

“The notary’s responsibility toward the authenticity of credit bank guarantees in Indonesia”

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THE NOTARY'S RESPONSIBILITY TOWARD THE AUTHENTICITY OF CREDIT BANK GUARANTEES IN INDONESIA

Abstract

This paper provides an overview of the law and a statute regarding the notary's responsibility toward the authenticity of credit bank guarantee in Indonesia, and compares them with those of other nations, including the United States of America and Germany. This study uses a combination of primary and secondary sources to assess the current state of the notary responsibility situation regarding banks and the financial lending world in general and employs a normative or doctrinal approach that views laws as a system of norms. The functions of notaries in Indonesia are different from those performed by notaries in some other countries, the notaries play different roles and participate in many formalities:

- a) a function in credit banking bind guarantees that not only allow people to feel comfortable with their transactions, but also increase public trust in the whole banking system;
- b) personal and material guarantees. In transacting any deeds, including credit bank guarantees, the notary is responsible for the authenticity of the physical, formal and material aspects of the deed;
- c) the binding of collateral objects;
- d) a function in binding banking credit guarantees.

Also, notaries have the risk of illegal jurisdiction of a banking credit guarantee deed. Notaries in Indonesia have different roles compared to other countries, including the United States of America and Germany. Notaries play an important role in increasing economic growth, especially through their responsibility for the authenticity of credit bank guarantees activity and they add to the overall body of knowledge.

Keywords responsibility, general officer/notary, bind authorization

JEL Classification K22

INTRODUCTION

Commercial bank lending in Indonesia has a positive impact on the economic development of the country. Economic development is typically a function of both private and public concern. On one level, the government oversees the development of the state through both funding and policymaking. However, private entities also support this effort. This is especially true for banks, which influence economic development without the need for a specific form of government funding. For this reason, the government has a vested interest in lending and funding even if it is not the entity directly involved.

Banks play a significant role in supporting economic growth, as they collect money from society in the form of savings, deposits, demand deposits, and so on (Swanepoel & Fourie, 2015). That money is then returned to society in the form of both productive and consumption credit. In Indonesia, the banking council is regulated as stipulated in

banking law number seven promulgated in 1992, specifically articles 1 and 2 (Sesung & Rina, 2018). In other countries, banks are typically profit-seeking institutions. While society gives a passing nod to the duty of all business, including banks, to be responsible, there is no true requirement that they do so (Borio, 2019). By requiring this kind of social element, Indonesia puts the onus on banks, but more than that, it ensures through measure of law that banks are required to do the right thing. This includes guaranteeing individual rights and collective societal goals (Setyowati et al., 2018).

In providing individuals with credit, banks usually demand certain guarantees. This limits the scope of debt underwriting in several ways (Donckels, 2017). While banks do provide a wide range of products and services and target different entities, the focus of this study is on loans granted to individuals, which tend to require such guarantees. Loans given to entities other than individuals typically do not have this type of requirement because of the nature of the working relationships (Karolyi, 2018); namely, banks can be more certain that institutional borrowers will repay their debt, while repayments by individuals are less certain, thus raising the risk profile for the bank. When it comes to individuals, guarantees could come in the form of land, building, machines, or personal guarantee and responsibility. The function of a guarantee is to provide the right to the bank as a lender to demand payment by using the guarantee as collateral (Karolyi, 2018). In the banking world, this is known as a secured interest, as the interest of the bank is secured by some interest represented by a piece of property. If the borrowers cannot afford to repay the bank, the bank as the surveyor possesses the right and authority to enforce the guarantees. In this arrangement, it is necessary to first make a formal juridical binding of the collateral according to the applicable law. For example, banks can obtain these rights and guarantees with Mortgages, Surat Kuasa untuk Memberikan Hak Tanggungan (SKMHT) (Bonds of Power of Attorney Installing Mortgage Rights), Akta Pembebanan Hak Tanggungan (APHT) (Deed Giving Mortgage Rights), and Pawn with Personal Guarantee Deeds. Mortgages are loans attached to real property that give the lender an ownership interest in the property until all payments are made. As many economists have noted, this does more than just bring down the costs of loans for the individuals directly involved in specific transactions; it also lowers borrowing costs overall.

Notaries have a long and illustrious history in terms of their relationship to banking systems (Béguin, 2018). If the binding guarantee is so important for underpinning the entire lending system, then there must be some entity to ensure that the guarantee is legitimate and reliable. This is the rationale behind the laws criminalizing the false creation of deeds (Subiyanto et al., 2017). This is critical because an obligation to pay is only enforceable if it can be proved that the borrower in fact made the promise to pay back the loan. To ensure this type of verifiability, the notary serves as a guarantor of the verification process and assumes the associated responsibilities. The binding guarantee process must be made in writing in the form of a notary deed, and it is this deed that serves as the authentication necessary to provide certainty to all parties and to establish the validity of the included signatures. Even in the case of mortgage lenders deeds and fiduciary deeds, the notary deed is a fundamental requirement to commence the executorial title (Lukman & Gunarto, 2018). In addition, protections are provided to notaries so that they can do their jobs faithfully and without fear at the end of the day (Dzaki & Hanim, 2018).

Thus, the chief responsibility of the notary is to maintain professionalism and integrity when fulfilling his/her duties (Suryahartati, 2018). Therefore, the field has emerged as a true professional opportunity in Indonesia as well as other parts of the world (Giuseppe et al., 2016). The function of the notary remains essential even in an era in which online banking dominates the landscape (Geva, 2018). Despite its noble goals, the role of the notary does not always live up to the required standards. This paper examines some of the issues in this regard to fully understand the role that notaries play. As pointed out in Sood (2017), several problems arise as notaries go about their duties. For example, some notaries may not execute the deed in accordance with the wishes of the parties. Indeed, there are certain requirements relating to deeds for individual purposes, and notaries must comply with these for the deed to be valid. In addition, the deed may be juristically improper, thus invalidating the banking binding guarantee process, as the

deed is not considered legal (Sood, 2017). This means that notaries must do more than just observe a signature: it is also important for them to understand the substantive law in the areas in which they work so they can ensure that the deeds are executed in accordance with the necessary standards.

This paper will center on the role of notaries not only in the world of banking, but within the overall economic system itself. It is relevant in showing that without notaries to provide documentation, the chief enforcement mechanisms of the financial world would cease to function. Thus, the core purpose of the paper is to counter the narrative that notaries are bit players in the financial world. In reality, they are substantial actors. The paper is especially relevant in that it presents a comparative review through which one can understand the role of notaries in Indonesian banking as compared to banking in other countries.

1. LITERATURE REVIEW

To understand the current situation, one must first review the theoretical basis for the discussion on the importance of notaries in the credit guarantee system. The use of notaries is common in the practice of banking, dating back several centuries (Stuard, 2018). Various frameworks have been used to analyze the role of notaries and assess the critical place they have within the system. Yuanitasari (2017) discusses the general role that notaries play in Indonesia to ensure that people enter contracts with confidence. Other works discuss the major role that notaries play in the respective country, showing that, in order to guarantee enforceability, one must be confident about the authenticity of the signature provided as well as the time and circumstances in which the signature was provided (Bidabad, 2017; Bidabad et al., 2017a; Bidabad et al., 2017b). This study touches upon the ways in which contracts in Indonesia have, in many instances, been unreliable and difficult to enforce. Because lenders operate only on the basis of a contract, it is essential to ensure that even the least significant formalities are dealt with in order to add strength and girth to the contracts (Fitri & Khisni, 2018). As noted by Laksono and Khisni (2018), many notaries go through specific courses to learn the many normative rules designed to give confidence to those operating in the system. July et al. (2018) note in their study that the rising role of notaries in Indonesia should not come as any major surprise. If one studies the history of financial transactions and other executed documents in Indonesia, one can quickly surmise that false executions and counterfeiting have been a problem that has not only presented a major financial cost, but has caused disruption to overall

markets because of the erosion of trust that many have seen and experienced. Notaries, thus, are a central response to this in that they arose to fix a critical problem holding back the financial and banking world in this country.

As Busro et al. (2019) note, it is important to remember that notaries, in concert with good policy, are truly the forces to credit in terms of adding more accountability to financial transacting. In particular, the authors note that there is now both civil and criminal responsibility placed on notaries, meaning that they then have a major and strong interest in ensuring that they are regulating the signatures and transactions in front of them. By placing such high consequences on the notaries themselves, the legislators in Indonesia have been able to essentially build a private regulatory force of individuals who have a very real reason to take their craft seriously. Adjie and Khrisna (2018) reinforce this view by noting that not only are the criminal and civil penalties high for people who serve in this role, but there is also a code of ethics that essentially serves as soft reinforcement for what is taking place. This helps to build the cultural expectation that people who help to regulate these markets and deals will do the right thing because the people who they work with are also under an obligation to do the right thing just the same.

In addition, Andini and Ma'ruf (2018) note that, at least in Indonesia, special respect is accorded to agreements executed through notaries. This helps distinguish the situation in Indonesia relative to that in other countries where signatures are often good enough and can be authenticated in other ways. For instance, in the United States,

a signature on a will can be authenticated by witnesses, and the presence of a notary to execute the document is not necessary (Rusmana & Gunarto, 2018). However, the legal system in Indonesia puts the highest amount of trust in the documents executed by those who are entrusted with notary power. This becomes critical and shapes the environment under which Indonesian banks and other consumers operate (Pratama & Khisni, 2018). This context is critical to better understand why the duties and responsibilities of notaries are so critical to the functional operation of the Indonesian banking system and, consequently, the impact it has on society at large.

The authors note the special role of notaries in Sharia banking. This can be contrasted with countries where Sharia law does not apply but for which notary services remain critical, as they help provide security especially in those countries with a heightened interest in fraud prevention in the banking system (Khambali et al., 2017). For instance, in their description of Italian law and banking, Levecchia and Stagnaro (2019) write that Italian notaries play a critical role in the process, but there have been attempts to have notary services provided for free. The role of notaries there is so substantial that attempts at this kind of reform have been fruitless, with notaries refusing to work for nothing or below market rates. Hoffman et al. (2015) note that in France, which does not practice Sharia law as a cultural artifact, notaries are actually competing with banks in many instances, presenting a situation that threatens to upset the balance of power in financial markets. The critical nature of notary services has traditionally been such in that country that people are more than willing to trust notaries with a wide range of functions that help to keep the financial system up and running. This shows that even in countries where Islam is not the dominant legal feature, notaries remain a distinct and important part of the process.

2. OBJECTIVES OF THE STUDY

Based on the review of literature, the objectives of the study is to provide an overview of the law and a statute regarding the notary's responsibility toward the authenticity of credit bank guaran-

tee in Indonesia, and to compare them with those of other nations, including the United States and Germany.

3. METHODS

This study uses a combination of primary and secondary sources to assess the current state of the notary's responsibility situation regarding banks and the financial lending world in general (Takyyi & Poku, 2015). Importantly, it will consider statutes and other governing documents as they apply to the duties and responsibilities of those who perform this work. Further, it will consider various empirical studies to ascertain insights into various analytical elements of notary responsibility.

The study uses a normative or doctrinal approach that views laws as a system of norms. The norms system means principles, norms, municipalities, law regulation, court decisions, and the doctrine agreements. According to Marzuki (2017), the normative legal study is "...a process of finding a rule of law, legal principles, and legal doctrines to answer the legal problems faced". This study seeks to undertake precisely that task, considering a range of legal authorities with the goal of better understanding the rule of law as it exists in this area.

This normative study also aims to gather argumentation, theory, or new concepts as a framework to address upcoming problems. In short, it seeks to build a collection of different sources to provide a picture of the body of law and practice as it exists today in Indonesia. Typically, the normative study design is chosen because there is not a single body of literature or law that can provide the full picture on a given topic. Rather, it is critical to cull various works from as many sources as possible to best understand the topic. The problem approaches used in this study are the status approach and the conceptual approach. Primary-law material is used, consisting of all regulations related to the credit binding guarantee and the responsibility of the notary and the corresponding deeds executed through this regulatory framework. Meanwhile, secondary-law material consists of all literature that supports information extracted from the primary material.

4. RESULTS

4.1. The notary's function in credit banking bind guarantees

In banking, the guarantee process is one of the most energy-consuming activities for the legal counsel (Deen et al., 2018). As trade and the economy develops, people's demand for credit grows and it takes legal action for the certainty of the law for the creditors. This ability to give a bonding guarantee is essential to the development of economies and the banking system itself (Pratama & Sulchan, 2018).

4.2. Personal and material guarantees

Civil law recognizes guarantees in the forms of both material and personal rights. Material guarantees are the tangible form of the absolute rights to an object. They have a direct relationship to certain objects from the debtor, can be defended against anyone, and always follow the object and can be dispensed. Material rights are absolute, because they can be enforced against anyone. Therefore, every person is obliged to respect these rights. As one considers the situation in the open market, it becomes apparent at times that although the general principles regarding individual rights should be paramount, in practice some entities are better treated by lenders than others are. In fact, some can extract concessions and gain credit without any guarantees. Moreover, in online transactions, these guarantees become even more difficult to obtain (Peters & Panayi, 2016). Some individuals are not subject to high interest rates and onerous conditions and as the loan conditions depend on the specific situation, some borrowers will end up with substantially different conditions than others. This can diverge from theory, which generally states that banks should act consistently across the client spectrum.

4.3. The binding of collateral objects

The process of collateral object binding by the council is regulated by the Indonesian Surat Edaran Bank Indonesia (SEBI) (Central Bank in decision) number 4/248/UPPK/PK of March 16, 1972. This regulation states that movable objects must use the fiduciary council, while credit inter-

ests involving immovable objects must use the hypothek (mortgage) and credit verband (credit association) councils. In accordance with the development of Indonesian law, the binding process may be performed in several ways, depending on the object used as a guarantee, as follows:

Mortgage rights: This council is regulated by the Undang-Undang Hak Tanggungan (UUHT), which is meant as a replacement of hypothek and is regulated in Book II Kitab Undang-Undang Hukum Perdata (KUHP) of civil law on land and by credit verband, regulated by Staatsblad 1908-542 Undang-Undang Pokok Agraria (UUPA) (Agrarian Law Act) number 5 of 1960. It is legal until the publishing of the mortgage law. The mortgage law as stated in article 1 act (1) of UUHT is:

"Mortgage rights are guaranteed rights charged to land rights as referred to in Law Number 5 of 1960 concerning Basic Agrarian Principles, following or not following other objects, which constitute a unit with that land, for repayment of certain debts, which gives a position that is preferred to certain creditors against other creditors".

Article 4 of Act 1 of the UUHT states that the rights of the land that could be taken as burden are ownership rights, business use rights, and building use rights.

In general, the mortgage responsibility under the UUPA according to Article 1 sub-article 2, Article 2 sub-article 1, and Article 5 is the land or right over the land. Unfortunately, from the statements above, not all land and rights to use the land may become mortgage rights.

4.4. The notary's function in binding banking credit guarantees

A notary is a public officer whose function is to guarantee the validity of deeds. The community needs the services of a notary to request that deeds be crafted as authentic evidence for any acts or legal relationships that the parties want or that are required by law to be authenticated (Arvio et al., 2019). The legal provisions that form the basis for the existence of notaries in Indonesia are contained in Article 1868 of the Civil Code, which states: "Authentic deed is a deed which is

determined by law, made by or before the authorized public official for whom the deed is made". Authentic deeds must include three main features:

- a) the form of an authentic deed must be determined by law; the meaning must not be determined by the legislation under the law;
- b) made by or before a General Officer; and
- c) the deed is made by or before the General Officer within the territory of his authority.

4.5. The risk of illegal jurisdiction of a banking credit guarantee deed

In order for the deed made by a notary to be legally enforceable, the deed must provide outward, formal, and material truth. This is critical in part because of the way the promise is enforced. To legally enforce a debt, there must be an established contract that can be enforced against a person in case they do not pay. According to the law, there must be a valid execution for that promise to be enforced as written. Thus, the function of the notary is reducing the risk lenders could incur by holding debts that cannot be enforced against people who claim to have no responsibility to pay. If the notary is negligent, then the deed made by the notary suffers jurisdictional defects. Of course, there are many reasons why a loan might not be carried out. In particular, there are reasons related to corruption, in which individuals seek to forge documents and the like, and the notary plays a key role ensuring that the process is legitimate. The legal consequences of a juridical defect on the deed made by a notary are Loss of Authenticity and Cancellation by law.

Sanctions can be imposed on a notary for preparing a deed with juridical defects, such as civil liabilities in the form of compensation and administrative responsibility, as well as criminal responsibility.

In UUJN law, if the notary, in carrying out his duties, is proven to have committed a violation, he/she may be subject to civil and administrative sanctions. The sanctions are set forth in the Notary Position Regulations (PjN) and now in the UUJN and Notary Code of Ethics, but do not stip-

ulate criminal sanctions as a result of Law Number 30 of 2004 concerning the position of a Notary. Therefore, if there is a criminal violation, notaries may be subject to criminal sanctions as specified in the Code of Criminal Procedure (KUHP), Article 63 paragraph (2), which states: "If there is an act that can be punished according to specific criminal provisions in addition to general criminal provisions, then the specific criminal provisions are used, otherwise if the provisions for special crimes do not apply, the violations will be subject to the general criminal code."

5. DISCUSSION

There are some similarities between the Indonesian and German banking systems as many financial traditions in Southeast Asia were based in part on European norms because of the influence of European governments in the region (Cassis & Cottrell, 2015; Cassis & Telesca, 2018). However, there has been a kind of *laissez-faire* approach in European banking where banks are granted autonomy and are not required to provide for the public good, as banks and lending institutions in Indonesia are Bank Negara Indonesia (BNI), Bank Rakyat Indonesia (BRI), and Bank Mandiri. This context sets the stage for understanding the relationship between the two banking systems. The law concerning the guarantee of loans and credits in Europe is commonly called economic law (*wirtschaftsrecht* in German, or *droit économique* in French), as it has the function of supporting the economy and the development of the state in general. Thus, fixing the current regulation should be a priority. As a result of the increasing number of transactions by people nowadays, the need for a more developed money credit and loan market increases.

The importance of bank credit lies in its role in the development process, as lending activities by Indonesian banks are mainly directed at supporting the implementation of the national development plan, which in turn relies on the Development Trilogy (Nafees & Habeebullah, 2016; Nafees et al., 2015), that is, bank funding must be equitable, promote dynamic economic growth, and ensure national stability. For this reason, the lender and recipient of credit and other related parties receive

strong legal protection. Therefore, legal circles should be responsive to the demands of economic growth by every citizen. Social and economic development should also be accompanied by legal developments (Schisani & Caiazzo, 2018). Only in such an environment will the law reliably serve the needs of the community.

In accordance with the provision of loans by banks, the bank credit agreement should have strong security features as well. For this purpose, the legal side has also provided the elements contained in the provisions of the Law on Guarantees in the Civil Law Act, and in the laws and regulations that have been issued by the government.

In banking terminology, a guaranteed loan is called a credit guarantee or collateral. Recent law, for example, Article 1131 of Kitab Undang-Undang Hukum Perdata (KUHP) (civil law act), provides lenders guidance in terms of the status of their money and assets. The bank may approve the credit without guarantee as long as the borrower fulfills several requirements. Indeed, credit can be extended without a guarantee at times for those who have an existing working relationship with the bank, as the bank has the assurance and confidence that the loan will be repaid as they have in-depth knowledge of the borrower. In addition, lenders are sometimes willing to extend credit on the promise of repayment alone in some limited circumstances. This can occur when people have excellent credit, or when the lender is charging an interest rate that is high enough to compensate for the risk of default. The function of credit guarantees is very important to ensure repayment, and this is related to the economic cycle of the bank, which takes a risk providing people with credit in exchange for a guarantee statement. Credit guarantees are the very basis on which banks and lenders operate.

While the concept of guarantee in the banking world is of universal concern, some concerns are specific to the Indonesian situation. There is a preference for material rights (Article 1133 of the Civil Code), that is, the party that has material rights in the case of repayment, must discharge the payment obligation immediately after the object is sold at an auction. According to its nature, this material guarantee is divided into two

types: guarantees with material objects (material) and guarantees with intangible objects (immaterial). Tangible objects can be objects or movable and/or immovable property, while intangible objects commonly accepted by banks as collateral for loans are in the form of claim rights.

A personal guarantee is a guarantee in the form of a statement of acceptance given by a third party, to guarantee the fulfillment of the debtor's obligations to the creditor if the debtor is in default (Talukder, 2016). Individual guarantees will lead to direct relationships with certain individuals and can only be used for certain debtors against debtor property (e.g., borgtocht). Borgtocht is the Dutch word for bail, referring to money that is put up as a guarantee to ensure that a person is willing to comply with all laws of a court or show up when requested by that court. Therefore, an individual creditor's demands on a guarantor are not given a privileged or special position than the demands of other creditors; hence, this individual guarantee is not common in the banking world, even if it is used only as an additional or supplementary guarantee in the form of a personal guarantee (Begum, 2018). The difference between individual rights and rights is that the principle of priority is applicable to material rights, while the principle of equality prevails in individual rights. In the individual rights realm, there is a preference for equality so that people are treated equally. However, material rights are often subject to a more exacting form of scrutiny, namely, a priority system in which some have greater rights than others. This is foreign and antithetical to the concept of individual rights, but it has long been the prevailing system as far as material rights and possessory rights are concerned, especially among creditors of different types. For instance, in most systems, those creditors with a secured interest will take priority over those with just a general promissory interest, even if the promissory interest was undertaken first and even if it is greater. This is foul considering one's understanding of individual rights, but it works well in terms of possessory and material rights (Setyowati et al., 2018).

The authority of the notary authenticating the deeds is an element that must be considered when making a bank credit guarantee bond deed, namely Deed of bond for bank credit guarantees must

be made and formalized in the form determined by law. The definition of form here is Form and must always consist of 3 (three) parts, namely

- 1) beginning or head of deed,
- 2) deed agency, and
- 3) end of deed.

General offices are state organs equipped with general power and are authorized to exercise state power to write and authenticate evidence in the field of civil law, while in accordance with Article 1 of Peraturan Jabatan Notaris (PjN) (Notary Department Regulation) and Undang-Undangn Jabatan Notaris (UUJN) (Law of Notary), notaries are the only public officials authorized to make authentic deeds, agreements, and stipulations required by a general regulation or that by an interest are required to be stated in an authentic deed, as long as the deed is made by a general regulation not also assigned to or excluding officials or other people.

Notaries also have a formal responsibility that helps define some of the legal relationships that notaries participate in. The notary must be responsible for the truth in making a bank credit

guarantee bond deed. In addition, the notary must also be formally responsible for the deed made. In formal accountability, the notary will guarantee the truth of the date of the deed, the truth of the signature contained in the deed, the identity of each person present (comparant), as well as the place the deed was made, that the parties are explained as described in the deed, while the truth of the statements themselves is only certain between the parties.

One of the most difficult duties of the notary is to ensure the truthfulness of a deed. This duty toward materiality in truth has long been a central tenet not only of the notary's individual function, but of the banking system at large in its operation. The notary's responsibility for the correctness of the deed, including in making a bank loan guarantee deed, is also required for material truth. As far as the strength of material proof of an authentic deed is concerned, there is a difference between the information from the notary public which is included in the deed and the statement of the parties listed therein. Not only the fact that something was proven by the deed, but also the contents of the deed were deemed to be true of every person, who ordered the deed/proof to be made as proof of him or called *prevue reconstitute*, the deed has the strength of material proof.

CONCLUSION

The function of a notary is to guarantee the authenticity of the credit guarantee binding deed, which may be used as evidence, and to ensure legal certainty under the principle of binding the burden of the object of credit guarantee binding force if it is not made with an authentic deed.

The responsibility of the notary for the correctness of the credit agreement guarantee deed must satisfy three evidentiary requirements of the authentic deed: the outward, formal, and material truth. If the notary is negligent in making a deed, then the deed experiences juridical defects. The legal consequence of a juridical defect is the loss of the deed's authority and such deeds can be cancelled or considered void by law. Sanctions that can be imposed on a notary for any juridical defects in a deed prepared by him/her are civil liability in the form of compensation and administrative responsibility, as well as criminal responsibility.

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