreement must be made in good faith. Goodwill in a subjective sense can be interpreted as a person's honesty is what lies in a person when a legal act takes place. The goodwill in the objective sense is that the exercise of a legal agreement must be based on the compliance norm or what is perceived as appropriate in society.

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his own power through a public tender for the repayment of the debtor's loan. With the need to implement risk management with risk transfer to third parties (Mashdurohatun et al., 2017).

III. CONCLUSION

Deed construction of credit agreement cannot be separated from the fulfillment of Article 1320 Civil Code, Article 1321 Civil Code, so that the role of Notary as public official is very important in ensuring legal certainty and justice of the parties. Factors influencing the switching of fiduciary security objects to third parties because the debtor does not understand in detail content of the credit agreement, the absolute preference principle, the creditor put forward the principle of legal duty in the return and development of business capital because the creditor also as the party renting fiduciary guarantee, Appraisal still patterned as a static machine and the high cost of execution. Ideal Construction of a credential treaty deed with a Justice Value-based fiduciary warrant, it takes the position of the debtor and the creditor in a balanced and well-balanced position, fair appraisal and equal execution cost.

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