Provision of Corporate Guarantee Between a Bank and *Commanditaire Vennootschap* as Debt Insurer

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Abstract

This study was to find out the provision of corporate guarantee between the bank and limited partnership as the guarantor based on the corporate guarantee deed. This study used a normative juridical method emphasizing the science of the law by examining the prevailing legal norms in society. Using this method, it was concluded that the legal consequence of the corporate guarantee deed between the bank and limited partnership as a corporate guarantor is an agreement that binds the partners of limited partnership. In addition, legal protection for the bank is by changing the position of limited partnership's partners as a personal guarantee.

Keywords: *Corporate Guarantee*, *Limited Partnership*, *Bank*, *Personal Guarantee.*

A. INTRODUCTION

Developments in the economic sector encourage people to continue to develop their business ideas so that they can compete with other business actors (Kurniawan, Nugraha, Putra, Taniady, & Jansen, 2022). Business actors can be individuals or in the form of business entities. One of the non-incorporated business entities known is the Limited Partnership or *Commanditaire Vennootschap* (hereinafter referred to as CV) (Lerner & Nanda, 2020). The basis of CV regulation is regulated in Article 19, Article 20, Article 21, and Article 32 of the Commercial Code (hereinafter referred to as KUHD). There are several types of CV capital sources to run its business, which can be viewed from an external and internal perspective (Agustin, 2022). Internal capital sources are derived from the capital input (*inbreng*) of the management, and external capital sources can be through loans from banking institutions or non-banking institutions with certain guarantees (Aspan, 2020).

Banks as parties that channel funds certainly need certainty that the credit provided is used as required and can be returned safely (Kurniawan, Nugraha, Abrianto, & Ramadhanti, 2020). Security measures taken by the bank are by requiring a guarantee (Asgher, 2018). The guarantee agreement is classified as a personal guarantee which is often used in banking practice, where the guarantee given by an individual is known as a personal guarantee, while the guarantee provided by a legal entity is known as a corporate guarantee (Nugraha, Murti, & Putri, 2019). A personal guarantee is an agreement between a debtor (creditor) and a third person to guarantee the fulfillment of the debtor's obligations. In this case, it can even be held outside (without) the debtor's knowledge(Arnanda, Ardhan, & Khoirunnisa, 2023). The

purpose of this guarantee is to ensure the certainty of the fulfillment of the obligations of the debtor, whose fulfillment is guaranteed as a whole or up to a specific part, the property of the insurer (guarantor) can be confiscated and auctioned according to the provisions regarding the execution of court decisions (Corredera-Catalán, di Pietro, & Trujillo-Ponce, 2021).

In the guarantee agreement between the guarantor and the bank, there is no obligation to be agreed in the form of a notarial deed (Mashdurohatun, 2021). Article 1824 of the Indonesian Civil Code determines that the debt guarantee is not presumed but must be made with an express statement (Claudia, Liman, & Rifai, 2023). This means that the guarantee must be explicitly stated in a notarial deed or under the hand. Furthermore, in practice, it was found that an insuring agreement was made, like in the form of a Corporate Guarantee Deed, Number 35, made before Notary IA, in which a non-legal entity became the guarantor/insurer. This non-legal entity was in the form of a CV. The implementation of this deed begins with making a letter of order by the bank given to the Notary. The order letter accommodates the process of providing guarantees so that the Notary has a handle to carry out what the bank asks for. The bank always puts the agreement as a notarial deed to protect the bank, given its perfect evidentiary power.

The Corporate Guarantee Deed states that CV. DR has bound itself as the guarantor to the bank as the creditor to provide collateral as a corporate guarantee. Article 12.1.1 of the deed stated that "Guarantor is a business entity with legal entity status that is legally established ...". This will undoubtedly affect the responsibility of CV. DR who acts as guarantor to the bank when the debtor defaults. Notaries are authorized to provide legal counseling to ensure the legal certainty of deeds in relation to their profession as public officials.

The existence of a CV as an unincorporated business entity determines that the CV is not a legal subject, so that the CV's assets are not separate from its allies, which also results in the CV being unable to act alone (Devi Yustisia Utami, 2020). The position of CVs can be seen in practice and court decisions.

Supreme Court Decision No. 879K/Sip/1974 states (Keizerina & Azwar, 2020): In Indonesia, the Company Komanditer or CV, is not an entity, meaning that the body in legal traffic is not yet a separate legal entity apart from the members of the Persero management, who can perform legal acts in trade are members of the management, so that in the event that the CV will sue in court or also if it is sued, then the one who sues is not the CV, but the members of the company.

In other practices, some court decisions still include CVs acting alone as plaintiffs or defendants in judicial proceedings (Indra, Fahamsyah, & Pratama, 2020). In this case, CVs are often equated as civil law subjects that can take legal actions and are legally responsible for third parties. In Decision No. 587PK/Pdt/2007 regarding a dispute over the unilateral cancellation of an agreement, the CV was named as the defendant (Setiawan, 2023). The lawsuit only named the CV as the defendant without its owner or management. This case shows that CVs can be treated as litigants in court

like civil law subjects, therefore, it is necessary to review the role of CVs as corporate guarantees based on the relevant laws and regulations in Indonesia.

B. METHOD

This research starts from an understanding that research essentially includes collecting, managing, analyzing, and constructing legal materials, all carried out systematically and consistently (Aldi, Tanbun, & Nugraha, 2019). The type of research used is normative legal research, which examines written law with various aspects such as theory, history, philosophy, comparison, structure and composition, scope and material, consistency, general explanation and explanation of each article, formality, and binding force of legislation (Marzuki, 2008).

Normative legal research has several characteristics, namely (Suhaimi, 2018): a) The use of internal theoretical frameworks related to law, such as laws or government regulations; b) The legal material used is secondary legal material obtained based on literature studies; and c) It often uses a qualitative form of analysis by referring to a conclusion as a statement or explanation.

Based on the explanation above, the research method used is the normative legal research method, which is to research and pour this discussion as a legal research method. The use of this normative research method is motivated by the suitability of the theory with the type of research needed.

The problem approach used in this research is a statute and conceptual approach. The statute approach is an approach that is carried out by examining all laws and regulations that are related to the legal issue at hand (Nugraha, Izzaty, & Putri, 2019). The conceptual approach is an approach that departs from the views and doctrines that develop in legal science (Harding, 2021).

C. RESULT AND DISCUSSION

1. Legal Effects of the Insuring Agreement between the Bank and the Limited Liability Company as the Debt Insurer

Collateral in relation to banking, arises to guarantee the debtor's indebtedness to the creditor, which is given to ensure the fulfillment of the performance due to the agreement of the debt and credit agreement as the main agreement between the parties (Chen & Kao, 2011). The guarantee must be convincing enough and provide legal certainty so that the bank itself can execute the primary purpose of the guarantee (Kusuma, 2014).

The insuring agreement contains(Gusti et al., 2020): a) *Borg* acting as a third party; b) Insurers are granted in the event of a creditor's interest; c) *Borg* binds itself to fulfill the debtor's obligation when the debtor defaults; and d) There is an agreement with conditions.

Debt settlement agreement has 3 (three) related parties, namely the creditor, who acts as a credit provider, then the main debtor, namely the debtor who is the debtor, and the third party as a guarantor or debt insurer, who has bound himself to fulfill the performance of the main debtor if he cannot fulfill it (Sang, Kadek,

Dewintha, & Purwanti, 2019). The insuring agreement does not designate certain assets as collateral in fulfilling its obligations, so the creditor needs to know about the debt insurer's assets, which will impact the realization of the debt insurer in the future. This guarantee agreement is not required in a particular form such as Fiduciary and Mortgage Rights which need an authentic deed (Siswanto & Sofjan, 2013). However, to facilitate proof, creditors often make it in written form with an authentic deed. In this case to prevent the emergence of a denial in the future, especially from the insurer himself.

A guarantee agreement can be given in 2 (two) forms, namely personal guarantee and corporate guarantee (Mayordomo, Moreno, Ongena, & Rodríguez-Moreno, 2021). Both have principles that are not different, namely the rights and obligations of the guarantor (guarantor) in both types of coverage, but the difference is related to the subject of the perpetrator (Anisah, 2002). Personal guarantee *is* given if the insurer is an individual, while corporate guarantee *is* given if the insurer is a legal entity. Corporate guarantee is basically an individual guarantee as referred to in Article 1820 of the Civil Code, namely the existence of an individual guarantee agreement is said to occur if there is a third party who is willing to become a guarantor (*borg*) for the debtor's debt and the creditor's agreement is then formed in an agreement known as an individual agreement.

More explicitly, in a corporate guarantee that can be an insurer is only a business entity that is incorporated, namely the separation of wealth between the company and its management. There is a clear difference between a legal entity and a business entity that is not a legal entity, so it cannot be equated in its position as an insurer. The requirement of a legal entity for a corporate guarantee is a form of legal certainty with the intention of providing this guarantee, namely to guarantee the fulfillment of the performance of the debtor, which is guaranteed to be fulfilled entirely or up to a certain part, the property of the borg (guarantor) so that it can be confiscated and auctioned according to the provisions regarding the execution of court decisions, while the CV does not essentially have property that is executed considering that the property is fully owned by its partners.

In practice, Deed of Corporate Guarantee No. 35, made before Notary IA, lists a Limited Liability Company as the insurer of the debtor's debt. Article 12.1.1 of the deed states that "The guarantor is a business entity with the status of a legally established legal entity ...". Article 1827 of the Civil Code requires that in order to become a guarantor (*borg*), the guarantor must meet the criteria of being capable of acting, capable of fulfilling its obligations to creditors and domiciled in the territory of Indonesia (Putriyanti, 2017).

The concept of capability can be said to have a meaning related to a person's ability to take into account the consequences and legal consequences of the actions he takes. Capability is often referred to as the main factor when wanting to do something in society in general. Legal capacity can be interpreted as a person's ability in relation to the rights and obligations to perform a legal act with the consequences contained in the laws and regulations. This capability can be interpreted as the possibility to

perform independent legal actions that have an impact on the binding between oneself and others which cannot be contested. A person's ability to perform a legal action can be measured, namely if from a person (personal), measured by the age limit of adulthood while *rechtspersoon* (legal entity) can be measured from its authority (Anand, Putri, Nugraha, Hartono, & Pusparani, 2022).

Legal subjects regulated in the Civil Code consist of 2 (two) types, namely, humans (*naturlijk persoon*) and legal entities (Diani & Kusuma, 2020). A legal entity must meet the formal and material requirements. According to Article 1 point 1 of the Regulation of the Minister of Law and Human Rights Number 17 of 2018 concerning Registration of Commodity Partnerships, Firm Partnerships, and Civil Partnerships, CV is a partnership established by one or more commodity partners with one or more complementary partners, to run a business continuously.

CV can be said to have not fulfilled all formal and material requirements. The formal requirements relate to the establishment of the CV, for the material requirements themselves there are 4 (four), namely: 1) The existence of a separate property between the CV and its allies; 2) Has a specific purpose; 3) Have an interest; and 4) The existence of a regular organization

The KUHD does not regulate the establishment of CVs, while the material requirements in the form of the existence of separate assets between CVs and the allies are not fulfilled in accordance with the expert doctrine, so CVs are not legal entities that can act as legal subjects. The CV acting as debt insurer in the Corporate Guarantee Deed does not meet the requirements regarding the capacity to be an insurer as intended in Article 1827 of the Indonesian Civil Code (Adnan, Syahfitri, & Ridwan, 2023).

The requirements for an entity to be categorized as a legal entity are: 1) The existence of separate assets; 2) The existence of a specific goal; 3) Self-interest; 4) The existence of an organization that is organized and complies with laws and regulation; and 5) Has been registered as a legal entity in accordance with applicable laws and regulations.

It is more firmly concluded that the characteristics of a legal entity are the existence of separate assets between the legal entity and its management, which as a result of this separation of assets this legal entity can participate in carrying out legal acts like a *naturlijk persoon* so that the owner of a legal entity is only liable to the extent of the assets included in the company.

Suppose the CV as an unincorporated business entity has made a guarantee agreement and agreed to bind itself with the bank as the creditor. In that case, the agreement applies as law to the parties in accordance with the principle of *pacta sunt servanda* contained in the provisions of Article 1338 of the Indonesian Civil Code (Anand, 2011). CV as an unincorporated business entity acting as a corporate guarantee will have implications for the responsibilities of CV allies. This guarantee agreement will bind the CV allies, in relation to active partners, the responsibility is up to personal assets, while passive allies are only limited to the capital issued.

2. Legal Protection for Banks against the Position of Limited Liability Company as Debt Insurer

Banking can be said to be one of the financial institutions that have strategic value in a country's economy (Park & Kim, 2020). Indonesian banking in carrying out its functions will be based on the principle of prudence, considering its primary function is as a collector and distributor of public funds. In connection with providing bank credit to the public, there is an essential aspect regarding collateral. Debt collateral is a requirement in granting credit, considering that channeling credit in the community is a high-risk activity in the banking world. Credit guarantees have an essential role in securing bank funds channeled to debtors through lending.

The risk of default from the debtor is a credit problem that can occur in paying the debt. Generally, the causes of non-performing loans as a result of debtor default are caused by the following factors:

a. Debtors who do not act in good faith
   In this case, in a granting of credit, it cannot be ensured that all debtors have good intentions (Kusmiati, 2020), often credit applicants do not carry out honestly their purpose in borrowing credit at the bank. For example, when applying, it is stated that the purpose is for working capital, but when credit has been obtained, the disbursement is made for personal matters.
b. Debtors who cannot manage credit
   The lender, in this case the bank, is not closed to the possibility of neglecting to assess the debtor's ability to manage credit, which results in mid-credit, the debtor becomes a default due to its limitations to manage credit from the bank.
c. The existence of a disaster against the debtor
   Debtors in running their business do not always run smoothly, often calamities can be unavoidable which can result in debtors experiencing obstacles in fulfilling their obligations.

Regarding defaults that the debtor may commit, the bank will provide legal protection for him as a creditor. Legal protection can be defined as protection by law or using legal institutions and means. There are several ways of legal protection, among others:

a. The creation of a regulation, in this case, has the aim to: Granting rights and obligations; and Guarantees the rights of legal subjects
b. Implementation of law enforcement through: State administrative law is to prevent violations of the rights of legal subjects; Criminal law solves a legal problem by providing legal sanctions in the form of criminal sanctions and penalties; and Civil law that serves to restore rights (*curative*) by paying compensation or damages.

The form of legal protection is divided into 2 (two), namely (Almaida, 2021):

a. Preventive Protection
   This legal protection is carried out by providing an opportunity for legal subjects to express an opinion or provide an opinion regarding their objections before forming a government decision, so that this protection is to prevent legal

problems from occurring. This preventive legal protection is so that the government can act based on the principle of prudence in making legal decisions that have an impact on society.

b. Repressive Protection

Repressive legal protection is used in a dispute or legal problem. This is evidenced by various bodies that partially handle legal protection for the people.

Indonesian law has several ways to resolve a dispute, which can be done by litigation or non-litigation. The court process is used to resolving a conflict, dispute, violation or dispute that occurs between or related to 2 (two) parties, in this case an alternative dispute resolution process is needed which provides justice to the community, especially for the aggrieved parties.

Non-litigation is a dispute resolution outside the court, in this case, as found in Law Number 30 of 1999, which states that dispute resolution can be carried out based on procedures that have been agreed between the parties, which are carried out in several ways, namely consultation, negotiation, mediation, conciliation, or expert judgment. Litigation can be said to be a dispute resolution carried out through court channels. Litigation is a lawsuit against an existing conflict in which the parties give a decision-maker two conflicting options. Article 24 of the 1945 Constitution of the Republic of Indonesia states that judicial power is exercised by a Supreme Court and the judicial bodies under it in the general court, religious court, military court, state administrative court, and the Constitutional Court. The provisions of Article 24 imply that dispute resolution through court channels by filing a lawsuit. A lawsuit is a right that the plaintiff can obtain in relation to making claims against the defendant through court channels.

A lawsuit can often occur when a party is suspected of committing an offense whose actions cause harm to other parties so that a problem arises. In this case, it can be equated with a debtor who defaults on failing to fulfill debt payments as determined by the previous period. In this case, the bank as a credit can do several things to prevent losses that can occur later. According to Bank Indonesia Regulation Number 13/9/PBI/2011 Article 1 point 7 related to efforts made by banks to assist debtors to rescue non-performing loans can be done, among others, as follows (Diastama, 2022; Park & Kim, 2020):

1. Rescheduling is the bank's step to change the terms of the signed agreement regarding the credit payment schedule and period and the nominal amount of installments that must be fulfilled to relieve the debtor.
2. Reconditioning is a step the bank takes by making changes to some or all of the terms of the credit agreement which are not limited to changes in the installment schedule or credit period. However, other things but are limited to providing additional credit.
3. Restructuring is a step the bank takes by changing the terms of the credit agreement, namely providing additional credit or converting all or part of it

into company equity or bank equity, which is carried out with or without *rescheduling* or *reconditioning*.

In relation to debtors who cannot repay their debts, the bank can first make efforts to resolve disputes outside the court, which can do several things, namely rescheduling, re-requirements, and rearrangements. Furthermore, in the case of bad debtors who use corporate guarantees where the guarantor is a CV-shaped business entity, changes can be made regarding the credit agreement and the previous corporate guarantee agreement. The corporate guarantee agreement can be changed to a personal or individual guarantee known as a Personal Guarantee. This is in accordance with the position of CV, which is not a legal entity but a business entity. The liability of a CV extends to the personal assets of its active allies, so it is appropriate for the active partners to act on their behalf to guarantee the debtor's debt.

Regarding the bank's efforts to resolve defaulted debtor disputes by litigation or court, it must first be ascertained who will be sued. Furthermore, for a debtor who uses a CV business entity as a debt insurer, for which an agreement is made in the form of a corporate guarantee agreement (Corporate Guarantee), the bank, as the plaintiff, can demand debt recovery by filing a lawsuit against the CV ally. A lawsuit filed against the CV management will result in the personal assets of the allies being confiscated to pay off the debtor's debt.

D. CONCLUSION

CV is categorized as an unincorporated business entity which causes CV to have no personal property. Therefore, its position as a guarantor cannot be called a *corporate guarantee.* Ownership of CV assets only exists in its allies so that CVs that have bound themselves as debt insurers in the guarantee agreement only bind the partner of the CV, in the case of active partners, the liability is up to their assets, while for passive partner it is only limited to the capital issued.

Banks, in resolving disputes between defaulting debtors and CVs who act as insurers of their debts, can be carried out by non-litigation and litigation channels. Banks can take the non-litigation route by rescheduling, reconditioning, or restructuring. Against a lawsuit to the court, the bank can demand debt repayment by filing a lawsuit against the CV ally, namely demanding confiscation of the assets of the CV ally.

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