

The State of Bank Guarantee When the Guaranteed Debtor is Declared Bankrupt

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Abstract— Bank Guarantee is one of the many ways for creditor to secure and safeguard the payment of its receivables from its debtor. When a debtor is in default by not paying its debts, the debtor can be declared bankrupt. There is case whereby court decided that to claim forpayment from Bank Guarantee issued for the benefit of a bankrupt debtor, the claim must be submitted to the curator of the bankrupt debtor. The purpose of this paper is to elaborate whether the holder of Bank Guarantee has the right to demand payment to the Bank based on the Bank Guarantee when the guaranted debtor is declared bankrupt. This research is a normative legal research using secondary data, especially primary and secondary legal sources. The analysis of this research finds and proves that the right of the holder of Bank Guarantee was never influenced by the bankruptcy of the debtor.

Keywords: *Bank Guarantee, bankruptcy, guarantee*

I. INTRODUCTION

Business is never certain. There are always risks associated with any kind of business transactions. It is the duty of the businessmen to minimize the risk. It is called risk management. One of the risk that business can never tolerate is the unperformance of obligation, which can always be calculated as monetary lost [1].

Creditor, in order to minimize its risk and therefore to maximize its possibility to get paid, may take guarantee from any third party. One of the most reliable party to provide guarantee is Bank. Therefore for such purpose, Bank used to issue Bank Guarantee. Almost every Bank has issued Bank Guarantees until today.

It is unavoidable that when a corporation or company is not paying its debt, the corporation or company will and can be declared bankrupt. Ever since the amendment of Bankruptcy Regulation (*Faillissement Verordening*) in 1998, there were more than 300 legal subjects have been declared bankrupt. There were many occasions that the obligations of the bankrupt debtors were secured or guaranteed by Bank Guarantee.

Recently there is a court verdict decided that claim for the payment arising from Bank Guarantee, which guaranteed the debt of the bankrupt debtor, must be submitted to the curator of the debtor.

The objective of this research is to analyse whether the holder of Bank Guarantee can exercise its right to demand

for payment and get paid directly from the Bank, when the guaranteed debtor is declared bankrupt without .As a normative legal research, data used in this research are secondary data, that are collected through literature review. The main data are primary legal sources that consisted of law and other prevailing governmental regulations, and secondary legal sources that consisted of text books. The main regulations used in this research are Indonesian Civil Code, banking regulations with resepect to bank guarantee and Bankruptcy Law.

II. DATA AND METHOD

A. Data

B. Method

Data obtained are analysed using qualitative method. Discussions are made to understand the conception of guarantee in Indonesia, either in general as regulated in Indonesian Civil Code or in form of bank guarantee as regulated in banking regulations; and conception of bankruptcy under Indonesian Bankruptcy Law. Futher the researchers discussed the relation between bankruptcy of debtor and the state of Bank Guarantee in relation to the obligation of the debtor and the Bank as guarantor to pay the bankrupt debtor's debt to the holder of the Bank Guarantee.

III. RESULT AND DISCUSSION

Guarantee, as additional security, provided for the benefit of creditor, in general, is regulated in Indonesian Civil Code Book III Chapter XVII from Article 1820 to Article 1862. Based on Article 1820 jo. 1831, guarantor is only obliged to pay the debt of the debtor when all the assets of the debtor have been seized and sold, that the debtor has no more assets that can be used to pay the creditor. Howver such obligation of the guaranted creditor to seize and sell the assets of the debtor shall be conducted only if the guarantor have requested the creditor; and appointed to the creditor, the debtor's assets (that are free from any kind of encumbrances as security of other debts and/ or located outside Indonesia) for sale, when the guarantor is sued in the court of law by the creditor.

Based on Article 1832, guarantor cannot demand the creditor to seize and sell the debtor's asset if the guarantor has waived his privilege right to do so, guarantor has joint and severally bind itself with the debtor, if the argument in the reply as the answers to the creditor can be brought by the debtors only, the debtor is declared bankrupt, in case of the guarantee which was ordered by court [2].

Bank Guarantee is regulated by Bank Indonesia in Bank Indonesia Board of Director Decision No.23/88/KEP/DIR regarding Providing Guarantee by Bank. According to the Decision, Guarantee can be made in the form Bank Guarantee issued by the Bank, which arising obligation to the Bank to pay to the creditor receiving the Bank Guarantee, in the event that the guaranteed party (real debtor) is in default. It is also mentioned that one among several conditions that must be put in the Bank Guarantee is the statement from the Bank that Bank will pay by firstly requiring the creditor to seize and sell the debtor's asset in according with Article 1831 of Indonesian Civil Code, or the statement from the Bank that the Bank has waived such privilege in accordance with Article 1832 of Indonesian Civil

Code. In practice almost all Bank Guarantee waive the applicability of the privilege right granted by Article 1831 Indonesian Civil Code, which make Bank Guarantee can be demanded for payment when the guaranteed party is default. The Circular Letter of Bank Indonesia No.23/7/UKU confirms the above explanation.

With respect to bankruptcy, in general, bankruptcy is a state whereby debtor is not allowed to do anything with respect to its assets and liabilities [3] According to Law No.37 Year 2004 regarding Bankruptcy and Suspension of Payment (the "Bankruptcy Law")[4], bankruptcy is a general seizure of all the assets of the debtor, which assets will then be managed and dissolved by Curator under the supervision of Supervisory Judge. This means that debtor is no longer has the capacity to manage its own assets during bankruptcy. The debtor has no more capability to pay its debt from its assets, neither to negotiate any payment that will involve the utilisation of its assets [5].

By understanding the conception of guarantee, Bank Guarantee and bankruptcy as explained above, it can be understood that based on Article 1832 point 4, bankruptcy of debtor may cause the guarantor of the debtor's debt losing its privilege right as mentioned in Article 1831. By losing the privilege right because of the bankruptcy of the debtor, the guarantor must pay the creditor immediately upon the submission of the claim for payment by the creditor, without any right to request the creditor to seize and sell the assets of

the bankrupt debtor. This means irrespective the existence of Article 1831 as privilege or the waiver of the privilege, when debtor is declared bankrupt, the creditor who hold the Bank Guarantee can directly required the Bank to pay based on the Bank Guarantee without even having the obligation to prove the default of the guaranteed debtor, and the Bank shall immediately (subject to the fulfilment of other conditions mentioned in the Bank Guarantee) pay the creditor upon the submission of the Bank Guarantee for the payment.

Based on Bankruptcy Law, curator only has possession and management over the bankrupt debtor's assets. Bank Guarantee never become the assets of the bankrupt debtor's, that made Bank Guarantee will never become the assets managed by curator. It is clear that the Bank, who issued the Bank Guarantee is the only party who is responsible for the payment of the Bank Guarantee, whenever a claim for payment is made against the Bank Guarantee. Payment will be made using the money of the Bank (as part of the assets of the Bank), not the bankrupt's estate. It is therefore submission for the claim of payment of a Bank Guarantee must and can only be submitted to the Bank who issued the Bank Guarantee, and not to the curator of the bankrupt debtor.

IV. CONCLUSION

The bankruptcy of the debtor never influence the right of the creditor to claim for the payment from Bank Guarantee to the issuing Bank that guarantees the debt of the bankrupt debtor. The bankruptcy of the debtor, by law, makes the inapplicability of Article 1831 of Indonesian Civil Code. It will directly provide the right to creditor to claim for payment to the Bank that issued the Bank Guarantee, and the obligation to the Bank to pay to the creditor immediately upon the submission for the payment based on the Bank Guarantee.

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