
THE EXISTENCES OF PERSONAL GUARANTEE IN BANCRIPTCY debtor of limited liabilities TO REALIZE THE LEGAL CERTAINTY

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ABSTRACT:

Legal certainty must be have by a law because law must guarantee that certain boundaries are bound to act, so that clear boundaries are considered with certainty. Law without the value of certainty will lose the identity and meaning, because it can notbe longer used as a guideline for everyones behavior. The research method used in this study is normative legal research supported by an empirical approach. The empirical approach used in this writing is the decisions of the Commercial Court at the District Court. The existence of personal guarantees in bankruptcy Debtor Limited Liability to realize legal certainty. Legal certainty regarding repayment of Debtors debt obligations by Garantor can be reached through a Suspension of Payment or a Bankruptcy Request filed against the Debtor and Garantees simultaneously in the same case. Problems will arise if the Suspension of Payment or Bankruptcy application is submitted only to the Debtor without including the Garantees. Moreover, if the Debtor is in a state of bankruptcy, the assets of the Debtor are sold by the Reciever whose results will be shared with the Creditors. The remaining credit of the creditor who also has the right to collect from Garantees will be

difficult to repay so that it does not provide legal certainty.

KEY WORDS: Legal certainty, law because law must guarantee

INTRODUCTION:

The development of national law is not merely directed towards the realization of a legal system that guarantees the functioning of the law as a means of social change, but through national development a national legal system can be created for the realization of the welfare of society as a whole, among other things being a legal basis that can prevent and resolve conflicts that occur in the process of development. Conflict or dispute in the realm of civil law is caused by a legal relationship between one or more people. Person (Person) is the bearer of rights and obligations or every creature that is authorized to own, obtain, and use rights and obligations in legal traffic which is referred to as legal subjects. (Elsi Kartika Sari and Advendi Simanunsong, 2008). Legal subjects in civil law consist of people and legal entities.

The role of law is expected to function as a means of resolving conflicts or disputes that occur between legal subjects in the community. Conflicts or disputes in the realm of civil law in particular can be seen from the settlement of the problem of accounts receivable debt, both debt born of an agreement or debt born of the

law. Invite. One alternative to settling conflicts or debts in the legal system in Indonesia is a bankruptcy institution.

Bankruptcy is the elaboration of the two principles contained in Articles 1131 and 1132 of the Civil Code (Civil Code), determining that all of one's possessions, both current and future, both movable and immovable objects are guarantees of all commitments. (Erna Idjajati, 2014). As implementation measures, Article 1132 of the Civil Code ordered that all property debtor sold in public auction and the results distributed to creditor proportionally, except among the creditor there are creditor precedence fulfillment of its receivables. To avoid the creditor scrambling precede each other for control and sell the assets (assets) debtor causing injustice regarding the balance of the distribution of wealth (assets) the debtor, the law makes the Bankruptcy Act. (Sutan Remy Sjahdeni, 2004)

In particular the provisions on dispute debts through bankruptcy law means arranged in a Undang-Undang No. 37 of 2004 on Bankruptcy and Suspension of Payment (the Bankruptcy Law and PKPU). Prior to the enactment of the Bankruptcy and PKPU Law, initially in Indonesia Faillissement verordening, Staatsblad 1905: 217 jo. Staatsblad 1906: 348 which was subsequently amended by Government Regulation in Lieu of Law (PERPU) No. 1 of 1998 concerning Amendments to the Law on Bankruptcy jo. Law No. 4 of 1998. Changes to the provisions of bankruptcy until the enactment of the Bankruptcy Law and PKPU .

Institutions bankruptcy is an alternative dispute resolution related to debts between creditor with debtor. Creditors who have debts that have matured and can be billed and have at least 2 (two) creditor, can be filed for bankruptcy through an application for a statement of bankruptcy at the Commercial Court at the District Court. Creditors may prove

a debt debtor maturing and can be charged and their creditor second, then it meets the requirements of proof is simple. This is in accordance with the provisions stipulated in Article 2 paragraph (1) jo. Article 8 paragraph (4) of Law Number 37 of 2004 concerning Bankruptcy and PKPU.

Debts relationship between creditors with debtor, arise because of the importance of additional funding from debtor so that business activities can continue to run. Funding of a company acquired various sources, one of which is obtained from the bank in the form of debt / loan (loan) . To realize an engagement between k editor with debtor, then made an agreement of debts / credit agreement. Credit agreement is a business agreement made by the bank to increase its business capital. Business agreements or contracts are the main basis in building business relationships. (Iswi Hariyani, 2018) The business contract outlines in detail the rights and obligations of the parties, including how the dispute resolution process will be chosen. Expertise in arranging business contracts is needed to ensure future business success and avoid business risks that can cause harm.

Business agreements in the disbursement d ana loan in issued by the bank, to be considered on the basis of 5 C, among other things: Character, Capacity, Capital, Condision of Economy, as well as Colateral (collateral). Specifically regarding collateral aims to strengthen the bank's confidence that the debtor actually repays the loan after the loan period ends. Collateral in debt receivable agreements in general can take the form of material guarantees (fixed and non-permanent objects) as well as individual guarantees and corporate guarantees. The theme in this thesis proposal which will be discussed specifically is individual guarantee. To strengthen the position of creditors, in the individual guarantee agreement, a guarantor clause is

released releasing the privileges that he has under Article 1831 and Article 1832 of the Civil Code. Individual collateral is part of a collateral institution where a person guarantees himself/herself for the debt obligations of another person or legal entity. Legal consequences for on the debt of others is when a debt have fallen due and billable, then Garantor also participate responsibility to bear the responsibility to repay the debt is used as das sollen in writing this thesis.

Assessments were carried out against d ebitor in this thesis specifically. Debt debtor Company Limited which is secured by a guarantee of individual (personal guarantee) does not directly lead to the The Guarantor debt (garantor) are in a state of bankruptcy, because legally debtors and garantor own entity (a presence) different to have rights and obligations different. When g arantor want to be held responsible simultaneously on its debt obligations debtor through proces bankruptcy, then garantor should be withdrawn as a party in a case similar to provide certainty law of treaties binding individual guarantee against settlement of receivables creditor.

Difficulties occur when filing petition filed by creditor concurrent (creditors who do not have a guarantee) that sec fig entitled to follow law does not include the garantor in the case. As a result of the ruling, the Creditor holder guarantees is difficult to prosecute individual debt repayment Debitor to the garantor, so had to wait for bankruptcy debtor ends beforehand. The individual guarantor (Personal Guarantor) system in paying off the debts of Limited Liability Companies that have been declared bankrupt will be used as a basis for this thesis.

The binding of individual guarantees is regulated in Article 1831 jo. 1832 Civil Code (Civil Code). If the garantor release privileges, then garantor billable in advance to settle the obligation debt debtor. An individual collateral

binding agreement is a derivative of a debt and credit agreement (credit agreement). Credit agreements can be made notarized or underhanded. In a notarial credit agreement, generally regulates in detail in relation to the repayment period of the loan which is used as the basis for the start of the default condition of the debtor. Debtors who have good faith will submit an application to reschedule the procedure for repaying loans. If approved by the creditor it will be executed addendum to the credit agreement.

Credit agreements and treaties binding individual guarantee (personal guarantee) which shall be notarized has the strength of evidence is perfect. Development Agreements personal guarantee be notarized ak 's further solidify the belief kreditor, so that debtor to repay loans on time frames debt disepakati. Apabila debtor has matured, then the assets of the guarantor individual can used and/or sold for settle.

Debtors who do not seek to pay their debt obligations may be sued for paying off their debt obligations through the judiciary. Creditors can file a civil suit in the District Court. However, due to settlement process through a civil lawsuit requires a long time, then creditor many choose PKPU dispute resolution and bankruptcy petition in the Commercial Court. If the guarantor to individual 's release privileges in agreement individual guarantees, then garantor billable in advance to pay debt obligations debtor. This is in line with Decision Number 137/PDT. SUS/ PKPU/ 2017/PN.NIAGA.JKT.PST between PT. Bank OCBC NISP Tbk. (Bank OCBC) with PT. Ika Maestro Industries (PT. Ika Maestro) as corporate guarantee and Fredy Chandra as personal guarantee (The Respondent PKPU). The PKPU Respondents respectively are the Guarantor of the Debt Repayment of PT. Megagraha Nusantara to Bank OCBC.

Debt obligations of debtor and guarantor to creditor normative can be charged through a petition PKPU or bankruptcy. However, in practice, PKPU's request cannot be granted at the time when the bankruptcy proceedings of the bank are still ongoing and not yet over. The reason for the applicant PKPU can not explain the residual value tagihan to debtor so that charges the applicant could not be proved simple.

Based on Decision Number 123/PDT. US/PKPU/2016/PN.NIAGA.JKT.PST, between PT. Bank OCBC against Hadi Raharjda and Wira Rahardja, in the consideration of the panel of judges who rejected the petition, explained that in order to avoid submitting double bills and the petitioner could not explain the remainder of the bill, therefore the application was rejected. Normatively no filing of a double bill related to liability guarantor personally (personal guarantor) and debtor, because when debtor maturity then the guarantor is responsible to bear on debt obligations debtor which can be the basis of the debt that has been due and billable. This is in line with the arrangements as contained in Article 1831 jo. 1832 Civil Code (Civil Code).

THEORITICAL REVIEW:

1. Guaranteed Legal Theory:

The term guarantee is a translation from the Dutch language, namely *zekerheid* or *cautie*. *Zekerheid* or *cautie* include general ways creditor ensure the fulfillment of the bill, disamping public accountability of debtor against stuff. In the days of the Dutch East Indies government, the legal provisions governing guarantee law could be reviewed in Book II of the Civil Code and Stb. 1908 Number 542 as amended to Stb. 1937 Number 190 concerning *Credietverband*. In Book II of the Civil Code, the provisions of the law relating to the legal guarantee is a pledge (*pand*) and mortgage. *Pand* is regulated in Article 1150 of the Civil

Code up to Article 1160 of the Civil Code, while mortgages are regulated in Article 1162 through Article 1232 of the Civil Code.

Since the days of independence until today (1945-2018) there have been many legal provisions concerning guarantees that have been ratified into law. In this era, it can be divided into 2 eras, namely the era before the reform and after the reform. In the pre-reform era, the legal provisions governing guarantees were Law Number 5 of 1960 concerning Basic Rules on Agrarian Matters. In this provision also refers to various other laws and regulations. This can be seen in the considerations of Law Number 5 of 1960 that revoked the enactment of Book II of the Indonesian Civil Code concerning land, water, and natural resources contained therein, except for the provisions concerning hypotheses which are still valid since the enactment of the law invite this. Although at the time of independence until now our government has determined many laws relating to guarantees, but we still enforce the legal provisions contained in Book II of the Civil Code. Legal provisions that still apply in Book II of the Civil Code are those relating to pawns (*pand*) and mortgages, especially those relating to the imposition of a mortgage of ships weighing 20m³ and aircraft. Whereas matters relating to land rights apply the legal provisions contained in Act Number 4 of 1996 concerning Mortgage Rights. Furthermore, in the reformation era, the enactment of Law Number 42 Year 1999 concerning Fiduciary Guarantees.

2. Legal Certainty Theory:

Certainty is considered as something that must be owned by a law because the law itself must guarantee that there will be certain limitations that become limitations in acting, so that clear boundaries are considered certainty. Law no certainty value will lose our identity and its meaning, because it no longer can be used as guidelines for the behavior of every person.

Certainty is considered a fixed price in law. Accordingly historically many conversations that have been made concerning the law - oriented Montesquieu's notion of separation of powers. Closely related to the social order, because the order is at the core of certainty itself. Of regularity will cause someone to live in certainty in carrying out activities required in people's lives.

Theory is a number of concepts used to define and explain a phenomenon that is happening. (Emi Emilia, 2009) While the theoretical framework is the basis of theory or theoretical support in establishing or reinforcing the truth of the problem being analyzed. The theoretical framework referred to is the framework of thought or points of opinion of the thesis theory as a handle either approved or not approved. (M. Solly Lubis, 1994)

The function of the theory in this study is to provide direction/guidance and explain the observed symptoms. Because this research is a legal study, the theoretical framework is directed towards the science of law and is directed towards the legal element.

According to Gustav Radbruch, there are two kinds of definitions of legal certainty, namely legal certainty by law and legal certainty in or from law. Successful law guarantees a lot of legal certainty in society is a law that has benefits. Legal certainty because the law gives other legal tasks, namely legal justice and the law must continue to have benefits. While legal certainty in law is achieved if the law is as much as possible contained in the law. In the law there are conflicting provisions (the law is based on a logical and practical system). The law is made based on *rechtswerkelijkheid* (a serious legal situation) and there are no terms in the law that can be interpreted differently. Gustav Radbruch stated 4 (four) basic things related to the meaning of legal certainty, namely: First, that the law is positive, meaning that positive law is legislation. Second, that the law is based on

facts, the meaning is based on reality. Third, that facts must be formulated in a clear manner so as to avoid errors in meaning, as well as being easy to implement. Fourth, positive law cannot be easily changed.

Gustav Radbruch's opinion is based on his view that legal certainty is certainty about the law itself. Legal certainty is a product of the law or more specifically of the law. Based on his opinion, then according to Gustav Radbruch positive law governing human interests in society must always be obeyed even though positive law was unfair.

According to Sudikno Mertokusumo, legal certainty is a guarantee that the law must be implemented in a good manner. Legal certainty requires an effort to regulate law in legislation made by authorized and authoritative parties, so that the rules have a juridical aspect that can guarantee the certainty that law functions as a rule that must be obeyed. (Sudikno Mertokusumo and H. Salim Hs, 2010)

RESEARCH METHODS:

The method used in this research to get the data is legal research nor an Atif are supported by empirical approach. The empirical approach used in this paper is the decisions of the Commercial Court at the District Court. Normative legal research is an approach to the problem by looking at the legal regulations that apply and relate to the facts that exist from the problems encountered in the study. In writing normative law, data processing in essence means activities to carry out systematization of unwritten laws or referring to legal norms contained in legislation and court decisions. Normative research objects include general principles of law, the systematic law, the degree of vertical synchronization and horizontally. (Sudikno Mertokusumo, 2010). The purpose of this method is to find out how the law is implemented including the law enforcement

process. Moreover the normative law in penelit
ian is supported by the empirical approach of
the cases occurred in the trials were Commerce.

In this study, the authors conducted
research at the Jayabaya University library, the
University of Indonesia library and other
universities in Jakarta and the Commercial
Court at the District Court.

RESULTS AND DISCUSSION:

A. Existence Guarantor Individual Upon termination of Bankruptcy Company Limited:

The position of the individual guarantor
on bankruptcy debtor Company Limited
remain attached to the credit agreement,
because it guarantees the individual is a
derivative of the credit agreement. Difficulty
creditor related to repayment of debt
obligations debtor by guarantor would occur in
the case of bankruptcy debtor Limited Liability
Company is not included guarantor in the same
case. During Bankruptcy is not over, then k
reditor not be able to sue garator on debt
repayment d ebitor through either through a
civil lawsuit or petition PKPU and Bankruptcy
for the bankruptcy of the bank to expire, as in
the case between PT. Bank Mandiri (Persero),
Tbk., Against Rustandi Jusuf, Tonnie Jusuf, Sunta
Yusuf and Eddie Jusuf as the guarantor of the
debt of PT. Dewata Royal Internasional
(Debtor).

Messenger Number
70/PAILIT/2010/PN.NIAGA.JKT.PST, between
PT. Bank Mandiri (Persero) Tbk., Against
Rustandi Jusuf , Tonnie Jusuf , Sunta Eddie
Joseph and Joseph (the Respondent) as the
guarantor of the debt of P T. Dewata Royal
International (debtor), the Commercial Court
has declared Respondent in state bankruptcy.
The debt obligations of bankrupt defendants
arise based on foreign exchange investment
credit facilities to PT. Dewata Royal
Internasional in the amount of USD 14,000,000.-

as it turns out in the Deed of Credit Agreement
and Credit Recognition No. 39 dated September
13, 1996 made before Tina Chandra Gerung, SH.,
Notary in Jakarta, which had undergone several
changes.

Previously PT. Dewata Royal International
as debtor has been declared bankrupt by the
Commercial Court of Surabaya through the
decision No. 04/PKPU/2009/PN.NIAGA.SBY,
dated November 10, 2009. The Garantor have
waived the privilege, then pursuant to Article
1832 of the Civil Code, Bankruptcy Petitioners
invoke the liability of the garantor untuk pay off
the entire debt of PT. Dewata Royal
Internasional to Bankrupt Petitioners. Based on
Article 1836 of the Civil Code, the remaining
debt of PT. Dewata Royal International to the
Applicant Bankrupt must ditanggung g jointly
and severally by garantor/ the respondent
Bankrupt.

Debt of PT. Dewata Royal Internasional to
Bankrupt/Bank Mandiri Applicants based on a
credit agreement that is past due and collectible
and verified by the bill on February 16, 2010
amounting to USD 22,237,078, - (twenty two
million two hundred thirty seven thousand
seventy eight US Dollars) after interest and
penalties have been calculated. After sales se
shed assets d ebitor bankruptcy, Curator has
published daf tar division of the approval judge
supervisor that had been paid USD
18.173.411.52 (eighteen million one hundred
and seventy-three thousand four hundred and
eleven US Dollars and fifty two cents). So that
the remaining debt of PT. Dewata Royal
Internasional to the Bankruptcy Applicant is
USD 4,063,665.75 (four million sixty three
thousand six hundred sixty seven US Dollars
and seven five cents).

Because the sales of all assets of PT.
Dewata Royal Internasional by the curator has
not been able to pay off all debt obligations to
the Bankrupt Petitioner, and to the debt of PT.
Dewata Royal International has guaranteed

personally by p ara g arantor by releasing privileges , then p ara g arantor is personally responsible for the deficiency payments made by PT. Dewata Royal International to the Applicant Bankrupt/Bank Mandiri and also into personal debt p ara g arantor.

In consideration of the Assembly H akim associated disclaimers the respondent p ailit / p ara g arantor who say refused to pay debts to the applicant bankrupt because of overlap with the bankruptcy process PT. Dewata Royal Internasional, the Panel of Judges believes that the bankruptcy proceedings against PT. Dewata Royal Internasional based on decision No.04/PKPU/2009/PN.NIAGA.SBY is a bankrupt statement to PT. Dewata Royal International and not personally has ended even the Bankruptcy Applicant has received partial bill payment. For the decision to grant the judges through a Request.

B. Existence Guarantor Individual In Bankruptcy Debtor Company Limited Not Yet Ended:

Individual guarantor liabilities when debtor Limited Liability Company (PT) is declared bankrupt, it still lives up to the value of debt d ebitor paid. Creditors will have difficulties to collect the guarantor through PKPU and bankruptcy petition if k reditor at the time of the submission of the guarantor have to prove the value of the remaining debt debtor were charged to guarantor. Based on messenger No. 123/PDD.SUS/PKPU/2016/PN.NIAGA.JKT.PST, between PT. Bank OCBC NISP, Tbk., As the PKPU Petitioner against Hadi Rahadja and Wira Rahardja as the PKPU Respondents, the Panel of Judges stated that they rejected the PKPU petition submitted by PKPU Petitioners. The consideration of the panel of judges who refused the application explained that in order to avoid submitting double bills and the applicant could not explain the remaining bills the application was therefore rejected.

Normatively no filing of a double bill related to the obligations guarantor and debtor, because when debtor maturity then guarantor jointly and severally on debt obligations debtor which can be the basis of the debt that has matured and could be charged .

Previously in case No. 49/PDT.SUS-PKPU/2015/PN.NIAGA.JKT.PST, a PKPU application has been submitted by PT. Abisatya Bhumi Lohjinawi against PT. Wirajaya Packindo. PT. Wirajaya Packindo in the PKPU process was unable to offer a maximum peace proposal, so that on January 13, 2016, it was declared bankrupt by the Commercial Court. The bankruptcy process of PT. Wirajaya Packindo still hasn't ended until the time this thesis was written. There is no regulation regarding the period of bankruptcy termination regulated by the Bankruptcy and PKPU Law. Termination of bankruptcy under Section 202 Bankruptcy Act and PKPU occur if d ebitor pay the debt in full or cover the distribution list becomes binding.

Bankrupt statement to PT. Wirajaya Packindo not eliminate the responsibility g arantor to repay debt obligations debtor. Bankruptcy proceedings against debtor which has not been terminated, may be a reason that makes it difficult creditor to collect against g arantor through a bankruptcy petition or PKPU. Adjustments should be made in the Law on bankruptcy governing a written document can be used as the basis for creditors to assert the value of remaining bills d ebitor outstanding.

C. Billing Efforts Against Individual Guarantor Which Precedes Billing Against Debtors:

In practice in the Commercial Court, guarantor billable advance through the petition without their billing PKPU debtor first. Referring to the decision No. 137/PDT.SUS/PKPU/2017/PN.NIAGA.JKT.PST between PT. Bank OCBC NISP Tbk. (Bank OCBC)

with PT Ika Maestro Industri (PT Ika Maestro) as Corporate guarantee and Fredy Chandra as Personal Guarantee (Respondents) . The PKPU Respondents respectively are the Guarantor of the Debt Repayment of PT. Megagraha Nusantara to the Petitioner .

Assurance Company (corporate guarantee) on behalf of PT. Ika Maestro Industri based on the Deed of Guarantee (Corporate Guarantee) No. 24 dated June 13, 2011, made before Henny H Endrawati Putradjaja , Bachelor of Law, Notary in Jakarta and of Amendment And Affirmation Back Guarantee Company (corporate guarantee) No. 35 dated September 10, 2015, which was made before Pauline N ataadmadja , Bachelor of Laws, Notary in Jakarta .

OCBC Bank has also held binding assurances against Freddy Chandra, is based on the Deed of Guarantee Agreement Individual, No. 23 dated June 13, 2011, made before Henny Hendrawaty Putradjadja, Bachelor of Law, Notary in Jakarta . The binding of the guarantee is reaffirmed by:

1. Deed of Amendment and Reaffirmation of Continuous Personal Guarantee, No. 34 dated 10 September 2015, which was made before Pauline N ataadmadja , Bachelor of Laws, Notary in Jakarta ; and
2. Personal Guarantee Deed, No. 48 dated 29 May 2017, made before Hajj Eddy A nwar , Bachelor of Law. Notary Specialist, Notary in Jakarta.

Whereas the purpose of the Individual Guarantee (Borgtocht Deed) of PT. I ka M aestro signed by Fredy Chandra is to ensure the implementation of the repayment of debt of PT. Millagraha N usantara to Bank OCBC in connection with several credit/debt facilities that have been received by PT. Megagraha Nusantara from Bank OCBC. With the position of Fredy Candra as the Guarantee of Debt Repayment, Fredy Chandratelah has promised and committed himself to and at the request of

Bank OCBC and without any conditions replacing the position of PT. Megagraha Nusantara as debtor and pay immediately and simultaneously to OCBC for all debts and/or liabilities to be paid by PT. Megagraha Nusantara to Bank OCBC, bothu pliers, and others the amount of money that must be paid.

It is set firmly on h people experience 3 last paragraph Akta Borgtocht redy Handra, which states: Guarantor hereby warrants are not irrevocable and unconditional to make payment in full to the Bank on the first request of the Bank to the Guarantor, the entire amount of money that is now or from time to time is owed and must be paid by the Debtor to the Bank based on the Loan Agreement.

Page 6 first paragraph which states: Guarantor hereby warrants are irrevocably and unconditionally to make payments on j Guarantees are secured in full to the Bank on the first request of the Bank to the Guarantor, the entire amount of money which is now or from time to time is payable and must be paid by the Debtor to the Bank based on the Loan Agreement.

CONCLUSION:

Binding individual guarantees are derivatives of agreement of debts between creditor with debtor. An individual guarantee agreements banking practice always include a clause about garantor that release privileges. Garantor billable in advance to pay debt obligations debtor of property wealth at the time g arantor relinquish its privileges. Additionally, garantor can voluntarily pay the debt d ebitor of property wealth or through Court Judgment.

Binding of individual guarantees is j Guarantees are secured extras given to strengthen confidence creditor to be able to repay its debt obligations at a predetermined time as agreed in the agreement of debts (Credit Agreement). In banking practice in

Indonesia, if the material collateral is not expected to cover outstanding debts, then the Bank will ask the debtor to enter into an agreement to bind the individual collateral as additional collateral.

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