

A Debt You Can Debt on: Creditor Protection in the Field of Non-Performing Loans of Banking with the Rights of Liability Associated

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This study examines the legal cases of non-performing loans due to collateral agreements defaults associated with legal protection and encumbrance. The method used is a normative juridical and qualitative approach which will examine the subject matter through legal sources concerning treaties and the constitution or the Banking Act that specifically examines encumbrance through literature approaches and interviews. Results of research can be concluded that encouraged related parties, namely debtors, creditors, notaries, the Land Office, the District Court, to be able to carry out their duties and rights properly as well as their obligations to avoid non-desirable outcomes.

Key words: *Legal protection, bank, juridical normative, Indonesia.*

Introduction

The banking sector plays an essential role in the economy of every country (Iman, 2014). One important measure of the success of a bank in carrying out their intermediary function is how much non-performing loans they have. The term “non-performing loans” is common and frequently encountered and could threaten the Indonesian banking system the term is so prevalent that it must be anticipated by all parties, especially the banks, which play a strategic role in Indonesian economic activities (Winarta, 2006).

There is an obligation that must be done by the customer provision of a credit guarantee, which aims to repay the debt at the time specified in the agreement if the debtor/customer when experiencing the appointment. In accordance with Law No. 7/1992 on banking, the bank’s confidence in the ability of the debtor or its client to repay the debt, prior to granting credits must make a careful assessment of the character, capability, collateral capital, and business prospects of the debtor.

There are five factors that are commonly known for this form of assessment known as the “Five Credit Analysis,” or the five principles in avoiding bad loans, these are character, capacity, capital, collateral, and collection. In the event of non-performing loans, the handling can be done through coaching, rescue, and settlement of credit. With the guarantee, then it can provide protection of the creditor in the case of default (or *wanprestasi*) or breach of promise so that the goods or property of the debtor that has been pledged to the bank will be processed immediately with the intention to pay off its debts.

The bank considers that such guarantees are not strong, as they may cause fear and lack of guarantees in the credit repayment given, and the financial institution cannot calculate the exact amount of the existing and future assets of the debtor (Lee and Rosenkranz, 2019). Therefore, the bank requires the debtor’s material to act as guarantee, specifically designated as a debt guarantee. So, objects that can be used as collateral in credit facilities are land (Subekti, 1992) because the land is generally easy to sell, and economically the price continues to increase, and the land can be burdened with the right of dependents.

If the debtor breaks the promise, then in Article 20 of Law No. 4/1996, the bank determines the following action. The first mortgage holder pursuant to article 6 Law No. 4/1996, may sell the object of mortgage rights with his own power. Secondly, in accordance with what is contained in the certificate of Insurance Rights, the holders of mortgages may sell the object of mortgage rights through a public tender. Thirdly, the object of mortgage rights may also be undertaken under the sale of hands, finally, through alternative dispute settlement by way of negotiation, mediation, and arbitration.

Lending is essentially borrowing agreements as set forth in Article 1754 - Article 1759 of the Civil Law. Thus, the credit agreement can be identified with the borrowing agreements and regulated in Book III, Chapter XIII of the Civil Law (Subekti & Usman, 2003). However, there are differences because the loan and lending agreements in accordance with the Civil Law arrangement, and the credit agreement is not subject to the Civil Law arrangement. The credit agreement is included in the unnamed agreement (*on beneoemde overeenkomst*), where the legal basis is on the credit agreement between the parties. In the business of the bank, the legal relationship of credit is not in the form of borrowing and lending agreement, but also there is an agreement of power of attorney, guarantee agreement, and others.

Departing from the aforementioned background, this study was conducted to determine the factors causing the agreement of credit guarantee in the banking sector with the right of dependents and the legal consequences to the bank as the creditor. How the legal protection of creditors associated with mortgage? What is the legal effort in case of a non-performing loan agreement due to default? This is the central premise of the paper.

The purpose of this study to understand the legal protection of creditors associated with the Banking Law and the Law on Mortgage (*Undang-Undang Perbankan* and *Undang-Undang Hak Tanggungan*) as well as in the form of the agreement that led to the insurance agency. Besides, to understand the form of settlement of non-certified land loan agreements on the land guarantee that has not been certified due to the process of registration of land rights has not been completed and resulted in default through the guarantee institution or the execution of mortgage rights.

Theoretical Background

Banking institutions, have a strategic value in the economic life of a country in order to achieve the economic goals of the country (Iman, 2014). To achieve these objectives, the government needs to be given the authority to regulate and supervise banks. The authority includes the authority to determine how much capital banks can have, how much loaned capital can be given to a company, who can be a bank manager, and so on. The authority to supervise is granted with the aim of monitoring whether the bank conducts business activities in accordance with applicable provisions (Hasibuan, 2005).

Banks and non-bank financial institutions basically have a very strategic function and a very important role in economic activity (Kasmir, 2004). The strategic role of banks and non-bank financial institutions is to act as a vehicle capable of raising funds and channelling public funds effectively and efficiently towards improving people's lives. Banks and non-bank financial institutions are financial intermediaries and act as a vital means of supporting the smooth running of the economy (Lee and Rosenkranz, 2019). Banks and non-bank financial institutions basically have the function of transferring funds (loanable funds) from savers of surplus units (lenders) to borrowers or a unit deficit of the funds allocated (Liu et al., 2016).

The term credit comes from the Latin "*credere*" which means trust. It can be said in this connection that the creditor or the party providing the credit (bank) in a credit relationship with the debtor (the recipient of the credit receipt) has confidence that the debtor in time and with the terms agreed together can return the credit concerned (Usman, 2003). Trust, which is the essence of the meaning of credit, according to R. Tjiptoadinugroho (1972) is "an element that must be held as a common thread that crosses credit philosophy in its true sense, regardless of its shape, type and variety and from whatever origin and to anyone it is given."

Savelberg (1996) posits that credit has meaning among others: (1) credit as the basis of every engagement (*verbintenis*) where someone has the right to demand something from someone else, and (2) credit as collateral, where someone gives something to someone else in order to recover what has been handed over. The definition of credit in the legal sense is similar to those definitions provided by J. A. Levy, which defines it as a voluntary handover of a sum of

money to be used freely by credit recipients. The recipient of the credit has the right to use the loan to his advantage with the obligation to return the amount of the loan (Badrulzaman, 1991).

In a contrary view, Muchdarsyah Sinungun (1993) defines credit as “a gift of achievement by another party and that achievement will be returned again in a certain future period and accompanied by a counter achievement in the form of money” (p10). Further understanding of the term credit is put forward by Raymond P. Kent (1996) that describes credit as the right to receive payments or the obligation to make payments when requested, or in the future due to the delivery of goods now. Thus, credit measures the ability of a person to get something of economic value in exchange for his/her promise to repay the debt on a certain date.

Meanwhile, Kasmir (2004) attempts to summarise the elements contained in the granting of credit, among others: (1) trust, or confidence from the bank on the achievement given to the borrowing customer of funds to be repaid in accordance with the agreed time, (2) the agreement between the bank and the customer is set forth in an agreement where each party signs their respective rights and obligations, (3) a certain period of time, including the agreed credit repayment period; the time period can be in the form of short term, medium-term or long term, (4) risk of uncollectible or bad credit; generally, the longer a credit is, the greater the risk -- this risk becomes the responsibility of the bank both intentional risk by negligent customers and unintentional risk, and (5) reply services profits from the provision of a credit in the form of interest and credit administration costs to the bank’s profit.

From the description of the definition of credit above, it can be seen that the legal definition of credit is the provision of money or bills, based on an agreement or loan agreement between the bank and another party which requires the borrower to pay off the debt at the specified time.

Research Methods

The method that is used in this research is the Juridical Normative method, which is research using existing secondary data, which refers to the legal norms contained in the legislation (Ali, 2013). The primary and secondary materials of law are using the legislation, for instance, the jurisprudence that associated with Regulation No. 7/1992 about banking, Regulation No. 10/1998 about banking (which has been updated), Regulation No.4 Years 1996 about Mortgage Right, Book of Indonesian Civil Code Regulation, Regulation No. 5/1960 on the Basic Agrarian Regulation, Government Regulation No. 24/1997 on Land Registration. Secondary law materials derived from various sources of literature outside of legislature and jurisprudence are books, articles, papers, lectures, clippings, magazines, newspapers, literature, and the Internet.

This research method also includes a qualitative juridical method, which is the research that uses data obtained directly from the sources through interviews where the data obtained is directly addressed to two officials, namely a bank official and an official Notary or *Pejabat Pembuat Akta Tanah* (PPAT) who has a significant service period in their respective fields working in these professions for a period of over ten years, by conducting interview techniques to extract the information sourced from both officials. We deemed that this approach is sufficient enough to provide empirical justification to conduct the research.

Results and Analysis

The legal protection of creditors associated with mortgage rights focuses on land that has not been certified guarantees due process of registration of land rights that has not finished in the submission in the appropriate Land Office according to Article 19 Regulation Number 5/1960 (*Undang-Undang Pokok Agraria* or UUPA). Land in Indonesia is required to be converted from old to new rights and registered to the local Land Office so as to realise the unification and simplicity of law in the Land Law of Indonesia in accordance with the objectives of UUPA (Sutedi, 2007).

According to regulation No. 4/1996 about Mortgage Right (*Undang-Undang Hak Tanggungan* or UUHT) on land and objects related to the land that the security interest is charged on land rights as defined in Regulation No. 5/1990 on the Basic Regulation of Agrarian. Following or not following objects constitute a unity with the land for a settlement of a debt which gives priority to a certain creditor over another creditor.

Mortgage Right by its nature is something that follows certain receivables, based on an agreement of debts or other agreements, and therefore the birth and existence are determined by the receivables that the repayment is guaranteed. Article 6 UUHT, states: If the debtor breaks the promises, the holder of the first rank is entitled to take out the repayment directly without requesting prior approval because in the right of dependents, embrace the execution part.

Based on interviews with bank officials that the importance of the object of the guarantee on the ground that it will be used as collateral for the bank to be bound by the mortgage right because in case of transfer of ownership rights of the debtor in this case as borrowers and owners of collateral to the lender in the event as a lender, so that if the debtor is ever in breach of promises and encounters default (*wanprestasi*) then the guaranteed land can be a source of repayment for creditors. It should be noted that the rise of nonperforming loans (NPLs) in Southeast Asian countries is important for financial stability in the region (see Table 1).

Table 1: Bank Nonperforming Loans (as percentage of gross loans)

Country	2010	2011	2012	2013	2014	2015	2016	2017
Cambodia	3.1	2.4	2.5	2.7	2.2	2.0	2.4	2.4
Indonesia	2.5	2.1	1.8	1.7	2.1	2.4	2.9	2.6
Malaysia	3.4	2.7	2.0	1.8	1.6	1.6	1.6	1.6
Philippines	3.4	2.6	2.2	2.4	2.0	1.9	1.7	1.6
Thailand	3.9	2.9	2.4	2.3	2.3	2.7	3.0	3.1

Source: Lee and Rosenkranz (2019) and World Bank (2019)

Article 11 paragraph (1) UUHT states: “Conversion of the old right is eligible for land registration but has not been implemented, but it can be done simultaneously with the grant of the deposit and registration”. Therefore, if the process of receipt of the object of land rights, which will be used as collateral for the debt and shall be conducted simultaneously with the land registration process, may pose a risk to the bank as the creditor party in the future.

Article 14 paragraph (1) UUHT and Article 6 UUHT Is a seven-day date determination and submission of files and *warkah* or titles for registration of land rights from PPAT to the Land Office and after signing then that birth certificate of the mortgage by the land office so that if there is a debtor breach of promise or default, then the creditor holder mortgage can perform parate execution which is an execution that can be executed directly if the debtor breaks the appointment or default. This parate execution can be considered as a practical confiscation of procedural law that, without going through formal courts and legal proceedings, allows the sale of mortgaged real estate. Thus, such procedure is also known as a non-trial procedure.

Default due to non-performing loans is still frequently encountered due to the non-fulfillment of the debtor’s liabilities, even though it has been established together with the creditor in a single agreement. In the case of the agreement, the occurrence of a meaningful default does not comply with a duty stipulated in the agreement, whereby a default indicates a condition in which the debtor does not perform or discharges his duty so that it can be blamed for being an intentional discharge by the debtor or in forced circumstances.

Execution is the implementation of the verdict in which the requested execution verdict is the verdict that already has permanent legal force (*in kracht van gewijsde*) (Sutarno, 2012) A verdict that cannot be countered against verset, appeal or cassation, or in other words execution can also be said to be a fulfillment of achievement by a losing party to a winner in a court case by a court of law. In execution due to default, the transfer of receivables can be done by cessie. In the case of receivables, under the terms of the law cessie is a means of transferring receivables of intangible property.

Execution is a fulfillment of achievement by a losing party to a winner in a court case by a

court of law. The law of execution is a law that regulates the execution of a judge's decision. Execution in relation to the mortgage is not a real execution but will be related to the sale by way of auction of mortgage object, which then the result is paid to the creditor holder of the mortgage rights, and the rest is returned to the debtor.

Thus, in the event that the debtor breach of promises and suffers a default, then the registration process of land rights at the local Land Office has not been completed so that the right to land to be the object of the bank guarantee has not been certified, hence based on the result of the interview with bank officials states that if the bank position as a creditor does not have rights to the land, then the bank shall have no preference right, where the preferred rights of other creditors because the guarantee on the land has not been certified so that it does not have permanent legal force.

Concurrently, therefore to minimise the risks that occur when the requirements and conditions on the prospective borrower should be more tightened which can be done only to the debtor through a repeat order or if the debtor has been a debtor with a good record and become an existing debtor that has been assessed and the bank must check that registration of land rights which means due to the debtors positive record, means it can immediately be directly converted with a certificate or behind the name without a lawsuit from another party. Finally, the debtor submits the registration of the land certificate to the bank to be tied to the mortgage right through a notary partner of the bank concerned.

The execution of a mortgage right which is the sale of the Deposit Insurance object must be made through a public upfront sale, or through an auction (Article 1 Number (1) UUHT), Then through an open auction sale, it is expected to be obtained a fair price, thus attracting other participants. This is one manifestation of the protection of the law to the guarantor.

If the debtor that suffered breach of promises and experienced default while the object of land guarantee is in the process of land registration and this process has not been completed in the local Land Office so that the certificate of Insurance Rights has not been based on interviews with bank officials. Steps to be taken are (1) request a surrogate guarantee that can be tied with Mortgage Right, (2) if the above does not exist then the debt collection effort must be executed, and (3) if within the agreed time the debtor cannot pay then the bank as a creditor party generally files a civil or criminal lawsuit including filing the lawsuit of bankruptcy.

Default or non-performing loans can be settled in two ways, namely by: Non-Litigation and Litigation. Dispute resolution with out-of-court channels is called Alternative Dispute Resolution. In completion through this path generates "win-win solution". The best solution in both creditors' and debtor's side is not the same as in a court-based settlement where defeating one party and winning another, which will have a negative impact on a customer's

business development.

In this case, restructuring and rescheduling can be done to improve the credit agreement. In addition, changing the terms of procurement of credit guarantees so that the bank is obliged to ask the debtor to provide assurance that the type and value of the sale are acceptable to the bank can be done so consequently the debtor is also obliged always to submit financial reports periodically. It should also be noted that Article 1338 Book of Civil Law (*Kitab Undang-undang Hukum Perdata* or *Burgerlijk Wetboek voor Indonesie*), states that all legally made agreements act as regulations for those who make them. Such agreements shall not be withdrawn other than by mutual agreement or for reasons which the law expressly provides. The agreements shall be carried out in good faith.

Furthermore, Article 66 UU No. 30/1999, states that banking is a scope of disputed disputes where disputes which, by law and by law, are fully controlled by the disputing parties to which peace may be held. Article 5 UU No. 30/1999, states that disputes that can be resolved through arbitration are merely disputes in the field of trade and on rights which, under laws and statutory regulations, are fully controlled by the parties to the dispute and disputes that cannot be resolved through arbitration are disputes under the law of non-peaceable disagreements.

The settlement of non-performing loans through litigation, especially in courts, is often disregarded because the process is quite convoluted, which takes a long time and costs quite a bit. The settlement of non-performing loans through litigation is divided into two, namely through State Agency for Receivables and State Auctions (*Badan Urusan Piutang dan Lelang Negara* or BUPLN) if the loan is derived from a State-owned Bank (*Badan Usaha Milik Negara* or BUMN). Contrastly, these proceeding are undertaken through the District Court if the non-performing loans are from a privately owned bank.

Moreover, Article 14 UUHT states: The certificate of mortgage contains titles (or *irah-irah* word” For the justice based on One God”, which replaces the gross deed of mortgages that have *irah-irah* “On behalf of Justice” has the same executive power as the court decision which has obtained permanent legal force. If the debtor holds a mortgage certificate, if the debtor breaches the creditor, then he/she may apply for direct execution of the guarantee without having to file a lawsuit, and the bank has the position of creditor preference or position in the first rank.

Conclusion

In providing its credit facilities, the bank, as the creditor to the customer, made a credit agreement followed by a guarantee agreement. The object of guarantee in the form of land should be the land of certified status, meaning that the land to be used as the security object

must have been registered first to the local Land Office and the land to be the guarantee is clear from disputes as well as having clear ownership status. If the land is clean and has been certified it can be tied up with mortgage right so that with the right of the dependent then the creditor has the right preference and if the debtor is experiencing default it can be done in litigation and non-litigation that is by way of either deliberation and agreement.

Based on the results and discussion above there is an element of risk that will be faced by the bank as a creditor because it is mentioned that the credit guarantee in the form of land should be land that has been completed so that it holds certified status and has the power and executorial rights or the bank has permanent legal force because it can be tied with a mortgage right. Moreover, the nature of the land registration in its law is very important in relation to the protection of the law, which can provide legal certainty about the plot of land, and the location of the land (Article 3 and 4 Government Regulation No. 24/1997 about Land Registration).

Legal protection to the creditor side of the mortgage right in the case of default due to uncertified land guarantee that has unfinished land registration places the bank as a creditor domiciled as a creditor of concurrent not a creditor of preference whose position is preferred from that of other creditors. In the case of the creditor against debtor default because the process of land registration has not been completed, then the bank, as the creditor, can choose the process of dispute resolution through alternative channels of legal dispute through mediation.

Recommendation for the future research is to increase the prudential principle of the bank in giving credit for the object to be collateral in the form of land must have been certified to be able to provide legal certainty so that if the debtor suffered a pledge injury and a default will give the preferred position to the bank. Notary or PPAT in order to cooperate with a legal bank to remind debtor candidates to not process credit before the land that will be used as collateral is certified. Notary or PPAT of the bank's partner to immediately process the land registration to the local Land Office (*Badan Pertanahan Nasional* or BPN) and often check the Land Agency for the process to be completed.

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