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Pratiwi, Nur Mawadah; Djumardin, Djumardin; Hirsanuddin, Hirsanuddin

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Personal Guarantee as Legal Protection as a Result of Debtor Default in Credit Agreements

Nur Mawadah Pratiwi [1], **Djumardin** [1], **Hirsanuddin** [1]

[1] *University of Mataram*
Jl. Majapahit No 62 Mataram, Nusa Tenggara Barat, Indonesia

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Corresponding Author:
mawadahpratiwi@gmail.com

Abstract. This study analysed the liability of personal guarantees and legal protection for personal guarantees due to debtor defaults in credit agreements. This normative legal research examined primary, secondary and tertiary legal materials. Legal materials were collected by document study and analysed normatively and prescriptively.

Forms of legal protection for personal guarantees include, such as the guarantor can ask for a return from the debtor in the condition of compensation for all losses that the guarantor may suffer as a result of non-fulfilment of obligations by the debtor; the guarantor only serves as a companion to the debtor, in the sense that as long as the debtor is current, there are no problems in the loan instalments until they are paid off. There are efforts to save credit or credit restructuring before the execution of particular collateral objects belonging to the debtor or collateral belonging to personal guarantees.

The bank, as the creditor, should provide an understanding to the prospective guarantor about his function and position as a guarantor to avoid the risk of loss on the part of the guarantor. The debtor should determine if the guarantor is adequate in finances and understands his position as a guarantor. The guarantor should have good faith in helping the debtor in the event of default so that the implementation of the credit agreement can run smoothly until the credit is repaid so that, in the future, it can carry out all responsibilities to the fullest. Further, in the personal guarantee agreement, it is best if the heirs of the personal guarantee are notified in advance when the deal takes place to avoid inheritance disputes.

Keywords: agreement; credit; default; legal protection; personal guarantee.

INTRODUCTION

Guarantees in Civil Law can be divided into two types, namely material guarantees and individual guarantees [1]. A material guarantee is a guarantee in the form of an absolute right to an object, which has the following characteristics: it has a direct relationship to particular things from the debtor, can be defended against anyone, always follows the object (*droit de suit*) which means that right will follow the object wherever objects that exist, have a priority principle, namely rights that are born first will be prioritised over rights that are taken later, droit de preference are preferences and can be transferred [1]. The party with this material right in terms of repayment must take precedence over payment, and the claim is in the form of a material claim where the guarantee holder is domiciled as the preferred creditor, namely the creditor whose repayment takes precedence [2].

An individual guarantee is a guarantee that creates a direct relationship between specific individuals to the debtor's assets in general [1]. Chapter XVII Book III BW regulates personal contracts with the title underwriting or borgtocht. Birth rights are relative rights that can only be defended against certain people bound by an agreement [2]. In an individual guarantee, there are no specific objects attached in the agreement because what is bound in the deal is the third party's ability to fulfil the obligations of the debtor, so that if the debtor breaks his promise, in the

individual guarantee agreement the general guarantee provisions stipulated in Article 1131 BW and Article 1132 BW apply.

Guarantees in banking practice are used as complementary guarantees, which are complementary to existing guarantees. It can be said that an individual guarantee is associated with the main agreement. So, it can be concluded that this personal guarantee agreement is assessor [1].

The personal guarantee aims to ensure that the guarantor's duties for the debt arrangement that the debtor has denied are settled and fulfilled. This is the best alternative if there are worries about the debtor's ability to fix or pay debts or if he lacks sufficient substantial collateral. In contrast to material guarantees, individual guarantees do not mention certain assets belonging to the guarantor that are used as collateral for the settlement of the debtor's obligations to the bank/financing institution. The above impedes legal practice when a debtor defaults, as individuals cannot be sold or auctioned off. Even so, the material rights of the guarantor can be sold or auctioned, as in individual guarantees, there are no specific objects belonging to the debtor that are bound, but what is attached is the ability of third parties to pay off the debtor's debt in full or to a certain extent.

One example of the Personal Guarantee case that the author used in this study occurred on Nusantara Sitepu and Masta Br. Sebayang and Demon Tarigan, Robina Br. Tarigan, Dewi Herlina Br. Tarigan, where the three were the heirs of the late Mbue Malem Tarigan. On December 1, 1999, the late Mbue Malem Tarigan entered a personal guarantee in the credit agreement No 00464/PA/XII/1999 No A/C 134-30-0346 conducted by Masta Br. Same with Nusatara Sitepu as the Director of PT BPR Solider. From the agreement, Masta Br. Sebayang provides guarantees in the form of fiduciary contracts, namely 1 (one) unit of 4 (four) wheeled blue Toyota branded motor vehicle, type of goods car, Frame No RN 25-288692, Engine No 12R-1475250, Police No BK 9827 DE, on behalf of Mbue Malem Tarigan, and provision of individual guarantees by Mbue Malem Tarigan. Over time, Masta Br. Sebayang that the debt was not repaid at the due date starting from October 1, 2000, and even up to October 20, 2010. And the debtor was only able to pay part of the debt. Later, Nusatara Sitepu, as Director of PT BPR Solider, submitted a lawsuit to the Court at the Lubuk Pakam District Court. As a guarantor, the late Mbue Malem Tarigan (Demon Tarigan, Robina Br. Tarigan, Dewi Herlina Br. Tarigan) was also held accountable so that he was a defendant simultaneously with Masta Br. Sebayang.

Based on the background above, this study aimed to answer the formulation of the problem: How is the personal guarantee liability due to the debtor's default in the bank credit agreement? And what is the legal protection for personal guarantees due to debtor defaults in bank credit agreements?

Literature Review

Legal Responsibility Theory. The theory of legal responsibility is a theory that analyses the burden of legal subjects or actors who have committed unlawful acts or criminal acts to bear costs or losses or carry out crimes for their mistakes or negligence [3]. Wright developed a theory of responsibility, which was later called interactive justice. Interactive justice is a theory that talks about: "a person's negative freedom to others in their interactions. The essence of interactive justice is compensation as a device that protects everyone from harmful interactions, commonly applied in tort, contract, and criminal Law. According to Wright, the limitation of civil law liability is determined by the presence or absence of a specified standard of conduct to serve as the basis for an assessment consisting of 1) no worse-off limitation, 2) superseding cause limitation, 3) risk play-out limitation" [3].

Legal Protection Theory. The term legal protection theory comes from English, whereas in Dutch it is called *theorie van de wettelijke bescherming*, and German is called *theorie der rechliche Schutz* [3]. Legal protection, according to [3], is the "Protection of dignity and recognition of human rights owned by legal subjects in a legal state based on the legal provisions in force in that country to prevent arbitrariness, so that it can be said that the law functions as a protection of human interests" [3].

Legal Certainty Theory. According to [4], legal certainty contains two meanings, namely first, some regulations have a general nature to make an individual aware of what actions may and may

not be performed. At the same time, the second meaning is legal security for an individual from the arbitrariness of the government because, with these general regulations, individuals can know what can be imposed and what can be done by the state against an individual.

Legal certainty can also mean things the Law can determine in some issues. Legal certainty guarantees that the Law will be enforced, that those entitled will obtain their rights and that decisions can be implemented. Legal certainty is a legitimate protection against arbitrariness, meaning a person can get what he expects.

Dispute Resolution Theory. As in law No 30 of 1999 concerning Arbitration and Alternative Dispute Resolution defines Alternative Dispute Resolution "as an institution for resolving disputes or differences of opinion through procedures agreed upon by the parties, namely settlements outside the court by way of consultation, negotiation, mediation, conciliation, or expert judgment." The parties themselves can resolve Alternative Disputes Resolution without interfering with other parties or involving third parties [5]. Mediation is a dispute resolution mechanism involving a neutral third party, in the sense that the intended third party (the mediator) is not competent to make decisions. The mediator is only allowed to offer alternative solutions, and the parties themselves ultimately make a decision [5].

Legal Protection. According to [6], legal protection is: "Protecting human rights (HAM) that are harmed by other people and this protection is given to the community so that they can enjoy all the rights granted by law". Meanwhile, the author states, "Legal protection is Efforts or forms of services provided by law to legal subjects and things that are objects that are protected". Theoretically, legal protection is divided into Preventive protection and Repressive protection.

Personal Guarantee. The term personal guarantee comes from the word *borgtocht*. Meanwhile, it is also known as an immaterial guarantee. The definition of personal guarantee (individual guarantee) can be seen from various views and opinions of experts. The author [6] defines immaterial guarantees (individuals) as "Collateral that gives rise to a direct relationship with certain individuals, can only be maintained against certain debtors, against the debtor's assets in general" [6]. In this case, the elements of individual guarantee consist of Having a direct relationship with certain people, Can only be defended against specific debtors and/or Against the debtor's assets in general.

Default. Default is not fulfilling or failing to carry out obligations as specified in the agreement between the creditor and the debtor [6]. In other words, they are not fulfilling the commitments agreed upon in the engagement. The default can be in the form of Absolutely does not meet the achievements; achievements made are not perfect; Late fulfilment of accomplishments; and Do what is prohibited in the agreement to do [7].

Creditors and Debtors. The meaning of creditors and debtors is that creditors are banks or other financial institutions with receivables due to agreements or laws [8]. Debtors are people or business entities with debts to banks or other financial institutions because of contracts or laws [8].

Credit. According to Law No 10 of 1998 concerning Amendments to Law No 7 of 1992 concerning Banking, credit is "the provision of money or claims that can be equated with that, based on an agreement on a lending-borrowing agreement between the bank and another party, which obliges the borrower to pay off the debt after a certain period by giving interest."

New credit is launched after there is a written agreement, although it may be in a straightforward form between the creditor as the lender and the debtor as the credit recipient. This written agreement is often called a credit agreement (credit agreement, loan agreement) [9].

METHODS

This research is normative legal research examining legal norms or rules as a building system related to legal events. The source of legal material used in normative legal analysis was legal material. Legal materials studied and analysed in normative legal research consist of primary legal materials consisting of basic norms or principles, basic regulations, laws and regulations, and jurisprudence. The legal materials to be used in research on personal guarantee legal protection due to debtor default in credit agreements were positive legal sources in the form of laws and regulations.

The secondary legal materials to be used were those relevant to the research object, namely the legal protection of personal guarantees due to debtor defaults in credit agreements. As for this study, the authors used an approach relevant to the problem under study, namely the statute and conceptual approaches.

Primary legal material in the form of laws and regulations was collected through library research. The primary legal materials in this study were then compared regarding the legal protection of personal guarantees due to default by the debtor in the credit agreement. Secondary legal materials were journals, scientific papers, books and magazines. The secondary legal materials to be used were those relevant to the research object, namely the legal protection of personal guarantees due to debtor defaults in credit agreements. Meanwhile, the analysis in this study used a qualitative analysis method, namely by interpreting (interpreting) legal materials that had been processed.

RESULTS AND DISCUSSION

Personal Guarantee Liability Due to Debtor's Default in Credit Agreement

Implementation and Responsibility of the Personal Guarantee in the Case of Death. In the case that happened to Nusantara Sitepu and Masta Br. Sebayang and Demon Tarigan, Robina Br. Tarigan, Dewi Herlina Br. Tarigan, where the three were the heirs of the late Mbue Malem Tarigan. On December 1, 1999, The late Mbue Malem Tarigan bound himself as an individual guarantor (Personal Guarantee) in credit agreement No 00464/PA/XII/1999 No A/C 134-30-0346 conducted by Masta Br. Same with Nusatara Sitepu as the Director of PT BPR Solider. From the agreement Masta Br. Sebayang provides guarantees in the form of fiduciary contracts, namely 1 unit of 4-wheeled blue Toyota branded motor vehicle, type of goods car, Frame No RN 25-288692, Engine No 12R-1475250, Police No BK 9827 DE, on behalf of Mbue Malem Tarigan, and provision of individual guarantees by Mbue Malem Tarigan. Over time, Masta Br. Sebayang that the debt was not repaid at the due date starting from October 1, 2000, and even up to October 20, 2010. And the debtor was only able to pay part of the debt. Later, Nusatara Sitepu, as Director of PT BPR Solider, submitted a lawsuit to the Court at the Lubuk Pakam District Court. The late Mbue Malem Tarigan (Demon Tarigan, Robina Brother Tarigan, Dewi Herlina Brother Tarigan) as a guarantor is also held accountable so that he is also a defendant simultaneously with Masta Br. Sebayang.

In the decision, No 99/PDT.G/2010/PN-LP, the panel of judges considered the reasons for deciding the case, which will be explained in the description of the judge's considerations in the following decision:

1. Whereas the central issue, in this case, is the credit agreement between Plaintiff and Defendant, which Defendant has not paid.

2. Whereas because Defendants were never present at the trial even though they had been duly summoned, this case was examined and decided without the presence of Defendants (*Verstek*)

3. Whereas Plaintiff is the Main Director of PT Solider Rural Bank, on December 1, 1999, entered into a credit agreement with Defendant I by providing a loan to Defendant I for IDR 15.000.000. with instalments of 10 months and will end on October 1, 2000, so that the instalments IDR 1.500.000 per month and bears interest at 4% per month and a 1% proposition per 10 months

4. That the credit agreement was guaranteed by the husband of the Defendant, namely the late Mbue Malem Tarigan, by ensuring one unit of a blue four-wheeled vehicle, Toyota brand, type of goods car, frame No RN 25-288692, Engine No 12 R-1475520, No BPKB 2192647 B, Police No BK 9827 DE, having its address at Jalan Binjai Gg. Official No 8 Medan. It was registered in the name of Mbue Malem Tarigan by providing Power of Attorney to Sell.

5. That evidence, P-7, is a statement letter from Defendant I and her husband, The late Mbue Malem Tarigan will repay the debt until it is paid off.

6. That he proposed as a party, in this case, Defendants II–IV, who are the children of Defendant I and The late Mbue Malem Tarigan, because Mbue Malem Tarigan's Guarantor had died, so his heirs were included as parties.

7. Whereas, as acknowledged by Plaintiff in his lawsuit, Defendant I have paid principal instalments of IDR 3.620.000 and interest instalments of IDR 5.522.688.

8. Whereas if taken into account in the credit agreement agreed upon by Plaintiff and Defend-

ant, the principal debt amounted to IDR 15.000.000, but until late October 2000, Defendant had only paid the principal debt of IDR 3.620.000, so the primary obligation that had not been paid IDR 11.380.000. Likewise, for the interest that was promised, namely 4% x IDR 15.000.000 x 10 months = IDR 6.000.000, while the interest paid by Defendant I amounted to IDR 5.522.688, so the unpaid interest was IDR 6.000.000–IDR 5.522.688= IDR 477.312). So, the total that Defendants have not paid is Principal debt of IDR 11.380.000 + Interest IDR 477.312 = IDR 11.857.312.

9. Whereas from the considerations mentioned above, by not carrying out debt repayments within the period specified in the credit agreement, Defendants have committed acts of breach of promise (default).

10. Regarding the fine proposed by Plaintiff due to the late payment made by Defendant, it cannot be calculated because it does not mention the percentage of the principal loan or the instalments in the credit agreement. Regarding the 1% proposition, it is common to have been deducted from the principal debt, so it is not considered further and rejected.

11. Whereas because Defendants had been declared to have committed an act of breach of promise (default), Defendants were punished for complying with the contents of the credit agreement and paying off all of their debts to Plaintiff jointly and severally in the amount of IDR 11.857.312.

12. Whereas because the credit agreement has been submitted as collateral in the form of one unit of blue four-wheeled vehicle, Toyota brand, Frame No RN 25-288692, Engine No 12 R-1475250, Police No BK 9827 DE, on behalf of Mbue Malem Tarigan, The Defendant was sentenced to hand over the four-wheeled vehicle to Plaintiff to be sold as payment for an unpaid debt.

13. Whereas regarding the Collateral Confiscation of the four-wheeled vehicle that was submitted as collateral for the debt, and the Court did not place the Collateral Confiscation on the car because Plaintiff did not proceed with his application, then there is no need for further consideration and rejection.

14. Whereas against Plaintiff's lawsuit so that Defendants are subject to forced money if they fail to comply with the contents of this decision, because Plaintiff's case is against the payment of an amount of money, the forced cash cannot be imposed and must be rejected.

15. The same applies to the petite of Plaintiff's lawsuit so that this decision can be carried out immediately. Because this is not a sufficient reason, it must be rejected.

16. From the above considerations, it turns out that Plaintiff's lawsuit was only partially granted and rejected the rest of the case.

17. Because Plaintiff's lawsuit was granted in part, Defendants were on the losing side and were punished for paying the costs incurred in this case.

And decided to judge:

1. Settle this matter with *Verstek*.

2. Granted Plaintiff's claim in part.

3. Stating that Defendants had committed a default, namely not fulfilling their obligation to pay off all of their debts to Plaintiff, which should have been paid in full on October 1, 2000, by the Credit Agreement Letter No 00460/PA/XII/1999 No AC 134.30-0346 dated December 1, 1999, Receipt of Personal Guarantee Letter of Agreement Regarding Transfer of Property in Fiducia Power of Attorney to Sell each dated December 1, 1999.

4. Punish Defendants, therefore, to fulfil and carry out all engagements that arise based on the Credit Agreement Letter No 00464/PA/XII/1999 No A/C 134.30-0346 dated December 1 1999, Receipt of Guarantee, Personal Guarantee Jo Letter of Agreement Concerning Transfer of Property in Fiducia Jo Power of Attorney to Sell respectively dated December 1 1999.

5. Punish Defendants jointly and severally to pay off all debts to Plaintiff for IDR 11.857.312. immediately and all at once.

6. Sentenced Defendants to hand over 1 unit of a blue four-wheeled motor vehicle Toyota brand, type of freight car, Frame No RN 25-288692, Engine No 12 R-1475250, Police No BK 9827 DE, on behalf of Mbue Malem. The appeal to Plaintiff is instantaneous and unconditional.

7. Rejected the rest of the lawsuit.

8. Punish Defendants to pay the costs incurred in this case for IDR 1.541.000.

Based on the description above, according to the author, the decision issued by the panel of judges

is by the applicable regulations where the heirs are jointly and severally responsible. Because in the agreement, the guarantor for the individual (personal guarantee) has relinquished his privileges, the judge stated that all engagements are borne by Defendants responsibly. In contrast, when the guarantor has lost his rights, if in the future the debtor cannot settle his debt and is declared in default, then the guarantor joins in responsible. Here the guarantor has died, and then the heirs will be accountable.

This is undoubtedly inseparable from moral considerations, where if an heir releases or rejects an inheritance that has not been disclosed, then it is the same as expecting the heir to die. Regarding the status of heirs who have been denied, no one can fully recover from rejecting an inheritance. This is confirmed in Article 1065 of the Civil Code, which reads: "No one can be fully recovered from the refusal of an inheritance, except if the refusal occurs due to fraud or coercion."

Personal Guarantee Liability When the Debtor is Declared Bankrupt Due To Default. Law No 37 of 2004 concerning Bankruptcy and Suspension of Obligations for Payment of Debt (also known as UUK and PKPU) regulates guarantees, Article 141 paragraph 1, which reads, "Creditors whose receivables are guaranteed by a person, the guarantor can propose matching, the receivables after being deducted by payment received from the guarantor."

One example of a personal guarantee case in a bankruptcy case is decision No 72/PAILIT/2010/PN.NIAGA.JKT.PST.

This case began when Liem Iwan Yuwana signed the deed of *borgtocht* (personal guarantee) No 74 dated June 20, 2006, and the act of amendment No 56 dated April 6 2007. The signing of this deed guaranteed the implementation of PT Metalindo Perwita in connection with the credit facility received.

Since January 2009, PT Metalindo Perwita, as the debtor, experienced financial difficulties and was unable to fulfil his obligations to several creditors, one of which was PT Bank OCBC NISP, so that due to the inability of PT Metalindo Perwita, the creditor asked the Court to bankrupt PT Metalindo Perwita so that the settlement of creditors' receivables can be fulfilled.

The guarantee deed confirmed that Liem Iwan Yuwana replaced PT Metalindo as NISP's debtor and relinquished its privileges.

NISP claims that Iwan has a liability of IDR 44.86 billion as of October 11 2010. NISP, as the creditor has sent a subpoena after several times, the guarantor was summoned and given a warning, but did not show good faith in being accountable for his obligations to the creditor, so the creditor requested the Court to bankrupt also the guarantor from PT Metalindo Perwita because Liem Iwan Yuwana did not fulfil his duties.

From the bankruptcy cases described above, it can be concluded that the legal position of the guarantor or personal guarantee if the principal debtor is declared bankrupt, the guarantor is obliged to provide accountability to the creditor if the primary debtor cannot fulfil his obligations by the contents of the guarantee agreement agreed upon by the creditor and guarantor. If the guarantor does not show good faith in fulfilling his duties, the creditor can apply to the Court to bankrupt the guarantor or personal guarantee.

A debtor with a guarantor, personal guarantee, or borgtocht is responsible for bankruptcy cases directed at the principal debtor. In Article 1831 of the Civil Code, it is explained that "a guarantor or personal guarantee or *borgtocht* is not required to participate in and participate in paying creditors unless the main debtor is negligent and his assets have been confiscated and sold in advance to pay off his debts."

However, Article 1832 of the Civil Code provides an exception to Article 1831 of the Civil Code. A guarantor or personal guarantee or *borgtocht* may apply for a declaration of bankruptcy, apart from having relinquished his privileges if [10]:

1. If the guarantor has released his privilege to demand that the principal debtor's assets be confiscated and sold first.

2. If the guarantor has bound himself with the principal debtor on a joint responsibility basis.

3. The debtor can submit a response that only concerns himself personally.

4. If the debtor is in bankruptcy.

5. In terms of guarantees or guarantees that have been given based on a court order.

If Article 1832 of the Civil Code is not fulfilled, then the provisions of Article 1821 of the Civil

Code apply where a bankruptcy statement application cannot be filed without including a bankruptcy declaration application to the principal debtor or at least the primary debtor is already in a bankruptcy decision. In other words, a personal guarantee cannot be bankrupted before it is proven that the proceeds from the sale of the assets of the principal debtor who was declared bankrupt still have outstanding debts that cannot be repaid.

In the bankruptcy petition case between PT Bank OCBC NISP, Tbk and Liem Iwan Yuwana at the Central Jakarta Commercial Court, as seen from the deed of guarantee or borgtocht between Bank OCBC NISP, Tbk and PT Metalindo Perwita, which has a guarantor or personal security. In the guarantee deed, the bankrupt respondent, in this case, serves as a personal guarantor for the debt of PT Metalindo Perwita. By decision No 72/PAILIT/2010/PN.NIAGA.JKT.PST, The purpose of the deed of guarantee or borgtocht is to guarantee the payment of PT Metalindo to PT Bank OCBC NISP, Tbk, in connection with the credit facility received by the principal debtor (PT Metalindo) from PT Bank OCBC NISP, Tbk as the bankruptcy applicant in this case.

Based on the commercial court decision, it also appears that the position of the Bankrupt Respondent as personal guarantor (*borgtocht*) means that the bankrupt respondent guarantees and therefore promises and binds himself, for and at the first request of the bankruptcy applicant and without any conditions replaces the position of PT Metalindo as a debtor and/or pays immediately and simultaneously to the bankruptcy applicant for all debts and/or obligations PT must pay. Metalindo to the bankruptcy applicant, principal debt, interest, fees and other amounts must be paid based on the credit agreement.

As a result of the position of the bankrupt respondent, the bankruptcy respondent can also be said to be a debtor as stipulated in the provisions of Article 2, second paragraph of the *borgtocht* deed between the bankruptcy respondent and the bankruptcy applicant which confirms that the personal guarantee of the bankruptcy respondent is the primary obligation and debt of the bankrupt respondent himself and the consequences in this case, the bankruptcy applicant is not required to:

1. Billing to PT Metalindo Perwita.

2. File a case or sue PT Metalindo Perwita through the courts.

3. Apply for bankruptcy or liquidation determination of PT Metalindo Perwita;

4. Taking settlement from other guarantees held by the bankruptcy applicant in connection with the obligations of PT Metalindo Perwita is based on the credit agreement.

Based on the provisions above, it can be ascertained that the bankrupt respondent is also the primary debtor because the bankrupt respondent is together with the principal debtor, PT Metalindo Perwita binds itself jointly and severally. Per Article 1832 of the Civil Code, the bankrupt respondent can be sued for bankruptcy without confiscation and selling the assets of PT Metalindo Perwita to pay off its debts.

In this case, the exception can be seen from the guarantee deed or borgtocht between the bankruptcy applicant and the bankruptcy respondent, in which case the guarantor promises and binds himself without any conditions to replace PT Metalindo as the principal debtor. Based on this, the legal considerations of decision No 72/PAILIT/2010/PN.NIAGA.JKT.PST state that the bankruptcy respondent is identically attached to the main agreement. According to the Law, all obligations submitted to the principal debtor are guaranteed to be the same as the guarantor as the guarantor.

As such, we conclude that if the debtor/guarantor remains negligent in fulfilling his achievements, the creditor has taken a persuasive action against the debtor by giving a warning letter to the debtor. If the creditor has complied with all administrative procedures, the debtor's attitude is uncooperative. The creditor has the right to take final action, confiscating the collateral and conducting an auction. These steps attempt for creditors to obtain legal protection and certainty with collateral because the parties here are separate creditors.

If the principal debtor does not perform his duties to the creditor, then on the other hand, the personal guarantee is also responsible for the debts of the principal debtor, especially if a personal guarantee has relinquished its privileges granted by Law.

In our opinion, applying for a declaration of bankruptcy against a personal guarantee that re-

leases its privileges is problematic because the creditor may bankrupt a personal guarantee without first breaking the principal debtor. The problem is how private security can be bankrupt because of debts the principal debtor's debt. However, on the other hand, the principal debtor's financial condition is still healthy and able to pay his debts. Because it could be that the primary debtor is deliberately not fulfilling his achievements even though he can deliver his obligations, or there is no goodwill from the principal debtor. Because according to [11], the default (negligence) of a debtor can be of four types:

1. Not doing what he is capable of doing.

2. Does what it promises, but not as promised

3. Did what he promised but was too late

4. Doing something according to the agreement is not allowed to do. The main issue can be seen in Article 2 Paragraph 1 of Law No 37 of 2004 Concerning Bankruptcy and Suspension of Debt Payment Obligations, which authors believe that it is irrational because it allows creditors to declare bankruptcy the personal guarantee party even though its assets are more significant than the principal debtor's. It is still in a position to pay its debts.

Analysis Based on Accountability Theory. Looking at Personal Guarantee Responsibilities, in the author's opinion, it can be explained that in cases of filing for bankruptcy, there are three concepts of guarantor positions, namely:

1. The debtor is billed first. Then the Personal Guarantee can be billed when the debtor's assets are insufficient for payment, and the curator has executed the investments. The application is different but for the same debt.

2. The second is that the creditor directly submits a bankruptcy application to the Personal Guarantee Holder without submitting a bankruptcy application to the debtor first. This occurs because the Personal Guarantee holder has relinquished its privileges as stipulated in the BW, which can be billed directly against the debtor's settlement of debt first.

3. The creditor files the bankruptcy application against the debtor and the Personal Guarantee jointly and severally. In practice, this is often done by creditors to apply for settlement of receivables, but still on the basis that the Personal Guarantee has released its privileges by the promise contained in the deed of individual guarantee agreed upon by the creditor.

Based on this matter, the bankruptcy petition for the responsibility of the Holder of the Individual Guarantee, according to the statutory provisions, has not explicitly regulated legal certainty regarding the legal certainty of making a Personal Guarantee holder who can be declared bankrupt, however, the BW stipulates that the Personal Guarantee Holder may relinquish its privileges to be jointly responsible for paying off all creditor obligations without having to wait for the debtor to default. The debtor's assets have been executed. Still, regarding making the Personal Guarantee holder appear as a bankrupt debtor, no legal certainty regulates such. Thus the legal community still does not know that the individual guarantee holder has a sizeable impact on all collateralised debts, let alone being sued by creditors as debtors in a state of bankruptcy.

Legal Protection for the Personal Guarantee as a Result of Debtor Breach in Credit Agreement

Personal Guarantee Legal Protection. Legal protection can be interpreted as protection by Law or legal institutions and means. There are several ways of legal protection, including the following [12]:

1. Making regulations (by giving rules) which aim to:

- Provide rights and obligations;

- Guarantee the rights of legal subjects;

2. Enforcing regulations (by law enforcement) through:

- State administrative law that functions to prevent (preventive) the occurrence of violations of consumer rights, with licensing and supervision;

- Criminal Law functions to overcome (repressive) every violation of rules and regulations by imposing legal sanctions in the form of criminal sanctions and penalties;

- Civil Law functions to restore rights (curative, recovery) by paying compensation or compensation.

According to the author, preventive legal protection for personal guarantees should be carried out before the guarantee agreement. In agreeing, the parties involved, especially the guarantor, should have sufficient knowledge about the legal consequences of using personal guarantee guar-

antees. Thus, it is not only a guarantee based on the factor of trust in signing a private pledge, but at least it must be based on the principle of prudence and good faith in freedom of contract. If this is used, it can minimise the risks in the personal guarantee agreement [13]. *Borgtocht* is an accessory, but from the point of view of fulfilling obligations, it is a subsidiary, meaning that the guarantor's obligation to fulfil the debtor's debt occurs when the debtor does not meet his debt. If the debtor has fulfilled his debt obligations, the guarantor does not need to fulfil his obligations as a guarantor [14].

A debt guarantee or *borgtocht* is an agreement for the benefit of the creditor where a third party binds itself to fulfil the debtor's obligations to the creditor if the debtor concerned cannot fulfil his obligations or defaults.

As described above, guaranteed credit requirements are standard in every credit provision. Still, at Bank Artha Graha, apart from the collateral in the form of Fixed Assets, the credit policy at Bank Artha Graha also requires other guarantees in the form of individual contracts from certain parties. This personal guarantee is an instrument that can provide more optimal guarantee protection and is considered to be able to support confidence in the credit granting mechanism. The warranty provided can result in financial obligations from the guarantor to bear the fulfilment of performance if the guaranteed party (the debtor) defaults [15].

The Individual Guarantee Agreement (*borgtocht*) has been made in an authentic/notarial deed. The form of a Guarantee Deed or Borgtocht Deed can be made by private act or by an original deed because the Law does not formally require or determine the condition of the Borgtocht deed. However, at Bank Artha Graha, a borgtocht act is always done with a notarial deed because it guarantees the truth and completeness of the contents of the *borgtocht* deed and can guarantee the strength of proof as an authentic deed [15].

At PT Bank Artha Graha Internasional, Tbk, the debtor's obligation to provide collateral as a Personal Guarantee is a decision issued by the Head Office Credit Committee as one of the main requirements for granting credit, which will be made later. In providing this individual guarantee, the guarantor does not explicitly give an item/object to the creditor/bank, so theoretically, the guarantor will be responsible for paying the debt with all of his assets. This belief is based on a feasibility analysis that the Bank Artha Graha Samarinda branch has carried out through the Account Officer/Marketing staff [15].

The Credit Committee always requires the requirements for granting a Personal Guarantee from a third party for several reasons:

1. The debtor is included in the type of Commercial Debtor or Corporate Debtor who has a credit limit with a large nominal.

2. The Customer owns several other companies or is included in a group of companies.

3. Financing requires special credit risk handling. The Guarantee (*Borgt*) is given in a personal capacity by the Commissioner or Director or Shareholders and not in the capacity as an organ of the company.

In principle, the debt guarantor is not obliged to pay the debtor's debt to the creditor unless the debtor fails to pay his debt. The goods belonging to the debtor must be confiscated and sold first to pay off the debt. The form of protection the author described is embodied in several legal regulations in Indonesia. Article 1831 of the Civil Code concerning the Consequences of Underwriting between the Creditor and the Guarantor states that "the insurer is not obliged to pay the creditor unless the debtor fails to pay his debt. In that case, the goods belonging to the debtor must be confiscated and sold first to pay off the debt".

According to the author, a procedure in legal protection for the guarantor does not run optimally. This procedure is closely related to the transparency of information regarding bank products. Bank Indonesia Regulation No 7/6/PBI/2005 concerning Transparency of Information on Bank Products and Use of Customer Personal Data emphasises the importance of transparency, which is necessary to clarify the benefits and risks of bank products. Loans granted by Banks Artha Graha in its various forms are included in the category of bank products referred to in Bank Indonesia Regulation No 7/6/PBI/2005 concerning Transparency of Bank Product Information and Use of Customer Personal Data. Article 4 Bank Indonesia Regulation No 7/6/PBI/2005 about Transparency of Information on Bank Products and Use of Customer Personal Data:

1. Banks must provide complete and precise written information in the Indonesian language

regarding the characteristics of each Bank Product.

2. As in paragraph 1, information must be submitted to the Customer in writing or orally.

3. In providing information as referred to in paragraphs 1 and 2, Banks are prohibited from providing misleading and/or unethical information (misconduct).

Hence, in providing these bank products, Bank Artha Graha must fulfil the PBI's mandate, namely [15]:

1. Banks are required to implement information transparency regarding Bank Products and the use of Customers' Personal Data.

2. In implementing information transparency regarding Bank Products and the use of Customer Personal Data, as referred to in paragraph 1, Banks are required to establish policies and have written procedures that include:

- information transparency regarding Bank Products;

- transparency of the use of Customer Personal Data;

3. The policies and procedures in paragraph 2 must be implemented in all Bank Offices. The regulations listed in the PBI and the Law above are a form of preventive and repressive legal protection for bank customers.

Settlement of debt and credit problems through the bankruptcy process is quite complicated. Still, with the promulgation of Law No 37 of 2004, the payment of debt and credit problems through bankruptcy institutions at the Commercial Court has become a matter that parties with problematic debt and credit issues have widely pursued. This is because the Law has provided equal and fair legal protection to creditors, debtors and the public.

The form of legal protection for personal guarantees includes, namely, that the guarantor can ask for a return from the debtor in the condition of compensation for all losses that the guarantor may suffer as a result of non-fulfilment of obligations by the debtor; the guarantor only serves as a companion to the debtor, in the sense that as long as the debtor is current, there are no problems in the loan instalments until they are paid off. There are efforts to save credit or credit restructuring before the execution of particular collateral objects belonging to the debtor or collateral belonging to personal guarantees.

Before obtaining a credit facility, the prospective debtor must meet the requirements of the Bank, one of which is by having a credit guarantee because the function of providing collateral is to give rights and powers to the Bank to obtain repayment with these collateral items if the debtor defaults or does not pay the debt at the time specified in the agreement. According to Bahsan, guarantees are a set of provisions governing or relating to guarantees in the context of accounts payable (loans of money) in various current laws and regulations [16].

Regarding the settlement of bankrupt assets by the curator, which makes third-party guarantees bankrupt, the form of legal protection that can be taken preventively is that the curator must pay attention to the basis of the rights used as guarantees.

If it's on behalf of another person, it can't be entered as a bankrupt debtor because the third-party guarantee doesn't belong to the debtor. Then, repressively, namely by submitting "Other Case Resolutions". The term "Other Cases" develops in practice based on the provisions of Article 3 of Law No 37 of 2004 concerning Bankruptcy and PKPU, which reads (1) "Decisions on requests for bankruptcy statements and other matters related and/or regulated in the Law this, is decided by the Court whose jurisdiction covers the area where the Debtor is domiciled". In his explanation of Article 3 paragraph 1, it is explained, "What is meant by 'other matters', are among others actio pauliana, third party resistance to confiscation, or where the Debtor, Creditor, Curator or Management becomes one of the parties in cases related to bankrupt assets including curator's lawsuit against the Board of Directors causing the company to be declared bankrupt due to its negligence or fault".

From the explanation above, we can describe important points regarding Other Cases, namely in handling other cases using the same procedure as a bankruptcy petition; and submitting other issues filed in the jurisdiction of the bankrupt debtor.

Settlement of Credit Disputes at Banks

In the case of non-performing loans, the debtor has been deemed to have broken his promise to pay instalments/interest that are due, resulting

in late payments or no payment at all. Thus, non-performing loans include bad loans, although not all problem loans are bad loans.

If the debtor does not fulfil his promise (default), the creditor can ask for his rights in the form of:

1. The right demands the fulfilment of the agreement.

2. The right to demand termination of the agreement if the contract is reciprocal demands cancellation of the contract (*ontbinding*).

3. The right to claim compensation (*schade vergoeding*).

4. The right to demand fulfilment of the agreement with payment.

5. The right to demand termination or cancel the engagement with balance.

Credit Settlement Efforts:

1. Guidance. The analyst concerned carries out guidance for debtors who have problem loans. Guidance is carried out using intensive credit monitoring and comprehensive credit planning, each using a unique form determined by the Bank. For debtors with lousy credit quality, it is necessary to immediately transfer management from the analyst concerned to the Bad Credit Supervision and Settlement Unit. Settlement of debtors who experience bad credit can be done through restructuring or using regular visits to customers.

2. Rescheduling. In this case, the Bank provides an extension of the credit period. Debtors are given relief in terms of credit terms so that debtors still have time to pay off their instalments.

3. Reconditioning or Return requirements. Requirements for returning credit that has been given by changing various existing conditions such as interest capitalisation, which is used as principal debt, reducing interest rates, which aim to ease the debtor's burden more and waiving interest with the consideration that the debtor will be able to repay the credit until it is paid off.

4. Restructuration. To minimise potential losses from non-performing loans, banks can restructure credit for debtors who still have business prospects and can pay after restructuring. Provisions for credit restructuring have been regulated in Bank Indonesia Regulation No 7/2/PBI/2005 concerning Asset Quality Rating for Commercial Banks as amended by Bank Indonesia Regulation No 8/2/PBI/2006. In Article 1 No 25, it is stated that credit restructuring is an improvement effort made by the Bank in lending activities to debtors who experience difficulties in fulfilling their obligations, which are carried out by the Bank, including:

- Decrease in lending rates;

- Extension of credit period;

- Reduction of loan interest arrears;

- Reduction of credit principal arrears;

- Additional credit facilities; and or

- Conversion of credit into temporary equity participation.

5. Collateral Foreclosure. Confiscation of collateral here is a last resort if the debtor does not have good faith and can no longer pay all of his debts.

The mechanism for resolving default cases is in two ways. Namely, Litigation is a lawsuit process, and a dispute is ritualised, which replaces the actual disagreement, namely the parties, by giving a decision maker two conflicting choices. Using a litigation system has advantages and disadvantages in resolving a dispute. The benefits are [17]:

- In taking over decisions from the parties, Litigation, at least to a certain extent, guarantees that power cannot affect the outcome and can ensure social peace;

- Litigation is good for finding faults and problems in the opposing party's position;

- Litigation provides a standard for fair procedures and broad opportunities for parties to be heard before deciding;

- Litigation brings societal values to personal dispute resolution;

- In the litigation system, the judges apply the community values contained in the Law to resolve disputes;

Analysis According to Legal Protection Theory

As stated by [18], everyone has the right to obtain legal protection as appropriate, dividing the form of legal protection into 2, preventive and repressive. Because it is related to handling personal guarantees provided by third parties in a credit agreement with the Bank, it is very urgent to develop a balanced scheme between the Bank

and the third party as guarantor. In the banking sector, there has never been a provision that specifically and concretely provides legal protection for the guarantor.

Legal protection is increasingly crucial in providing individual guarantees if we refer to one of the principles of the agreement, namely the principle of good faith. Likewise, the person who will agree must be done in good faith. In a subjective sense, good faith can be interpreted as a person's honesty, namely what lies with a person when a legal action is carried out. Meanwhile, in an objective sense, good faith is that the implementation of a legal agreement must be based on compliance norms or what is deemed appropriate in society [14].

Both parties must have sound faith when making an individual guarantee agreement between the Bank and the personal guarantee provider. The third party has guaranteed all its assets or assets in the guarantee agreement. Because of that, the Bank should also carry out the principle of good faith as it should [15].

CONCLUSIONS

1. Based on Judge Decision No 99/PDT.G/2010/PN-LP, personal guarantee liability to default debtors in the credit agreement, if the Personal Guarantee dies, the responsibility shifts to the heirs of the personal guarantee. And based on Judge Decision No 72/PAILIT/2010/PN.NIAGA.JKT.PST, if the private security still exists, if the principal debtor does not perform his creditor's performance, then on the other hand, the personal guarantee is also responsible for the debts of the principal debtor, especially if a personal contract has waived the privileges granted by Law. Due to the relinquishment of confidential guarantee privileges in the Civil Code, the private guarantee party can be filed for bankruptcy on the debts of the principal debtor.

2. Forms of legal protection for personal guarantees include, such as the guarantor can ask for a return from the debtor in the condition of compensation for all losses that the guarantor may suffer as a result of non-fulfilment of obligations by the debtor; the guarantor only serves as a companion to the debtor, in the sense that as long as the debtor is current, there are no problems in the loan instalments until they are paid off. There are efforts to save credit or credit restructuring before the execution of particular collateral objects belonging to the debtor or collateral belonging to personal guarantees.

The Bank as the creditor, should provide an understanding to the prospective guarantor about his function and position as a guarantor to avoid the risk of loss on the part of the guarantor. The debtor should determine if the guarantor is adequate in finances and understands his position as a guarantor. The guarantor should have good faith in helping the debtor in the event of default so that the implementation of the credit agreement can run smoothly until the credit is repaid so that, in the future, it can carry out all responsibilities to the fullest. Further, in the personal guarantee agreement, it is best if the heirs of the personal guarantee are notified in advance when the deal takes place to avoid inheritance disputes.

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