
The Mortgage Guarantee as the Settlement Effort of Non-Performing Loan and the Resistance In the Execution of Collateral

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ABSTRACT

This article aims is to acknowledge the factors of a Non-Performing Loan. Also, to acknowledge on how to settle the non-performing loan with the mortgage guarantee through the litigation or non-litigation way, as well as the obstacle on mortgage guarantee execution by the creditor (Bank). The method of this research using a normative (library) research which is the research on the secondary data. The problem approach of this research is normative juridic, the specification of this research using analysis descriptive, in the field research the writer using 3 (three) methods which is done through an interview, questionnaire lists and document. The location of this research is PT. Bank Danamon branch of Purakarta. The result of this research shows that the factors which causes of a Non-Performing Loan by the debtor from the internal and external factors. The internal factors are a situation where the debtor unable to pay his loan that have matured because of the burden of the installment is too heavy, the debtor who is on purpose to not fulfill the installment and from the creditor party or bank because of the calculation mistake even though this matter is very rare to be occurred. Hence, the external factor is a factors outside the creditor and debtor capability which causes by the Force majeure, the settlement effort of non-performing loan with the mortgage guarantee may be divided into two parts which are: Litigation and Non-Litigation ways, the obstacle on the mortgage execution by the reciprocal or lawsuit to the court which is done by the third party at the time of the auction sale will be performed.

Keywords: Non-Performing Loan; Mortgage Rights; Guarantees.

INTRODUCTION

Banking is business element that collecting wealth from the public as a deposit and contribute it to the people in the form of credit and/ or any types of different structure to develop the living level of the individuals. One of its functions is as the collector of people surplus funding and as the distributor of the funding so that it could be able to help the people in developing their living condition and people's economy through the credit allowance¹.

There are several forms of credit in the funding distribution which provides by the bank, such as: investment credit, working capital credit and consumptive credit. To transfer the credit finance that issued by the government or non-government bank, there is a condition of

¹ Undang-undang Nomor 10 Tahun 1998 Tentang Perbankan

credit which agreed by both of the parties. Mostly, the credit agreement which can be found in the field usually made by the creditor, which is a bank, while the debtor only studying and understanding the agreement properly. With the existence of a credit agreement, this matter become one of the legal bases of the engagement resource for both of the parties. "In providing a credit or financing which accordance with the sharia standard, the conventional bank needs to have a certainty that bound to the deep examination or purpose ad capability of the debtor to satisfy its obligation or returning the financing in accordance with the agreement."²

In the matter of credit grants by the bank to the debtor there must be an agreement before the credit is granted, which is a credit agreement. According to Remy Sjahdeini stated that credit agreement has a particular definition.³ the statement of agreement between bank as a creditor with the customer concerning the supply of money or bills which can be equals with those required the debtors to settle his loan after the temporary time with some amount pf interest, reward or profit sharing.

By virtue of the credit agreement, it surely is meant to avoid any risks if one day the debtor not able to satisfy the loan to the creditor which is a bank in the particular time or the time is temporary. It cannot be denied that there are still a customer who is careless and unable to take care of his obligations with the substantial reason as the understanding is difficult for the debt holder, so that it can not meet the service as stipulated under the agreement of the parties. At the present condition, the client uable to pay his debt, unable to fulfill his commitment as the debtor to the creditor of the installment. This kind of situation according to the civil law considers as a default condition (*wanprestasi*) or broken promises.⁴ As an example in this research usually before the credit is temporary the debtor used to run away to avoid his responsibility.⁵ According to the statement of Mr Oksa, there is one of case example where a private bank debtor in the branch of Purwakarta, the debtor lend a credit with reason that he wants to start a business of motor steam wash and to expand his grocery shop, and the debtor tried to make sure to the bank party with the guarantee of mortgage rights of his plantation land, the bank gave a credit because the bank was sure that he will use the credit facilities in accordance with his proposal to the bank. However, the debtor only paid the installment only for 3 months and he was purposely to act on default by not paying his next installment until the bank party send first warning letter (SP1) until the third warning letter (SP3) because the debtor did not perform good will and did it in purpose. For this reason, it can be said that the push factor of non-performing loan that occurred in the village credit agency in the district of Buleleng came from an internal factor.⁶

To prevent the creditor losses so there must be a credit guarantee. As an outline, there are two types of credit rights in the society, the first is personal guarantee, second is an object guarantee (*persoonlijke en zakelijke zekerheid*) which is a guarantee of movable or immovable object as regulated under Article 1131 of the civil code.

In practice, most of the guarantee which is used by the bank as a creditor is an immovable object such as land along with the building on it. The guarantee will be burdened with a mortgage right⁷. the entitlement of mortgage right is one of the most important things in the

² *Ibid*

³ Sutan Remy Sjahdeini, *Kebebasan Berkontrak dan perlindungan bank yang seimbang bagi para pihak dalam perjanjian kredit bank, institute banker Indonesia*, Jakarta, 1993, hlm, 158-160

⁴ Gatot Supramono, *Perbankan Dan Masalah Kredit*, Djambatan, Jakarta, 2001, hal 92

⁵ Wawancara Pribadi dengan bagian kepala kredit bapak Oksa di PT. Bank Swasta tbk Cabang Purwakarta pada tanggal 3 Agustus 2020

⁶ Armana, M. R., Herawati, N. T., & Sulindawati, N. L. "Analisis Faktor-Faktor Penyebab Terjadinya Kredit Macet Pada Lembaga Perkreditan Desa (LPD) Di Kabupaten Buleleng", e-Journal S1 Ak Universitas Pendidikan Ganesha. 2015

⁷ Undang-Undang Nomor 4 Tahun 1996 Tentang Hak Tanggungan

credit agreement, the creditor will hold the main rights (preference) because the existence of a mortgage right will use to pay off the debt as a profit of selling the guaranteed object. As mentions under Article 6 on the law of mortgage rights stated that if the debtor breaches the contract, the main holder will have a special rights to sell the object of mortgage right according to its own strength through the public auction and to collect the solvency from the public auction. Article 20 of the act number 4 year 1996 stated that with the assumption of the default debt holder (wanprestasi), therefore: the first person of the mortgage rights holder may sell the debt object or mortgage rights by his own strength as mentions under Article 6 of this act.

One of the examples is a customer of PT. Bank Danamon Branch of Purwakarta have committed default that leads to a bad credit. The bad credit caused by the debtor who cannot fulfill his debt to the bank as agreed. With the existence of mortgage right will be purposely to guarantee the debt that imposed to the creditor or the the rights holder or a mortgage giver. To provide the mortgage rights there is a deed of granting mortgage rights (APHT) which is a situation where the debtor lending a special guarantee certificate to the bank through a notary or the official land deed and bound as the grant of mortgage. Based on the description above it can be concluded several problem which are what is the factors that causes the bad credit by the debtor, and how is the effort on bad credit settlement by the debtor with the guarantee of mortgage right object and what are the obstacles in executing the guarantee object”

METHOD

This research using a normative legal research which is a library conduct research where the data comes from a secondary data with juridical normative approach. The specification of this research using analytical descriptive which purpose to pictures the characteristic of an individual, situation, social symptom or particular group or to determines the deployment of other symptoms in the society. By using an analysis method, further it is tried to get the data and description concerning the cause of those symptoms, so that it is able to reach the suggestion of those problem. The library materials which is used as the main materials as a legal materials which contains of basic norms or principle, guidance or main guidance as well as laws and regulations.⁸

In the field research the writer using three methods which are an interview, questionnaire lists and document. The data then collected according to the problem then analyse in a qualitative way.⁹ the population or a palce of research as a whole of humankind or units (may be in the form of symptom or event) which has the same features.¹⁰ in this article the research population is in the PT. Bank Danamon Branch of Purwakarta.

ANALYSIS AND DISCUSSION

The Factors that Cause a Non-Performing Loan by the Debtor

Credit is cash regulation or similar money supply, in accordance with the regulation that legal or agreed by both lender parties between bank with the other so that it required the lender to replace the obligation after a period with interest, profit sharing or reward.¹¹

In the banking world, credit distribution does not always run smoothly. The Non-Performing Loan occurred because of several factors which is sometimes the debtor experienced arrears

⁸ Soerdjono Soekanto Sri Mamudji, *Penelitian Hukum normative Suatu Tinjauan Singkat*, Grafindo Persada, Jakarta, 1994, hlm.13

⁹ Amirudin. (2012). *Pengantar Penelitian Hukum*. Jakarta: Grafindo Persada.

¹⁰ Amirudin. (2012). *Pengantar Penelitian Hukum*. Jakarta: Grafindo Persada.

¹¹ Undang-undang Nomor 10 Tahun 1998 Tentang Perbankan

or not able to pay his debt.¹² the quality of credit may be divided into several parts which is:¹³ performing Credit, credit with special attention, substandard credit, questionable credit, and Non-performing Loan (Bad Credit).

A credit that includes in the problem credit are substandard credit, questionable credit and bad credit. According to the decision letter of director of Bank of Indonesia Number 30/267/KEP/DIR, the Non-performing credit occurred when the debt is temporary in the main installment and/or premium which is more than 270 days, or the loss from operational covered by the new loan or from the legal perspective or economy situation, the collateral cannot be disbursed with fair value. The non-performing loan is bad credit because it is not performed smoothly and the credit have temporary and cannot be resolved with the customer in question.¹⁴

Non-performing loan is a situation where the debtor experienced of money difficulties. There are several factors which includes in the debtor money difficulties that divided into two parts are:¹⁵ an internal and external factors. An internal factor is a problem in the lack of wisdom in buying and selling, ineffective on control of spending, a wisdom in the debt which is not effective yet, excessive placement in fixed assets, insufficient business capital. While the external factor are natural disaster, war, the changes of economy condition, and technology development.

According to Bayu Aji the factors which causes non-performing credit in the credit agreement as follows:

The factor of internal bank

The sharpness or low ability of banks to analyze submissions made for the feasibility of credit requests, the weakness of supervision system and credit administration as well as credit information system, the bank shareholders intervention in the decision making of the credit, and imperfect guarantee agreement.

The External Factor, which includes:

The failed attempt by the debtor, the lack of economic activities and the rise of credit interest rate, taking advantage of the unhealthy competitive climate of the banking world by irresponsible debtors, and problems in favor of debtor companies.

While from the beginning, the customer has purposely planned to not returning its credit even in any situations. Usually before the credit reach the time, the debtor used to avoid his obligation.¹⁶ The development of non-performing advance apart from starting from the customer also it could come from the bank, because the bank cannot free from the shortage that the bank has. The bank also a consequence of the non-performing credit, because in doing so, the bank investigations are not carefully performed so what should happen cannot be anticipated in advance.¹⁷ A nonperforming credit is caused by the debtor, may be performed by the creditor however this matter rarely happens and there is also a non-performing credit outside the capability of the creditor and debtor.

What is the effort to settle the non-performing loans by debtors with guaranteed objects of mortgage?

The settlement of non-performing loan by the Purwakarta branch of private Bank is an effort to settle credit carried out by creditors against debtors who are unable to pay their credit

¹² Peraturan Bank Indonesia Nomor 7/2/PBI/2005 tentang Penilaian Aktiva Bank Umum

¹³ Hermansyah, *Hukum Perbankan Nasional Indonesia*, Prenadamedia Group, Jakarta, 2019, hlm. 66-67

¹⁴ Sinungun, *Dasar-dasar Teknik Manajemen Kredit*. Bumi Aksara, Jakarta, 1993, hlm. 57.

¹⁵ *Ibid*, hlm. 58

¹⁶ Wawancara dengan bagian kepala kredit bapak Oksa di PT. Bank Swasta Cabang Purwakarta pada tanggal 3 Agustus 2020

¹⁷ Kasmir. *Op. Cit.*, hlm. 115

installments because of the debtor's business is no longer has a purpose or a debtor who intentionally do not have a good faith to pay his credits so that it cannot be restructured again.

The interview result with the head of bank credit "Mr Oksa" stated that the settlement of non-performing credit of private bank companies has its own ways for various effort which is through the verbal warning which are by phone and written warning in the form of letter to the debtor so that he is able to performed his obligation to pay the credit through an installment so that the debtor credit will not become a non-performing credit.

The warning letter which will be given by the bank as a creditor to the debtor who has a non-performing credit are in the forms of concerning the warning I which contains late payment of principal and/or interest or also called maturity. Concerning warning II which command the debtor to pay his obligation with amount that has been detailed according to the bank notification. The third warning which contains the limited time to pay off the debt starting from warning letter 3 which delivers and in the form of debtor status become a non-performing credit.

After getting the warning letter then if there is a good will from te debtor party there will be a credit repair which is as regulated under the circular letter of bank of Indonesia Number 26/4/BPPP which regulates the nonperforming credit rescues before it settle through legal body, which are rescheduling, reconditioning and restructuring.

Nonperforming credit may be solving through the two ways, which are: The implementation of credit settlement by peace or non litigation

The settlement through non-litigation is a settlement to the debtor's business where his business is capitalized by the bank with credit eventhough in the isntallment payment stittinger or his capability to pay his debt getting weaken and cannot able to pay his installment but he must paying the interest, even debtors whose business are no longer exist, the credit settlement may be done through negotiation by the debtor where his credit guarantee including also the existence of other business which considers worthy and so to the debtor is still considered worthy and it may be getting addition of funding so that it is hope to get some profit that can be use to pay all of his obligation to the creditor, in other word if there is a new agreement, then the non performing credit of the debtor will become a performing credit.¹⁸

The settlement of non performing credit which is done by the bank in peace or through a non litigation is one of the bank priority, the settlement in implementations are;¹⁹

- a) The granting of relief by the creditor to the debtor, both in terms of arrears, maximum fines, limited to interest and/or fines that have not been paid by the debtor
- b) The reduction in arrears of credit provided by the creditors. However, there are considerations from the director and staff of the bank which met through a general meeting to obtain approval so that the reduction of the loan principal arrears has just been implemented.
- c) There is a third who pay off the debts
- d) Direct collection by visiting the residence of the debtor through directions in completing the credit or by sending a letter. This billing is often done by the remedial officer or account officer.
- e) The debtor performed sales of the mortgage privately, the selling of object will be performed partially or entirely to settle the debtor obligation.

The implementation of mortgage rights may be done by selling privately is regulated according to Article 20 paragraph (3) of the mortgage law, which are: (1) if the is one month starting from the written info by the providers and mortgage rights holder for the interested

¹⁸ Muhammad Abdulkadir dan Muniarti Rilda, *Lembaga Keuangan Dan Pembiayaan*. PT Citra Aditya Bakti. Bandung, 2000, hlm. 136.

¹⁹ Wawancara dengan bagian kepala kredit bapak Oksa di PT. Bank swasta Cabang Purwakarta pada tanggal 3 Agustus 2020

party have passed then it can be performed. (2) it is informed that in the local media and or at least two newspapers. (3) neither party expressed any objections.

Article number 20 paragraph (2) of the act of mortgage rights explains that “according to the understanding of the mortgage rights holder provider, the offer of mortgage object may be done privately, so then it will get the highest price”. So that this article regulating the selling action in private, if there is agreement between both of the parties and this matter will not arises dispute.

Settlement of Non-Performing Credit through Litigation

The settlement of non-performing credit is a settlement for the debtor who still running his business, but the debtor does not want to pay off his debt whether the principal or its interest, while there is debtor whose business is no longer exist, but the debtor does not want to cooperate with the creditor to pay off his debt even only to pay the principal.

According to the statement of Mr Oksa as the head of credit, the interview results that if the credit rescued through restructuration is failed, then the bank will do the settlement of non-performing credit through auction of the mortgage object according to article 6 of the acct number 4 years 1996 concerning the mortgage rights, which stated that “ in terms of the debt holder is in the default condition, the first mortgage holder has a special rights to sell the mortgage object by his own strength through the public selling anf collect the claim from the public selling”.

The provision under article 20 paragraph (1) of the act number 4 years 1996 concerning the mortgage rights is “at the letter a. the special rights of a mortgage holder is to sell the object of the mortgage rights as mentions under article 6 or letter b. with the title of execution which contains in the authentication of mortgage rights. The explanation of article 20 paragraph (1) can be understood that the implementation of mortgage rights if the debtor is default, there are two ways or a basic implementation of object of mortgage rights that is different, those ways are by selling through public auction according to the procedures which determines as regulated in the regulation and performing title executorial which listed in the mortgage rights certificate,

The explanation of article 20 paragraph (1) may be defined as mortgage rights execution in terms of the debtor is default or breach the agreement, through the public auction and implementation of title executorial.

Article 20 paragraph (1) letter a Jo article 6 of the mortgage act stated that if the debtor refuse and/or against the auction implementation then this provision will be applicable as an alternative way for the creditor.

There are two ways to executes the mortgage rights according to the act of the mortgage rights, namely:

Simplified Execution

By virtue of article 20 paragraph (1) Jo article 6 of the act number 4 years 1996 concerning mortgage rights, if the debtor breaches the agreement or default, the creditor may sell the mortgage object by his own authority and from the selling it could get the acquittance. They have a special position as a *droit de preferen* dan *droit de suit in this matter*. The implementation of selling the mortgage object does not need permission from the debtor, the requirement of this matter must be noted in agreement through the deed of mortgage rights as mentions under article 11 paragraph (2) letter e of the mortgage act, particularly “the guarantee of mortgage rights holder have the rights to sell the mortgage object if the debtor negligent to give the guarantee”.

With the chances under the act of mortgage. This must be interesting for many banker, because the enactment of this regulation it open the chances for the banker to solve the non performing credit problem with faster time and low in cost. However, according to the statement of Mr Oksa stated that article 6 Jo article 11 paragraph (2) letter e of the mortgagae act in the practice it still be found the doubt on using this provisiom because in any views of the object execution still need a permission or fiat execution by the general or auction lcourt.²⁰

Parate Execution

According to Subekti, Parate execution is an execution which performed without any help from other people or took what is belong to their rights, such as without pointed delegation, which focuses on the guarantee such as an object or because of that selling the object.²¹ Directing the parate execution through public auction, the bank will submit an invitation to execute the mortgage object to office of wealth and state auction services (KPKNL). Through a writing letter and the bank party will prepare the documents as the requirement of holding the execution auction such as:²²

- a) Copy of the details of the debtor's debt that must be fulfilled in payment proof.
- b) Copy of credit agreement
- c) A warning letter which sends to the debtor who commit default which is the first warning letter
- d) Second warning letter, until the third warning letter which was done by the bank
- e) Copy of certificate of mortgage rights and the deed of mortgage rights grantee
- f) Copy of certificate of property rights as a proof of the ownership of the certificate.

As for how to submit an auction that can be done as follows:

- a) Applying to the office of the state assets and auction services which carried out by the seller or bidder with conditions as previously determined.
- b) After analyzing the complete documents, the office of state property and auction services will determine the day and date of the auction.
- c) The auction will be announced either through the media or through newspapers in accordance with the applicable regulations.
- d) Participants who participate on sale through the auction office must deposit a security deposit to the office of state property and auction services.

From the auction, the proceeds will be divided, namely the net proceeds of the auction sales will be given to the auction or deposited into the state treasury if the acution is the result of the state inventory, and the deposit for auction fees and poor money will be put into the state treasury.

The implementation of auction which performed by the bank as the mortgage rights holder is in accordance with the regulation of ministry of finance number 93/PMK.06/2010 concerning the auction instructions, the KPKNL will be on duty on the implementation of auction. KPKNL is a government agency under the directorate general of state assets at the ministry of finance.

²⁰ *Ibid*

²¹ Subekti, *Pelaksanaan Perikatan, Eksekusi Riil Dan Uang Paksa, Dalam: Penemuan Hukum Dan Pemecahan Masalah Hukum. Proyek pengembangan teknis yudisial*, MARI. Jakarta, 1990, hlm. 69

²² Wawancara dengan bagian kepala kredit bapak Oksa di PT. Bank swasta Cabang Purwakarta pada tanggal 3 Agustus 2020

What are the obstacles in the execution of debtor's collateral?

The obstacle of collateral object owns by the debtor

There is a resistance or lawsuit to the court carried out by the third party as the debtor to the creditor when the auction will be held so that the auction cannot be performed because of the lawsuit, other than that there is also a court lawsuit filed by a third party or debtor after execution of a mortgage in the auction has been terminated and sold because it is deemed detrimental to the debtor because it cannot get the right price. As for the debtor who does not want to vacate the mortgage object because of the debtor's involuntary, and the mortgage is under control by the third party, the difficulties on finding prospective bidders eventhough there has been announcement of the auction. In the execution of mortgage objects in the form of a land and building, sometimes it is difficult to be check because their existence is far away, lack of through preparation, such as auction advertisements which annouced through the mass media such as newspapers and social media due to lack of interest in reading the advertisements. As for other unexpected obstacles, one of it is when executing the mortgage object, the executed parties intentionally mobilize time to block the road or the location of mortgage object so that during the execution the implementing team cannot get in.

The efforts to solve obstacles during the execution of debtor's mortgagae

object If there is a debtor who intentionally does not want to vacate the object of the mortgage guarantee, then the head of the district court must apply the sale of the mortgagae object to the office of state auction/ the office of debt services and state auction (KLN/KP2LN). the auction will be held on the submission of application made by the head of the district court according to the necessary conditions. After the object of mortgage is sold through the public auction and purchased by the winner, then the emptying process will be carried out by the buyer on the winner of the auction and the holder of the mortgage rights, and the new owner can subkit to the head of the district court to emptying the mortgage object that was purchased at the of winning the auction.

To avoid a rebellion by the debtor as the defendant who will mobilize the time when the execution of the mortgage object will be confiscated, there must be coordination from the head of the village, executor, and apparatus to guard the execution, secured the location of execution and sterilized by the apparatus.

CONCLUSION

According to the description above, it can be concluded as follows:

The factors that cause a nonperforming credit by the debtors is come from an internal factor such as a debtor who cannot pay his debt installment that have matured because the installment is too heavy, debtors who deliberately do not pay his debt and avoid his responsibility by let it temporary in time then run away, and as for the creditor or bank for a calculation error. While the external factor such as factors beyond the ability of the creditors and debtors or also known as force majeure factor.

The effort in settling the nonperforming credit with a mortgage right can be done through the non-litigation and litigation way.

The obstacles on performing the execution of mortgage rights such as there is resistance or lawsuit to the court carried out by the third party when the auction will be held, the debtor who does not want to vacate the mortgage object due to the debtor's involuntary, and other unexpected obstacles such as the executed parties intentionally mobilizing time to block the road or location of the mortgage object so that during the execution the implementing team cannot performed their duty.

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Peraturan Bank Indonesia Nomor 7/2/PBI/2005 tentang Penilaian Aktiva Bank Umum

c. Interview

Interview with the head of credit, Mr. Oksa at PT. Private Bank Purwakarta Branch on August 3, 2020.