SUBSEQUENTLY AQCUIRED ASSETS AS FIDUCIARY SECURITY ON BANK LOANS Ω

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Abstract

Collateral in terms of subsequently acquired assets namely subsequently acquired credit might be charged with fiduciary security. This collateral is not considered ideal regarding the high risk a bank must take. To minimize the risks, the bank analyzes the credit thoroughly, impose fiduciary security officials perfectly and performs monitoring of credits regularly to avoid misconduct committed by the debtor. If a default occurs, the bank will take over the assets. Nevertheless, the problems of execution on the subsequently acquired credits might arise due to debtor's default and bad debts to the third party. Consequently, subsequently acquired assets as collateral provides as additional collateral.

Keywords: bank, subsequently acquired objects, fiduciary, security, loans.

Abstrak

Jaminan berupa benda yang diperoleh kemudian berupa piutang yang akan diperoleh kemudian dapat dibebani dengan jaminan fidusia. Objek jaminan berupa piutang tersebut tidak ideal sebagai objek jaminan, mengingat risiko yang dihadapi bank sangat besar. Upaya untuk meminimalkan risiko yang dilakukan oleh bank adalah melakukan analisis kredit secara cermat dan seksama, membebani lembaga jaminan fidusia secara sempurna dan melakukan monitoring atas piutang secara rutin agar tidak terjadi penyimpangan yang dilakukan oleh debitor. Bilamana terjadi wanprestasi oleh debitor maka bank dapat melakukan eksekusi atas objek tersebut. Problematika eksekusi atas piutang yang akan diperoleh kemudian adalah bilamana debitor wanprestasi dan piutang debitor pada pihak ketiga juga tidak tertagih maka bank tidak dapat mengeksekusi piutang tersebut. Oleh karena itu, jaminan berupa benda akan diperoleh kemudian dijadikan sebagai jaminan tambahan.

Kata kunci: bank, benda yang diperoleh kemudian, fidusia, jaminan, kredit

Introduction

Capital needs for business development is urgently required by entrepreneurs. However, they often require capital by proposing a bank loan. Loans granted by banks, on one hand, is the greatest asset of the bank since it is the main revenue of reward; on the other hand, it potentially becomes a source of problems for banks, such as bad credit loans. Law Number 7 of 1992 on Banking as amended by Law Number 10 of 1998 (Banking Acts), Regulation of Bank Indonesia as well as in the Regulation of Financial Services Authority (OJK) has provided the guidelines for banks to extend credit to the debtor in order that the distributed and to be distributed credits have lowest risks. However, no one knows what happens next.

One of bank's effort to minimize credit risk is done by requiring collateral from debtors. Security is one of the important elements that has to be considered in analyzing the credit that will be distributed although it is not the principal of the loans. Banking Acts, Law Number 4 of 1996, Law Number 4 of 1996 on Mortgage of Land and Their Land-related Assets (UUHT), Law Number 42 of 1999 on Fiduciary Security (UUJF) and Law Number 9 of 2006 on the Warehouse Receipt System as amended by Law Number 9 of 2011 have accommodated the development of

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security objects to meet the public needs, especially entrepreneurs on capital. For example in the elucidation of Article 8 of the Banking Act states that girik, petuk (Letter C), and other related forms can be used as collateral/security assets. In fact, girik and petuk are not official certificates resulting in a questionable legal assurance, as reaffirmed in the explanation of Article 10 paragraph (3) UUHT.

Similarly, in Article 9 paragraph (1) of UUJF, it stated that Fiduciary security can be assigned to one or more units or types of objects, including receivables, either existing at the time the guarantee is given or subsequently acquired. Consideration of legislature is that Article is important in terms of commerce. This provision explicitly allows Fiduciary security which includes subsequently acquired objects. It shows this Act ensures flexibility on the ob-jects charged by Fiduciary security for debt repayment. In terms of commercial as well as flexibility, it is significant aid for bank capital seekers yet the principle of legal assurance towards Bank position is at stake. It puts bank at high risk especially if debtor's default is found. This becomes a dilematic decision; the bank is obliged to comply with the regulation but it must develop its assets in terms of credit providers by taking the risks.

Problems

Based on the background, the problems are formulated as follows: *first*, bank's efforts to minimize the risk on security objects in terms of subsequently acquired assets; and *second*, execution of fiduciary security in terms of subsequently acquired assets.

Research Methods

This type of research is a legal study. Legal research is conducted by methods which is in accordance with law studies. The distinct characteristics of this study is normative[1]. Legal research is a process of finding the rule of law, principles of law and legal doctrines in order to address the legal issues. This is in accordance with the prescriptive character of legal studies. This study applies statute approach, the conceptual approach and cases studies (cases study). Statute approach started by examining the Banking Act, UUJF, and other regulations governing banking, particularly security. Conceptual Approach is done by studying the views and doctrines developed in jurisprudence, particularly concept of objects, objects load and concepts of guarantee execution. The case study is a study of cases occurred in banking practice, especially with regard to security objects in terms of subsequently acquired assets viewd from from perspective of law, banking law and security law.

Discussions

Bank's Efforts to minimize the risk on security objects in terms of subsequently acquired assets

The loans that extended by banks are the biggest asset yet a source of great risk. Credit risk can be minimized by performing credit analysis. Credit analysis is a preventive measure that should be done professionally by the bank based on the bank procedures. Credit analysis can serve as the first filter to prevent bank from bad credits. The main objective of activities of credit analysis is to assess carefully the debtor's character, capacity, capital, collateral and business prospects. Collateral as one of factors necessarily considered by bank regarding the existence of collateral functions as a means of protection for bank security, that is payment assurance or execution of an accomplishment by the debtor or by a debtor guarantor. In assessing collateral, the bank must assess goods, projects or claim right financed by one's credit facility and other goods, securities or risk guarantee, written as additional collateral, whether it has been sufficient or not so when the debtor is unable to repay its obligations, the collateral can be used to cover the repayment of loans from the Bank. It can be seen that there are two (2) types of collateral, which are: main collateral is any goods,

[1] Philipus M. Hadjon and Tatiek Sri Djatmiati, 2005, *Argumentasi Hukum*, Yogjakarta: Gadjah Mada University Press, page 1

project, or claim right financed under related credit facilitiesand Additional Collateral is any object indirectly related to the object financed by credit facilities.

In banking practice, collateral refers to either moveable objects or immoveable objects, either registered or unregistered objects which are more acceptable as collateral compared to individuals security who only issues individual rights. Referring to Nindyo Purnomo on the meaning of goods then people can refer to the explanation on subject rights and object rights. If subject rights or the rights owner are person (*persoon*) further divided into individuals (*natur-lijkpersoon*) and legal entities (*rechts-persoon*), then the opposite of the subject right is the object of rights (goods). *Zaak* (Dutch term) can also be interpreted as a part of the properties, either tangible or intangible, as either movable or immovable. For example, found in Articles 500, 501, 503, 504, 508, 511 and 520 Burgerlijk Wetboek (BW).[2] Objects are object rights of which meaning is governed by Article 499 BW; based on law, material is, every goods and every right, controlled by proprietary rights. Thus in BW legal system, materials has two (2) meaning, ie, goods and rights. Objects may be charged on certain debt, by making an object as a security for repayment of a debt to the frame guarantee agreement.

Security agreement is an accesoir agreement of the credit agreement between the debtor and the bank. The signing of the loan agreement between the bank and the debtor then there is a legal relationship that in fact there have been conflicts of interest; the debtors need credit easily and quickly, on the other hand, the banks need certainty and security for debt repayment through credit in time with the material security as collateral material easily executed.[3] Djuhaendah Hasan stated that material security agreement is an act of separating a part of the wealth belonging to one who aims to ensure and provide it for the fulfillment of the obligations of a debtor. Material guarantee is an absolute right on a particular object that becomes the object of a guarantee of the debt, which at one time can be cashed for the repayment of debt the debtor if the debtor defaults. Wealth can be a wealth belonging to the debtor or property belonging to a third person.[4]

Collateral material of some objects belonging to the debtor or a third party may be accepted as security object if they meet the requirements. The requirments of objects that can be used as a security object if the object can be diverted and has economic value. When the object is in the form of land rights, then the rights shall be registered in the public register of the land office. Those requirements are cumulative not alternative.

Collateral material bonded by material security agreement, the agreement may be pledge, mortgage, fiduciary and security rights. Material collateral agreements created material rights. Material right is absolute, which can be enforced to anyone not limited to the contract only, while personal rights can be established only on certain parties only, is relative (not absolute). *Droit de suite*, the material right remains attached to the object to whom it belongs. The principle of priority, the material right that was earlier would be prioritized rather than those which come later. *Preferences*, material right bearers shall be preferred in the repayment of debt than other creditors.

Regarding to the given objects and subsequently acquired objects mentioned in Article 1131 BW, known as general collateral issued due to law and Article 1334 BW, states that:

> "Any movable and immovable property of the debtor, **either already exist or subsequently exist** become collateral to the engagements of individual debtors".
>
> "**Subsequently existed goods could be the subject of an agreement**. However, one is

[2] Nindyo Purnomo, "Perkembangan Hukum Kebendaan", *Makalah*, Semiloka Pembaharuan Hukum Perdata Indonesia, Faculty of Law Universitas Airlangga, September 2013, page 1-2

[3] Sri Mulyani, "Pengembangan Hak Kekayaan Intelektual sebagai Collateral (Agunan) untuk Mendapatkan Kredit Perbankan", *Jurnal Dinamika Hukum*, Vol. 12 No. 3, September 2012, Purwokerto: Faculty of Law Universitas Jenderal Soedirman.

[4] Djuhaendah Hasan, "Aspek Hukum Jaminan Kebendaan dan Perorangan", *Jurnal Hukum Bisnis*, Vol. 11, 2000, Jakarta: Yayasan Pengembangan Hukum Bisnis, page 18.

> not allowed to release a closed inheritance, or to determine a condition of the agreement on that legacy, even with the consent of the person who will leave a legacy that is the subject of the agree-ment, it does not limit the provisions of articles 169, 176 and 178. "

Based on the provisions of Article 1131 BW and Article 1334 BW indicate that the object in the agreement is possible to the subsequently existed object for instance, people can guarantee a coming harvest, in this case the object of the agreement does not exist, This is called an absolutely non existing objects.

In mortgage collateral board regulated by Article 1175 BW stated that the mortgage can only be held on existing goods. **Mortgage on non existing goods was void**. However, mortgage can charge a ship which is still under construction as mentioned in the explanation of Article 33 paragraph (1) of Government Regulation Number 51 of 2002 on Shipping, in condition that such ships have been registered temporarily in the Deed Registration of Ships and as regulated in Article 14 paragraph (1) of the Reg-ulation of the Minister of Transportation PM Number 13 of 2012 on the National Registration and Ships's identity. The subsequent requirement demand the process has reached 50% or at least physically have reached the stage of com-pletion of the main deck. Pledge security institution cannot consider any subsequently objects due to the pattern of *inbezitstelling* as provided by Article 1152 BW that the lien over movable goods and receivables are put by bringing loan objects under the power of the indebted or one's party third, about who has been approved by both parties.

The security agency encumbrance rights set that subsequently acquired objects can be used as a security object according to Article 4 paragraph (4) UUHT that encumbrance right may also be imposed on the right over land and buildings, plants, and works either given or subsequently given attached to the land, and belong to the land rights bearers in which its imposement is obviously stated in related Deed Granting Mortgage. UUJF allows any subsequently acquired objects as collateral as provided by Article 9 of UUJF. In this sense, they are receivables given either on given objects and subsequently acquired ones. Receivables according to BW is classified into intangible movable goods (*onlichamelijk*). These objects include claim right, securities, not to mentioned being imposed by fiduciary security institution or pledge security institutions as provided in Article 1152 (1) jo. Article 1152 bis and Article 1153 BW.

In banking practice[5] it is common that subsequently acquired objects becomes the object of fiduciary. For instance: *first*, The provision of working capital credit facility in the cooperation as a collateral object is billing/receivables owned by the cooperation on credit being given to members either already owned by cooperations or subsequently owned; *second*, The provision of credit facilities to multi finance then as collateral object is receivables owned by multi finance on credit distributed to the debtor or subsequently owned by multi-finance.

For example, a clause of fudiciary security objects in terms of subsequently acquired objects On Fiduciary Collateral Deed:

> Furthermore, each party acts in the position of explaining to guarantee payment of any amount owned by the debtor are due and must be paid by the debtor to the bank, whether arising under the agreements by number.... based on the credit agreement, fiduciary providers herewith provide fiduciary security to the fiduciary recipients for and on behalf of whom and those who meet before the second party to act as the recipient of fiduciary up to the value of collateral approximately -------,-(------), over colla-teral object as follows:
>
> All rights and authority over claims/receivables owned fiduciary providers **both given and/or subsequently fiduciary provider over the third party based on an agreement made separately by the recipient fiduciary with third parties** based on the agreement by fiduciary recipient and third party as stated in a statement of fiduciary providers are made over duty stamps, dated ---, month ---, year ---, in

[5] Interview with staff of credit Bank X on April 20th 2016

> which the original version is attached to this deed: concerned with a duty stamp list to be sub-mitted later by the fiduciary providers to the recipient list as an inseparable part of this deed with the amount of ------- (----------) henceforth referred to "fiduciary security objects".

In banking world, provision of credit facilities to debtors necessarily takes account of risks and minimizes any potential risks. Banks should do thorough credit analysis since funds for loans are largely received from public who have entrusted their funds managed by the bank. This was also stated by Rajev Sirohi and Pankaj Chauhan that:

> "Banking institutions involved in lending carefully assess credit risk. To assess credit risk, lenders gather information on the current and past financial conditions of the prospective borrower and the nature and value of the property serving as loan collateral. The precision in credit risk assessment is desirable because it ensures profitability and reduces the probability of opportunity lost when the application of profitable customer is rejec-ted."[6]

In Article 8 of the Banking Acts, it emphasized that bank must assess credit analysis, known as 5C principle, consisting of elements of Character, Capacity, Capital, Condition of Economy, and Collateral. Collateral is one of the principle elements of 5C but banks still need to analyze the collateral carefully and thoroughly, because the collateral is very important for banks when bad credits occur. At this condition, collateral execution is the last option taken by the bank. Likewise, as stated by Alina Mihaela Dima on the importance of assurance as one of the basic components of credit analysis:[7]

> "Collateral (or guarantees) are additional forms of security the customer can provide the lender. Giving a lender collateral means that an own asset is mortgaged, such as a property, to the lender with the agreement that it will be the repayment source in case the loan is not repaid from the established sources as per terms and conditions agreed for the financing. A guarantee, on the other hand, is just that - someone else signs a guarantee document promising to repay the loan if the initial lender cannot. Some lenders may require such a guarantee in addition to collateral as security for a loan. A collateral is considered „the second way out" by the lender in case the credit goes wrong".

Not all objects can be used as credit collateral, but must meet MAST'S: *first*, marketability, the existence of a sufficient market preventing it from trading down; *second*, ascertainably of value, the guarantee must have a standard price; *third*, stability of value, the assets used as collateral stable in price, *fourth*, transferability, that is its guaranteed assets is easily transferred either physical or juridical; and *fifth*, secured, the goods that are guaranteed can be held legally formal binding in accordance with the laws and legislation in case of default.[8]

Thus, when subsequently acquired objects such as bills or receivables to a third party made the object of collateral, banks must ensure the authenticity of the receivable evidence or these bills by checking it to a third party, such as security object in the form of bills of mem-bers of the cooperation it is certain that the members of the cooperation have obligation to the cooperation.[9]

In addition, the collateral, subsequently acquired objects in terms of receivables/bills should be made tied with fiduciary perfectly. Fiduciary security registration is an absolute requirement to issue the fiduciary security to fulfill the principle of publicity. This is in accordance with the provisions of Article 11 (1) of the Law Fiduciary that the objects charged by fiduciary security must be registered.[10]

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[6] Rajev Sirohi dan Pankaj Chauhan, "Credit Risk Assesment for Mortgage Lending", *International Journal of Research in Business Management*, Vol. 3 Issue 4, April 2015, pages 13-18

[7] Alina Mihaela Dima "Credit Analysis" AcademyPublish.org – Risk Assessment and Management, available at http//: www.academypublish.org/papers/pdf/447.pdf accessed on April 15th 2016.

[8] Abdul Aziz, "Analisis Risiko Kredit Musyarakah Lembaga Keuangan Syariah, Fakultas Syariah dan Ekonomi Islam IAIN Syekh Nurjati Cirebon, available at http://www.id.portalgaruda.org/article.php?article=447183&val=9459 , accessed on April 15th 2016.

[9] Interview with staff of credit Bank X on April 20th 2016.

[10] Puwanto,"Beberapa Permasalahan Perjanjian Pembiayaan Konsumen dengan Jaminan Fidusia", *Jurnal Rechts-*

Efforts to minimize the risk of collateral object in form of bills or account Receivables (AR) are performed by making a list of charges, which at least includes a bill list, which includes at least statement of a list of charges to any parties, following the amount of each respectively and the date or the number of the agreement. Due to its tentativeness, (subject to payment at any given time), fiduciary providers must make periodic reports a list of charges, which are usually set out in the quarterly Fiduciary Security Deed.[11]

Moreover, the banks monitor debtor's business as well as their collateral such as accounts receivable/billing consistently in order to avoid defaults committed by debtors. Practically, Bank X puts subsequently acquired objects as the main collateral but the other might put it as additional collateral regarding the high risk taken by the bank. For example, the provision of credit to the cooperation as main collateral include given or subsequently acquired receivables/billing of cooperation members.[12]

Execution object collateral in the form of objects to be acquired in the future

In the sense of banks as the holder of material security such as fiduciary, banks takes resposibility if any debtor's default occurs. If the debtor default, the bank as a preferred cre-ditor has the right to execute guarantee either through parate execution or by executorial title or under-hand sales as provided in Article 29 Fiduciary law.

One of the privileges owned by material guarantee holders is in case that debtor de-faults on its debt or default/breach of contract. Obtaining payment of receivable creditor is not necessarily done by sueing through court. Even the first mortgage holder holders have the right to sell on its own authority towards the object of security rights through public auction, called as parate executie.[13]

When the debtor defaults that may cause non-performing loans, the collateral execution is the final attempt made by the bank if an attempt to rescue the bad debts by restructuring credit does not bring results or where the debtor has no good will since the beginning. The execution is done by selling the collateral given by the grantor fiduciary to the bank and the sale proceeds used as all obligations of the deb-tor to the bank. If the sale of security object is greater than the amount of all liabilities of the debitor,then the bank must refund that surplus to fiduciary providers as the owner. However, on the contrary if the sale of that security object is less to settle all obligations of the debtor, then the debtor is obliged to pay the deficiency.

Problematic execution of subsequently acquired objects in form of receiveables or the bill occurs if the debtor defaults while the collateral in the form of subsequently acquired receivables or bills on a third party are not collectible or bad debts then bank can not execute receivables or charges. As an illustration, if a cooperation or multi finance defaults on a bank, the bank is unable to execute such collateral object, i.e. receivables from members of the cooperation or the multi finance debtor or if members of a cooperation or multi finance debtor itself default on a cooperation or a multi finance. It can be said that bank issues credit without specific guarantees even in the credit agreement and the security agreement is no guarantee in the form receivables or bills charged by fiduciary security institution. Moreover, if the collateral in the form or subsequently acquired receivables used as main collateral then consequently the bank only serves as concurrent creditors, which is only secured by a general guarantee as provided by Article 1131 Burgerlijk

Vinding, Vol. 1 No. 2, August 2012, Jakarta: Badan Pembinaan Hukum Nasional, page 201.

[11] Melysa Natalia Tobing, "Analisis Yuridis Faktor Penghambat Eksekusi Jaminan Fidusia dalam Melindungi Kreditor (Studi di Bank Mandiri (Persero),Tbk BALAIKOTA MEDAN) available at http//jurnal.usu.ac.id/index.php/premise/article/viewFile/8345/3732, accessed on April 15th 2016.

[12] Interview with staff of credit Bank X on April 20th 2016.

[13] Rumawi, "Prinsip Parate Executie dalam Hak Tanggungan dalam Hal Debitur wanprestasi", *Buletin Hukum Perbankan dan Kebanksentralan*, Vol. 10 No. 3, September-December 2012, Jakarta: Bank Indonesia, page 22.

Wetboek. The position of creditors with a main collateral only serves as concurrent creditors which equal to other concurrent creditors. It raises individual right which are relative rights, no principle of droit de suite, the position of the individual right holders are equal, there is no take precedence and the lawsuit is called individuals claim, which can only be filed on the counterparties.

Conclusion

The efforts made by banks to minimize credit risks whenever they receive collateral in terms of subsequently acquired objects as fiduciary security are performed by thorough credit analysis on five (5) factors including character, capital, capacity, collateral and business prospects. In addition, the imposition of fiduciary security is done perfectly to raise material right. Furthermore, to minimize credit risk, regular monitoring of accounts receivable or that bill are conducted to prevent bank from debtor's defaults. It can be said that the bank extend credit with the absence of specific assurances even though bank as preferred creditors proven by fiduciary security certificate but the bank cannot enforce its material right because the object cannot be executed. Therefore, collateral such as subsequently acquired receivables or bills bring higher risks, thus, as a bank compliance on the precautionary principle, they should not put collateral in the form of subsequently acquired receivables or bill as main collateral but as additional collateral.

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