The Legal Development of Guarantee in Indonesia

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Abstract
The Legal of guarantees are the terms and rules of law governing the legal relationship between giver and recipient accounts receivable by charging a guarantee. Previous law guarantees are subject to the Code of Civil Law (Civil Code) Book II Law Objects. In the development of guarantees are no longer tied to the Civil Code, as lex specialis subject to other legislation related to the guarantee is understood as economic development gave birth to the type and shape of new guarantee, such as Act No. 4 of 1996 on Mortgage of Land, Along with objects related to the Land and Act No. 42 of 1999 on Fiduciary and other legislation which imposes a guarantee in any legal action.
Keywords : Guarantee law, development of law, agreement, legal act

1. Introduction

The term of guarantee in indonesia came from zakerheidesstelling, zekerheidsrechten or security of law. There are also opinions, said that the strict definition of guarantee regarding the Code does not found. The literature used the term "zekerheid" to guarantee and "zekerheidsrecht", which can be translated into a guarantee law. But we should remember, that the word recht in the Dutch language words can mean law, it could also mean the right or fairness (justice) (Frieda Husni Hasbullah, 2002 : 6).

Some restrictions on the legal definition of guarantee, as follows: (1) Legal guarantees defined as laws governing guarantees receivables a creditor against a debtor (J. Satrio, 2002 : 3), (2) Law guarantees a set of regulations governing or relating to guarantees in the context of debts (loans money) contained in the various laws and regulations in force today (M. Bahsan, 2008 : 3), (3) Legal guarantee is the overall legal principles that govern the relationship between the giver and receiver guarantees in relation to the imposition of collateral to obtain credit facilities (Salim H.S., 2008 : 6).

From these three opinions, so it can be redefined that guarantees and the rule of law are provisions that regulate the legal relationship between the giver and the recipient's accounts receivable with imposes a guarantee.

Legal relationship was born from legal act. The continental European legal system is divided into two forms, namely the one-sided and two-sided. The one-sided legal act (eenzijdig) is the legal act performed one party only, for example the provision of wills and recognition of the child. The two-sided legal acts (tweezijdig) is the legal act performed two or more parties, such as agreement.

Guarantee law was born of a two-sided legal act or agreement. Starting from the credit agreement as a principal agreement which is then charged to a guarantee as an additional agreement (accesoir) or a guarantee agreement. Which is said that guarantees are secured in Article 1131 of the Civil Code is "all the debtor's property rights either moving or not moving, either already exist or will exist in the future for any dependents on engagement".

Basically used as guarantee by the debtor are immaterial and material warranty. Immaterial guarantee is a guarantee that pose a direct connection to a particular individual and can only be defended against certain debtor like individual guarantees / underwriting (borgtochttt). The material guarantees absolute assurance that such rights on an object that has a characteristic and direct relationship with the debtor in the form of movable and immovable.

Based on the above, the authors are interested in analyzing developments guarantee law in Indonesian. Object of study centered on the concept of guarantee arrangements in Indonesia.

2. Research Methods

Research is a primary means in the development of science. The study has purpose to reveal the truth with a systematic, methodological and consistent, including legal research. the law as sui generis science, it means that the science of law is a science of its own kind and it has a distinctive character that it is normative (Philipus M. Hadjon, 2005 : 1). Thus, the methods of research in the science of law also has its own method. Method and procedure of research in the natural sciences and the social sciences can not be applied in the science of law (Peter Mahmud Marzuki, 2006 : 26).

The type of this research, using normative juridical with normative legal research methods, including reviewing and analyzing legal materials and legal issues related to the problems studied. This research was done to solve the problems that arise, while the results will be achieved is in the form of prescriptions about what should be done to resolve that issue.

This research use some approaches such as statute approach, historical approach and conceptual approach. Historical approach allows researchers to understand more deeply the law of a system or institution or a specific legal arrangements so as to reduce errors, both in the understanding and application of an institution or a specific legal provision. legal institutions contains the elements of the legal order ago and formed shoots on the rule of law in the future.

Statute Approach conducted by reviewing all laws and regulations relevant to the legal issues that are being addressed. Law approach will open up opportunities for researchers to study the consistency and compatibility between a law with other laws or the laws with the Constitution of the Republic of Indonesia Year 1945 or between regulation and guarantee law (Peter Mahmud Marzuki, 2006 : 93). *Historical approach done for examining the background of what is learned and the development of legal issues faced. This research in the history of legal institutions from time to time. On the other hand, researchers also need to looking for a basic philosophy of the legal dynamics over time. For example, a study of* the Constitution of the Republic of Indonesia Year 1945 *before and after the amendment.* Conceptual approach is an approach that moved from the views and doctrines in the science of law. It would find ideas that create a notions of law, legal concepts and principles of law that are relevant to the legal issues encountered in this study. Sources of legal materials used in this research is the Primary Law Materials that authoritative legal materials, meaning that the legal materials have authority, which consists of legislation, official records or treatises.

This research using the law as the primary legal materials is Code of Civil Law, Law No. 4 of 1996 on Mortgage of Land Along with objects related to the Land and Act No. 42 of 1999 on fiduciary. Secondary law, including all publications of the law which is not an official document. The publication of this law include text books, theses, dissertations, law dictionaries, commentaries on court decisions also the opinions of the legal experts published through journals, magazines or internet.

3. Result and Discussion

The Law of Guarantees in the Code of Civil Law

Guarantee arrangements was contained in the Code of Civil Law Book II of Objects and Book III of Engagement. General assurance that comes from the law, namely the Code of Civil Law (Civil Code) that the rule reads: all the material owed, either moving or not moving, both existing and new will be at a later date, dependents for every engagement-engagement of individuals (Article 1131), under the provisions of Article 1132 determined that the material be guaranteed together for all those who borrow it; sales revenues objects divided by the balance, viz according to the size of the receivables respectively, unless among the indebted, there are legitimate reasons for precedence. And special guarantee under the agreement, viz mortgage, lien, fiduciary and underwriting or personal guarantees.

The reason of loading guarantee can be seen through the division, viz according to the occurrence, nature, object and how to master it.

The division of guarantee by occurrence.

There are two reasons behind the guarantee, it was born from the Civil Code Article 1131 and Article 1132 of the Civil Code as well as the position of creditors by other creditors (creditors together) is the same and there is no precedence in the fulfillment of its receivables are referred to as unsecured creditors . Example: Person A (creditor) charge a contractor (debtor), when the contractor billed said that his company would be insolvent, so that employers A fear of the unpaid accounts receivable because it is not guaranteed by a certain property rights of contractures (debtor). However this creditor has no right making repayment in advance than other creditors and including Concurrent creditors are creditors who do not have the right to first repayment decision than other creditors.

Distribution of guarantees by their characteristic

There are two forms division of guarantees by their characteristic, they are:

Material Guarantee (zakelijk)

Object material guarantee is a guarantee of good fortune in the form of property objects and property rights granted by means of separation of the assets of both the debtor and third parties in order to ensure fulfillment of the obligations of the relevant debtor default. The guarantee is immaterial is a guarantee in the form of an absolute right over some object, which has the characteristics of having a direct connection on a particular object of the debtor, it can be defended against anyone, always follow the object and can diperalihkan. Collateral material presented for the benefit of certain creditors who have asked him to provide the right or privilege to a creditor position as a preferred creditor which take precedence over other creditors in making repayment guarantee receivable of objects.

Guarantees material known in the sphere of civil law such as:

Pawn (Civil Code Section 1150-1160)

Provisions regarding the lien provided in Article 1150 of the Civil Code which states that a right acquired an indebted above a moving goods, which are submitted to it by a debt or by another person on his behalf, and that

gives power to the indebted it to take repayment of the item is precedence over those of other indebted with the exception of costs for auctioning goods and the cost of bailing out after the goods were pawned, the costs which must take precedence.

Mortgage (Civil Code Section 1162-1232)

Since the enactment of Law No. 4 of 1996 on Mortgage Along with objects - objects related to land, the provisions of the mortgage as stated in book II of the Civil Code Article 1162 to 1232 in respect of the imposition of a security interest in the rights to land and related objects with the ground, is no longer valid. While the provisions of the mortgage remains in effect as long as the imposition of a mortgage as collateral in addition to the right to land and immovable objects (fixed objects), which also includes the land or land rights (Rachmadi Usman, 2008 : 246).

However mortgage ships still under Article 314-316 of Commerce Code and Article 60-66 of Law Number 17 of 2008 concerning shipping, aircraft mortgage for under Article 71-82 of Law No. 1 of 2009 on Aviation.

Personal Guarantee (personlijk)

Personal Guarantee is the third person (borg) which will bear the refund loan, if the borrower can not repay the loan. Article 1820 of the Civil Code states that "underwriting is an agreement by which a third party, in the interest of the debt, bind themselves to meet the debt their bond when this man does not fulfill it." At personal guarantees, there is no specific objects bound or no objects belonging to third parties that can be used as collateral, if the debtor broken promises the creditors of individual guarantees the rights holders only serves as unsecured creditors only. In the event of bankruptcy of the debtor or a third party as a guarantor, the guarantee will apply the general provisions as stated in Article 1131 of the Civil Code and 1132 Civil Code.

General and debt underwriting guarantee does not fully provide protection against debt repayment, because the lender does not have the right to precede that creditor position remains as unsecured creditors against other creditors. It is only in the course material guarantees the lender has the right precede so he serves as privileged creditors can take the first settlement of the collateral without regard to other creditors.

The Legal of Guarantees beyond the Code of Civil

Some guarantee in the Civil Code is not used anymore or is not bound anymore. Some are submit and bound by the Code of Commercial Law (Commercial code), Legislation, such as: security rights, which are regulated by Law No. 4 of 1996 on Mortgage of Land Along with objects related to the Land (UUHT), Mortgages, under Article 314 of Commerce Code, Act No. 2 of 1992 on the voyage along with Government Regulation No. 23 of 1985 for Ship Mortgages and in Article 12 of Law No. 15 of 1992 on Aviation for Aircraft Mortgages, Liens (Pand), under Article 1150-1160 Civil Code, Fiduciary, stipulated in Law No. 42 Year 1999 on Fiduciary. Act No. 9 of 2011 on the Amendment of Act No. 9 of 2006 on the Warehouse Receipt System and Other Laws and Regulations relating to such Collateral suspension guarantees in general corporate guarantee.

Fiduciary

Fiduciary according to his origin comes from the word "fides" which means trust. In accordance with the meaning of this word, then the relationship (legal) between the debtor (the giver of fiduciary) and creditors (fiduciary) is a legal relationship based on trust (Gunawan Widjaja, 2000 : 13). fiduciary grantor believe that would restore the property rights of goods that have been submitted, after the debt is settled. Instead fiduciary believe that the grantor will not abuse the collateral that was in his power (Gunawan Widjaja, 2000 : 113).

This fiduciary words means "trust" addressed to the belief that given opposite sides by one party to the other party, that what comes out is revealed as alienation, actually into only a guarantee only for a debt (Subekti, 1982 : 76). Article 1 of Law - Law No. 42 of 1999 on Fiduciary shall include a definition or understanding of fiduciary. Article 1 paragraph 1 of Law Fiduciary No. 42 of 1999 stipulates that: The notion of a fiduciary is the transfer of ownership of an object on the basis of trust with the proviso that the objects of the transferred ownership rights remain in control from the owner.

Based on these definitions, there are three (3) characteristics of fiduciary namely: (1) The transfer of ownership of an object, (2) On the basis of trust, and (3) It was still in control of the object owner (J.Satrio, 2002 : 159). In Article 1 paragraph 2 of Law Fiduciary No. 42 of 1999 stipulates that fiduciary is a security interest on objects both tangible and intangible and immovable particular building can not be encumbered encumbrance referred to in the Act - Act No. 4 of 1996 on the rights of dependents who remain in control of fiduciary giver, as collateral for the repayment of certain debt obligations that provide the preferred position of the fiduciary to other creditors.

As for who can be the object of fiduciary are as follows: (1) Tangible objects as objects move merchandise, inventory (items in supply), machine tools, vehicles, etc, (2) Moving objects are intangible, including stocks, receivables, (3) No moving objects that can not be tied up with mortgage, for example, buildings owned by the debtor that stands on land owned by others or land use rights of the other party. A Guarantee in the form of a fiduciary, which is set in Act 42 of 1999 on Fiduciary guarantee. Fiduciary is one form of guarantee in which objects are secured by the debtor to the creditor for repayment of the debt is in the

hands of the debtor. Thus the debtor surrender title to the goods moving his possessions to the lender, on the condition that the goods remain in the hands of the debtor.

Mortgage Right

Mortgage Right is an extension of the Act No. 5 of 1960 on Agrarian Principles as a form of unification of the national land law. Prior to known and apply the Basic Agrarian Law, the law known institutions guarantee rights to land, if the land is used as collateral western rights, such as rights Eigendom, Right or Right Erfpacht Opstal, the guarantee institution is Mortgages, while right can be as an object Credietverband. Thus in terms of the Mortgage and Credietverband of land still under the provisions of the Civil Code and the 1908 Gazette No. Jo Gazette No. 542 1937 190 is for example on the rights and obligations arising from the legal relationship of the principles Mortgages, Mortgages levels of promises in Mortgages and Credietverband (Sri Soedewi Masjehoen, 1975 : 6).

Mortgage as collateral rights institutions that can be charged on the ground following or not following objects related to land, has not been formed. While provisions regarding hypotheek as set forth in Book II Code Indonesian Civil Code in respect of the land, and the provision of the Statute Credietverband 1908-542 as amended by the Statute 1937-190 is no longer applied to the formation of the Law on Mortgage.

Article 1, point 1 of Law No. 4 of 1996 on Mortgage of Land Along with objects related to land are: "Mortgage on land and objects relating to land, herein after called the Mortgage, is a security interest imposed on land rights as defined in the Act No. 5 of 1960 on the Basic Regulation of Agrarian Affairs, following or not following other objects which are an integral part of the land, for the repayment of certain debt to other creditors."

Object of Mortgage Right

1) The right to land that can be loaded Encumbrance is:

a) Property Rights;

b) leasehold;

c) Broking.

In addition to the rights of land referred to in paragraph (1), Right to Use on State lands which according to the applicable provisions shall be registered and transferable by their nature can also burdened Mortgage.

Mortgage can also be imposed on the right to land and buildings, plant, and the work that has existed or will exist that are installed on the ground, and which belong to the holder of the assignment of land rights expressly stated in the Deed of Giving Mortgage is concerned.

Subject of Mortgage Right

The understanding of the subject of mortgage is the parties who made the imposition of mortgage agreement, namely: Giver of mortgage (lender) and Recipient of mortgage (debtor).

Principles of Mortgage

Principle is a fundamental statement or general truth that can be used as guidelines for thought and action. Principles emerge from the results of research and action. The principle is permanent, general and every science has a principle that reflects the "essence" basic truths in the science field. The principle is basic but unabsolute or absolute.

The principles of Mortgage rights include:

Publicity Principle

The principle of publicity can be seen from Article 13 paragraph (1) UUHT which states that: "The granting of a security interest must be registered at the land office." Therefore, the registration of a security interest is a necessary condition for the birth of the security right and tied encumbrance against a third party.

Specialties Principles

The principle of these specialties can be seen from the elucidation of Article 11 paragraph (1) UUHT which states that: "This provision establishes the contents of which are compulsory for validity Giving Mortgage Deed (APHT). There is a complete exclusion of the things mentioned in the deed which resulted APHT concerned null and void. " This provision is intended to satisfy the principle of specialties from encumbrance, of the subject, object and collateralized debt obligations.

The principle can not be divided

It affirmed in Article 2 paragraph (1) UUHT, that have the nature of a guarantee interest can not be divided, unless otherwise agreed in APHT referred to in paragraph (2), which regulates when Encumbrance imposed on some of the right to land, may be contracted in the Deed of Mortgage entitlements to concerned, that repayment of secured debt can be done by installments equal to the value of each of the rights to the land that is part of the object Mortgage, the Mortgage will be exempt from these, so then it's just overload Mortgage Mortgage residual objects to ensure the rest of the outstanding debt in pay off.

The Strengt of Executorial Mortgage guarantee

Guarantee rights are privileged, that the issuance of Certificate of Responsibility as referred to in

paragraph (1) makes irah-irah with the words "FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD". Thus Encumbrance certificate has the same force executorial court decision that has gained legal force and effect as a substitute remain grosse facte hypotheek along over land rights. Unless otherwise agreed, the certificate of land rights that had been spiked with notes of loading Encumbrance as referred to in Article 13 paragraph (3) UUHT be returned to the holder of the rights over the land that is left to the holders of Mortgage.

4. Conclusion

The Legal of Guarantee in Indonesia which was originally set in the Civil Code Book II (Law Objects), which guarantees material such as Pledge (Civil Code Section 1150-1160) and Mortgage (Civil Code Article 1162 to 1232) as well as the Individual Assurance (personlijk). In its development has been set up outside the Civil Code and subject to the laws of such guarantee Law No. 4 of 1996 on Mortgage of Land Along with objects related to the Land (UUHT) and Act No. 42 of 1999 on Fiduciary and other legislation which imposes a guarantee in any legal actions like a bank loan agreements and securities.

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