005

JUDICIAL ISSUES ON NATIONAL DEVELOPMENT RELATED TO IMPLEMENTATION OF PRUDENTIAL BANKING PRINCIPLES WHITIN THE CREDIT OF THE GUARANTEE MORTGAGES/ SECURITY RIGHTS[1]

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Abstract

Judicial issues on national development Related to implementation of prudential banking principles Whitin the credit of the guarantee security rights internally can cause a bank, as well as external, such as the social aspect result ineffective the banking functions as one of the driving aspects of national development

The problem is how the functions and benefits of the Banking Law in supporting the implementation of development through the Credit, and the effectiveness of the Banking Act in relation to the implementation of security rights in guarantee credit.

The conclusion was that functions and benefits of the Law no.10 / 1998 on banking in supporting the implementation of development through credit suboptimal implementation guarantee security rights of bank credit because it is not certain in its provisions. The effectiveness of enforcement in the field of mortgage credit rights guarantees have not achieved optimally because the banks were not aware that the bank should be healthy, among others through the application of prudential banking principle because the bank is one of the important determinant factor in the adjustment process of international as well as regional development support national development, especially in field of economic improvement.

It is suggested implementation of prudential supervision principel seriously, also outreach to the community (the debtor) relating to rights in obtaining a a loan. In connection with that, necessary to improve the national the banking system that not only includes the attempt to rescue individual banks, but also restructuring the banking system as a whole. National banks restructure a shared responsibility between government, banks themselves and the public using bank services.

Keyword: *Juridical Issues of National Development, Credit Guarantee Mortgage*

A. Background

Judicial issues on national development related to implementation of prudential banking principles whitin the credit of the guarantee security rights can be derived either from within bank, with less serious offenders embodiment banking implement legal protection of banks, and outside of bank, such as the social aspect which can result in not efektifit function of banking as one

of the driving aspect of national development.

Prudential principles in the implementation of bank protection can be one of the indicators of national development goals through the role of banks, as one of the bank's liabilities. Violations of the principle of prudence can result in the bank are criminalized in law. It was stipulated in Law number of 10 of 1998.

A range of views expressed about what is meant by development. Naboyuki Yosuda argued in his book on the Development of Asean Countries that the development is a process of change which requires the support of the various aspects to support the success especially the legal aspects, in addition to economic aspects. political, social, and cultural, which according to Herman Indarto,[3] related to operational management affecting the public welfare due to changes in economic, infrastructure, defense, education and technology, institutional, and cultural.

From the various views can be said that the development is carried out through a process of transformation to a change for the better through the effort undertaken in a planned manner, to advance the nation in accordance with the desired.

Transformation of the economic structure, can be seen through increased production or a fast growth of in industry and services, which is supported by the effectiveness of banking institutions, such as credit provision business of supporting, not only to the business big capital, but also medium and small business capital in order to achieve of success so that its contribution to national income.

Banking institutions function as a collector and distributor of public funds aimed at supporting the economic development, not without risk, and therefore the Act N0. 10 of 1998 on Amendment of Law No. 7 of 1992 concerning Banking (Banking Act), define the rules which contains the principles of protection to avoid any risk.

Risk,[4] against the bank provision of credit processes is defined with unpleasant consequences are occurred within credit mechanism because violations of the rule of law. These risks can be avoided if the implementation of credit held under the law. This is in accordance with the legal theory of development by Mochtar Kusumaatmadja are influenced view of Northrop, Laswell-MacDougall, and R Pound that law functions as means of create order, fairness, and certainty.[5] Security rights problems within banking credit development perspective of national law, then the problem can be solved within bank credit when if the rules of the Banking Act functioned in the implementation mechanism.

Credit comes from the Greek word "credere" are means belief in the truth in daily practice.[6] Furthermore, according to experts, the credit is the ability to execute a purchase or hold a loan with a promise, payment will be carried out at the agreed time period.[7] Meanwhile, according to the Banking Act, credit is the provision of cash or equivalent, based on the approval or the borrowing and lending between banks and other

BHAKTI - DHARMA - WASPADA

parties that requires the borrower to pay off debts after a certain period of time with the amount of interest, remuneration or profit sharing (Article 1: figure 7). The goal is to meet the embodiment of the establishment of the Banking Law which supporting the the economic empowerment of the community in improving the national economy to the welfare of society.

Be reviewed from the economic aspect, then the experts, among others Cunan,[8] are commented on Adam Smith's view of on the the need for optimal functioning of the banking institutions in improving the country's economy that it can run smoothly if the banks are seriously carry out its functions and the public understand their rights and obligations in the mechanism implementation based on the boundaries or rules set by government.[9] It is in accordance with the view that in order for development Mochtar Kusuma-atmadja including banking orderly, then made based on the laws that govern them. According to his view that the law is not only the rules but also processes, namely the mechanism, are according to the author mean by the manufacturing processes of the law, its application is how to implement, and enforcement.

Bank is defined as an agency or a private person are runs the company in receiving and giving the money from and to third parties, in accordance with Fockema Andreae. In the view of GM Verryn Stuart in his book Politics Bank, that: "of Bank is an agency that aims to meet the credit needs, either by means of the payment itself or with the money obtained from other people, and with the passing of new tools exchangers form demand deposits.[10]

Under the Act N0. 10 of 1998 on Amendment of Law No. 7 of 1992 concerning Banking (Banking Act), Article 1 (2): "Banks are business entities that raise funds from the public in the form of savings and channeling to the community in the form of credit or other forms in order to improve the living standard of the people" . While the "banking is everything related to of Bank include institutional, business activities, as well as the way in carrying out the activities and processes".

Thus it can be said that the of Bank is an entity are carries on in the form of finance as intermediary in the the business to get the source of financing, and the business capital investments, the business to raise funds, provide credit, everything is done directly or indirectly through fund raising, especially with the way issuing commercial paper.

Credit is defined in Article 1 of the Banking Act is the provision of cash or equivalent, based on the approval or the borrowing and lending between banks and other parties who require the borrower to repay the debt after a certain period of time with interest.

Usually with guarantee of such as land rights are then burdened with dependents as credit guarantee of to the Bank for the protection of creditors in the event of default. Mortgage give preferred status to certain creditors against other creditors. Requirements for object security rights over the land is, because the money's secured debt in the form of money, have the

transferable nature of breach of contract because if the debtor objects that serve as guarantee will be sold, including are right to be registered according to the regulations on the the applicable land registration due to be met publicity requirements, and require a special appointment by a law.

Security rights execution of is done by selling through auction then proceeds paid to creditors acquisition security rights holders and when the rest returned to the Debtor. Execution security rights basing on a pedestal rights "For the sake of Justice Based on God", so that the security rights Certificate has executorial title, which is a quick and easy way for the solve the problem of bad debt.

By convenience and certainty within execution of the security rights for the protection of the interests of creditors can be realized.

In the common practice of mind and not willing debtor voluntarily emptying the object of security rights was even trying to defend by seeking an extension of credit or through execution action security rights resistance to the District Court for the purpose of delaying the execution of the security rights, this attitude certainty disrupt the order of law enforcement.

Therefore it takes the seriousness of the bank in applying the precautionary principle in accordance Banking Act in order to realize the objectives of the Banking Act, coupled with a wide range of economic policy adjustments to be able to improve and strengthen the national economy continues to grow and continue to move quickly with the challenges of an increasingly complex. To achieve these objectives, the implementation of development should always pay attention to harmony, and balance the various elements of the development, including in the fields of economics and finance, both nationally, regionally with the prosecution of the obligations in entering the era of the Asean Economic Community (AEC).

Principle or the precautionary principle which is the destination of Indonesian banks within fact have not been optimally realized. It can be seen in the case of The Hongkong and Shanghai Banking Corporation Ltd. (HSBC) was found guilty by the courts within tort lawsuits by customers who have lost their deposits. In addition to having to replace 900 million fund and moratorium interest of 6% to the plaintiff (Eko Sulityowati), HSBC also have to pay court costs in the Central Jakarta District Court.[11] In connection with the guarantee of the bank as a result security rights inadvertently Customers know (know-how costumer principle), occurred within complex problem solving default. Settlement of non-performing loans secured by Mortgage Guarantee of in Bank Rakyat Indonesia (Persero) Tbk Branch Office Pandanaran Semarang done by outside the court processes and the completion of the auction through the Directorate General of Receivables and State Auction. After completion of the auction Debtors assume the problem is solved when the results of the auction only paid part of the obligation of Debtor.[12] Are means that there is no obligation to repay are rest.

BHAKTI - DHARMA - WASPADA

B. The Problem

1. How does the functions and the benefits of the Banking Law in supporting the implementation of development through Credit?
2. How is the effectiveness of the Banking Act in relation to the implementation of security rights in guarantee of of credit?

C. Discussion

The embodiment of sustainable national development through the smooth banking credit is applied, among others, through the implementation of certain principles in practice to avoid the risk. Risks can occurred as a result of failure or congestion within repayment of debt. Due that risk very influential to the health of Bank, because money are lent to borrowers from the community which in turn affects the security of public funds consequences on public confidence in the of Bank

Therefore, it is necessary to boost of Bank's presence is always fast moving, competitive, and integrated with the increasingly complex challenges as well as more advanced financial systems. Implementation of of bank business based on the principles of economic democracy by using the precautionary principle, which is reflected in the provisions of Article 2 of the Banking Law. This principle is implemented in the framework of realization of the principles of good governance, and implementation of the of Bank obligation to protect customers.

Economic democracy in question is the economic democracy based on the Constitution of 1945, while the banking and law enforcement sources, such as the 1945 Constitution, Act No. 10 of 1998 jo. Law No. 7 of 1992 on Banking, Law No. 3 of 2004 concerning Bank Indonesia, the draft Civil Code, Code of Commercial Law and Bankruptcy Law, and its implementing regulations.

In general, there are some characteristics within Indonesian banking mechanisms aimed at supporting national development, namely economic democracy principle spite of attempts to use the precautionary principle, functions as collector and regulator of public funds to support the implementation of national development. As a means to maintain the continuity of the implementation of national development, also in order to create a society are just and prosperous. Always move quickly in order to face the challenges of increasingly severe and widespread in the development of national and international economy.

Thus, the banking law is a collection of laws and regulations governing the financial mechanism of within collector and distributor of public funds relating to the rights and obligations of the parties that are in practice in supporting national development.

To realize the implementation of national development objectives, the scope of banking can be: principles such as efficiency, effectiveness, soundness of banks, bankers professionalism, relation-ship rights and obligations of of Bank. The professional players in banking, banking rules specifically intended to regulate the protection of the general interest of the banking measures, such as the

prevention of unfair competition, protection of customers and others. Organizational structure related to banking, such as the existence of the Monetary Council, the Central Bank and others. Security goals to be achieved by the bank's business proficiency level, such as the courts, sanctions, surveillance and others. There are also several factors are help shape the banking law, the agreement among them, jurisprudence and doctrine.

Agreement provisions contained in the Civil Code, that all agreements made legally valid as a law for those are make it (Article 1338 BW, the principle of pacta sund servanda picture, and agreement of the parties is a rule for them (principle of concensuality) which refer to Article 1320 of the Civil Code.

Jurisprudence, remains Widely accepted as one of the sources of law, or factors forming the law. As within provisions of article 27, paragraph 1 of Law No. 14 Of 1970 concerning to the Basic Provisions on Judicial Power, roomates that "Justice as law enforcement and justice shall explore, and understand the legal values are live in the community. "Such provisions can be used as a basis that the court can be an active role for the legal establishment.

Doctrine or opinion of renowned legal experts can be used as a source of law, which is the teaching on Romans but later in its development has been the grip of other nations.

Philosophy implementation of credit is the fifth principle of Pancasila, namely social justice is reflected within legal theory that the the the constitution of 1945, in Article 33 are describes the theory of economic democracy are contains the principles of justice. The principle of justice set forth in the rules of the law of the provisions of the Banking Law.

From the description it can be said that the practice of credit needs to be done carefully, and be careful not to cause adverse legal risks of Bank as well as customers. Therefore, the rule of law within banking through the of Bank responsibility implied obligation of the application of the precautionary principle, which is one of the principles known within the banking law is the principle of trust (fiduciary relation principle), the principle of confidentiality (secrecy principle), and principle of know your customer (customer know-how principle).

The principle of banking prudence (prudential banking principle) is an important principle or principles because those principles discussed because the principle regulated with virtually without explanation. Banking Article 2 specifies that "Indonesian banks within conduct of its business with the principles of economic democracy using the precautionary principle". In carrying out the functions and business activities requires cautious (prudent) in order to protect the public funds entrusted to him. Prudential principles set out in Article 2 is not explained in the article description. Described only on the pinsip democracy alone. Etymologically, prudently interpreted as "planning carefully ahead of time", can also be interpreted as "characterized by

good judgment or good management".

Furthermore, Articles 8 paragraph (1), define: The extension of credit or sharia financing, commercial banks are required to have confidence (Author: believe as understand/ grasp) based on in-depth analysis on intention and the ability and responsibility of debtor to repay his debt or return the funding defined in accordance with the agreement. Affirmation of the principle of prudence related to responsibility of banks are also regulated in Article 29 paragraph (2) of the Banking Law. Article 29 paragraph (2) specifies that: "Banks are required to maintain health level the bank in accordance with the terms of capital adequacy of, asset quality, management quality, liquidity, profitability, solvency, and other aspects that relate to the business's bank, and shall open for business accordance with the principles of prudence. Furthermore, Article 29 paragraph (4) of the Banking Law specifies that: "for the benefit of customers, banks are required to provide information about the potential risk of loss with respect to transactions conducted through the bank's customers".

In terms of the principle of prudence outlined in the explanation of Article 3 paragraph (2) point b of Bank Indonesia Regulation (PBI) Number: 7/4 / PBI / 2005 on the principle of prudence in Asset Securitization Activity for Commercial Bank, stated that: "the meaning of the principle of prudence is in accordance with the applicable provisions, among others, regarding Asset Quality Rating for Commercial Banks, lending Limit Commercial Bank, the principles of sound lending and the principles of risk management ".

In addition to the Banking Act, Act 23 of 1999 concerning Bank Indonesia junto Act No.3 of 2004 on the First Amendment of Act 23 of 1999 concerning Bank Indonesia Junto Act 6 of 2009 concerning Stipulation of Government Regulation Substitute Law 2 year 2008 on the Second Amendment Act 23 of 1999 concerning Bank Indonesia to Become Law (hereinafter abbreviated UUBI).

Article 25 of Law 23 of 1999 determines that: In order to support or guarantee the implementation of the decision-making process in the management of the bank in accordance with the the principle of prudence, banks are required to have and implement a system of internal control (self regulations) bank.

With these principles have poured in banking law rules or in other words to be set in the Indonesian banking regulations (Article 2 of Act 7 of 1992 in conjunction with Law 10 of 1998), then the result is implicitly that the the principle of prudence is as one of the most important principles that must be applied by the bank in operation. If violated/diverge, there will be the legal risks, and the next, sanctioned either criminal or civil.

Operationally, banking practices are based in the a variety of Circular Letter (SE), Decree (SK) The Board of Directors of Bank Indonesia and of Bank Indonesia Regulation (PBI), such as: BI SK 30/11/KEP/DIR/1997 on Procedures for Rating Bank, SK BI 30/12/ KEP/DIR/1997 on Procedures for

BHAKTI - DHARMA - WASPADA

Assessment of Rural banks, and so on.

In accordance the description above, it is seen that the law protects the bank's activities, and also the customer, through the application of prudential principle, for example, in terms of accepting the rights mortgage, which is less than optimal when implemented it will be detrimental to the bank, especially if the credit in large numbers, but the understanding prudence is not described in the Banking Act.

The extent of scope of the principle of prudence, and the settings are spread out in various laws create legal uncertainty because there are defined implicitly and some explicitly assertion (implied). Banking Act has often been revised but still normatively defined the principle of prudence, but the principle/principle is the most important principles in banking. It will lead to broad interpretation, creates uncertainty in its application, and especially in its enforcement.

Certainty is needed because if the bank credit disbursed to the public in large numbers, and the event of default, the nonpayment the loan is not exactly on time in accordance with the credit agreement, the credit quality can be classified as non-performing Lean (NPL) or non-performing loans so consequently can interfere the health of the bank. Although to avoid obstacles in the realization of the function of supporting the national development bank related to credit granting limited as specified in Article 11 paragraph (1) the Bank establishes provisions regarding lending limit or financing and so on, but the explanation of the principle of prudence should not be interpreted so broadly.[13]

This was due to the enforcement of the principle of prudence which is the obligation of banks in terms credit stipulated in the regulations, in addition to the banking legislation, namely the Consumer regulations, the Civil Code, Criminal Code, the Basic Agrarian Law, and a guarantee of security rights over the land which is set in Law 4/1996 on Mortgage of Land and Their Bodies Relating to Land, and Law Arbitration and Dispute Resolution included in the Contract Law of the BW/Civil Code, as well as law enforcement is the KPK for the BUMN.

General guarantee of credit is in the form of something (a project, or business prospects credit financed) or objects that are directly related to the requested credit. The guarantee of can be any assurance that material objects are objects belonging to the debtor or individual, the ability of third parties to fulfill the obligations of the debtor.

Rights of the credit guarantees are known for their implementation, are: personal guaranty, and persoonlijke en zakelijke zekerheid.

- Personal guaranty (guarantees individual credit), is a guarantee of a third party that serves as a guarantor of the fulfillment of the obligations of the debtor, including borg (third party guarantor of the debt redemption certainty lai);
- Persoonlijke en zakelijke zekerheid (credit guarantees rights material), is a guarantee made by the creditor to the debtor, the creditor with a person

or a third party that guarantees the fulfillment of the obligations of the debtor. Included in this classification if the relevant precedence to the other creditors in the distribution of the sale of the debtor's property, including: previlege (privilege), liens, and mortgages.

Warranty practices that are often used in the Indonesian banks, is guarantee of material including: mortgages, crediet verband, and fiduciary, and institution mortgage guarantee in the form of land rights.

Mortgage, is a property rights over immovable objects, to take him to the replacement of an engagement repayment (Article 1162 Civil Code);

Credietverband is a guarantee for land based Koninklijk Besluit (KB) on July 6, Year 1908 No. 50 (Stbl 1908 No. 542), while Fiducia (fiduciare eigendomsoverdracht), which belongs to the trust transfer.

Furthermore warranty Institute of Mortgage object used to bind land in the form of loan guarantees or objects relating to the land concerned. With the enforcement of Mortgage Rights Act of 1996, the mortgage is governed by the Civil Code and credietverband formerly used to bind the land as collateral, does not apply in binding the land.

The binding of the land in the form of loan guarantees object implemented by Law No. 4 of 1996 on Mortgage (UUHT). UUHT define that the Mortgage on land and objects relating to land, hereinafter called the Mortgage, as stipulated in Article 1 paragraph (1) UUHT as follows: "Mortgage is a security rights that is charged in the land rights as referred in Law No. Regulation 5 of 1960 on Basic Agrarian, following or not following other objects that is a unity with the ground, to repayment of certain debt, which gives the preferred position to certain creditors against other creditors".

In the event that the risk of failure or congestion with its repayment, and any dispute, then the rules the legal are considered in dispute resolution. The situation is very influential to the health of the bank, because the money loaned to the debtor from or sourced from the community are stored in the bank so that the risk is very influential on public confidence in the bank at once to the security of the public funds.

The existence of legal rules concerning the implementation of the Mortgage loading in a credit agreement in addition aims to provide protection, as well as legal certainty for the parties to take advantage the land and objects relating to the land as credit guarantee. Therefore, the practice of credit agreements with guaranteed Mortgage banking activities should be also carried out in accordance with what has been set in UUHT.

Be reviewed from the legal aspects, the relationship between the Bank and the Customer consists of two (2) forms, namely, non-contractual relations, and contractual relationships. Contractual relationships set forth in the agreement, but is generally a raw deal.[14]

In many civil agreement, clause arbitase used as a dispute resolution option. Legal opinion given binding arbitration institution (bindings) because of the opinion

BHAKTI - DHARMA - WASPADA

given will be an integral part of the basic agreement (which is consulted in the the arbitration institution). Any opinion contrary to the legal opinion given means violation of the agreement (breach of contract - breach of contract). Therefore, the resistance can not be done in the form of any legal remedy.

With through mediation in the settlement of of problem loans secured by a security rights of in Bank Rakyat Indonesia (Persero) Tbk Branch Office Pandanaran Semarang done by outside of the court process and settlement of the auction through the Directorate General of Receivables and the State Auction. Resolution of problem loans outside the court process can be done with the rescue effort by calling the debtor and invite business management consultant to save the debtor or by way of rescheduling (rescheduling), reconditioning (back requirements), restructuring (realignment).

If the rescue attempt is not successful then the next by removing the last of the credit balance (write off the debt), or seek to to charge/pulling back credit from the debtor by way of direct billing, sales under execution by the hand, and the settlement of accounts submitted to the Committee jammed Affairs State Receivables (PUPN) and the Directorate General of receivables and State Auction (DJPLN) to hold property auction warranty.[15]

In the jurisprudence, we know there is a case of Arrest Artist de Labourer in which cases were brought to the District Court but already contains an arbitration clause for settlement of disputes.[16] In practice today still be found serving claim that the district court losers in arbitration. The loser may occur because of the deception of documents, interpretation outside of the context of the parties' agreement.

Related to the banking dispute settlement can be done with the mediation system. Through the Dispute Resolution Procedures set out in the of Bank Indonesia Regulation No. 10/1/PBI/2008 Amendment to of Bank Indonesia Regulation No. 8/5/PBI/2006 About Mediation Banking SEBI dated 29-1-2008 and the No. 8/14 / DPNP dated 1-6-2006.

The agency define that the dispute between the Customer and the Bank due to non-compliance with the financial demands of the Customer by the Bank to the value of Rp. 500.000.000,- (five hundred million Rupiah). Value of a financial claim financial losses that have occurred in the the Customer, potential losses due to delay or not executable financial transactions Client with other parties, and the or the costs incurred by Customer to resolve the dispute. Coverage does not include the value of financial claims value immaterial losses.

Submission of settlement of the disputes between the Customer and the Bank for the Banking Mediation Mediation Banking executive functions can be performed by Customer or Customer Representative if it has met the requirements as proposed in writing (form available in the office nearest bank), accompanied by supporting documents.

In an effort to rescue the banks, the settlement mechanism can be done by calling the debtor and

BHAKTI - DHARMA - WASPADA

invite business management consultant to save the debtor or by way of rescheduling , reconditioning (back requirements), restructuring (realignment). If the rescue attempt is not successful then the next by removing the last of the credit balance (write off the debt), or seek to to charge/pulling back credit from the debtor by way of direct billing, sales under execution by the hand, and the settlement of accounts submitted to the Committee jammed Affairs State Receivables (PUPN) and the the Directorate General of receivables and the State Auction (DJPLN) to hold property auction warranty, for example in the case of settlement of of problem loans secured by a Mortgage guarantee of in Small community bank of Indonesia (Limited Company/Persero) Tbk Branch Office Pandanaran Semarang done by outside litigation and the settlement of the auction through the Directorate General of receivables and the State Auction.[17]

In the the settlement of the dispute, then the debtor, the contractual relationship based on a contract made between the bank as a creditor with the debtor is based, among others, by the legal of contract.

Sources of contract law on which the creditor and debtor relationship is the provisions of the Civil Code of the contract (the third book). Therefore, according to Article 1338 paragraph (1) of the Civil Code define agreements made legally equal magnitude with the law for both parties. In addition, some scholars argue that the bank credit agreement also governed by specific provisions regarding "lease out" (Verbruiklening) refer to Article 1769 of the Civil Code article 1754 until. In supporting the development of national economy and in order to create legal certainty, it is necessary to rule in one container.

Setting the legitimacy of the legal relationship between the bank and the customer arranged in the Civil Code. contractual scheme which is based in the the legal agreement.

The legal relationship between a debtor and creditor/bank happens after the two sides signed an agreement to take advantage services of the products offered by the bank. In the presence of consent of the the customer to form an agreement made by the bank, means the customer has approved the contents and purpose of the agreement and thus apply FACTA sun servanda that the agreement binding on both parties as the law. This principle contained in article 1338 of the Civil Code. The agreement is an act by which one or more persons bind themselves to one or more other person (Article 1313 BW).

The legal relationship between the debtor/the customer with creditors/banks associated with the freedom of contract and validity of agreement, it is clear that the legal relations as well as law and have sense of fairness.

Banks should pay attention to whether the debtor/the customer that will make agreement with the bank has been qualified capable. Customer adults are only allowed to the customer or the customer credit and current accounts. While the customer deposits or other bank services possible minors, such as the customer or the customer savings and off (working customer)

for the transfer and so on. To the agreement made between the bank and its customers that it has been realized immature legal consequences they cause. Consequences of non-compliance with the law is one of the elements of validity of agreement as contained in article 1320 of the Civil Code, then the agreement can be canceled. This means that the agreement can be canceled by the party that can represent the minor child, the parent or guardian through the event a request for cancellation. In other words, immersion parent or guardian of the minors are not making claims, such agreement shall remain valid and binding on the parties.

In addition, agreement must be made with the agreement of the parties, the parties will define what things are going to the agreement.

But in fact, often tend to be overlook this point agreement. Just as the customer in the a bank, sometimes the minors, which is not required under the terms of credit. In addition, the tendency of the agreements made in the form of standard contract made unilaterally by the bank. This leads to a different position between the bank and its customers. Position of the bank is higher than the position of the customer. Such conditions can position the customer as weak ones that tend to be harmed, and non-compliance with the principle/the principle of democracy.

Furthermore issues that often arise in the credit which is detrimental to the bank if the banks are not optimally implement the principle of prudence related to land certificates as collateral as security rights that is already clearly regulated settlement possibilities that protects the bank if problems arise in the repayment. The legal status of the land certificate is important for the Bank in addition to knowing who the owner is, and of the rights to the land, whether the land is Freehold the land, Broking, Hak Guna Usaha or Hak Pakai.

As we know today's Hak Pakai on State lands registered in the Land Office can be the object of Mortgage (in practice according to the research, then the right to use the bank receives a certificate which is used as mortgage are not registered at the Land Office. This will result in an adverse risk for banks because in the event of default, the right to use these rights null and void as mortgage).

In general, only a piece of land encumbered by the Rights of the Mortgage. However can happens, that piece of land loaded by some Mortgage. The sequence is determined by the position holders at the date of its registration with the provisions of the Land Office, that the Mortgage is registered on the same day, its position is determined by the date of manufacture by the Mortgage Deed Imposition PPAT (Article 5 paragraph (3) UUHT).

UUHT of Article 16 expressed: If the accounts are secured by the Mortgage switch because Cessie, Subrogation, Inheritance, or other causes, the Mortgage participate be legally transferred to the new lender. Regarding the meaning of Cessie, Subrogation and other causes, have been determined in Article 16 UUHT.

Due to transfer of the security rights subject to the provisions of this happens because the legal, it is

BHAKTI - DHARMA - WASPADA

not necessary to prove the deed made by PPAT.

Mortgage (security rights) Registration of transfer of is simply done by deed that proves the transfer of accounts receivable are secured to the new lender, as well as described in the General Explanation of figure 8.

The right to the land is used as loan guarantees with Mortgage burdened with according to Article 2 paragraph (1) UUHT have properties can not be divided, meaning that as a whole weighed Mortgage Mortgage object and each of its parts. Where has repaid part of the debt secured, does not mean freeing most object Mortgage and the Mortgage load, but still weighed Mortgage Mortgage entire object to the rest of the outstanding debt.

This principle is based on the principles applicable to the Mortgage set out in the Article 1163 of the Civil Code. The provisions of Article 1163 specifies that: the Rights of the (land rights) in effect for the indivisible and can not be located at the top of all the immovable object that is attached in its entirety, at the top of each of those objects, and at the top of each section of the padanya.Jika based on such properties, then the partial roya Mortgage becomes impossible.

However, nature of can not be divided for him Mortgage can be implemented if the creditor and debtor wishes pour in Deed Granting Mortgage. If the desire is not stated in the Act, the Mortgage can not be indivisible for.

It can be done by the Mortgage terms charged to some land rights, and secured debt repayment is done by installments equal to the value of each land rights that are part of the object Mortgage, the Mortgage will be exempt from the. Thus, it only weighed Mortgage Mortgage rest of the objects to ensure the rest of the outstanding debts.

The conclusion from the description above is the application of the principles of democracy and need for prudence in bank credit warranty security rights for the sake of banking functions as a support national development, especially in the economic sector can run smoothly. Application of the principle of democracy through protection not only to the Lender/ Bank but also to the Debtor/ Customer

Bank officials are expected to be seriously careful in know your customer (customer know-how principle), in addition to carrying out other principles that are required, especially with the wide scope of the obligations that must be implemented as well as the readiness to enter the era of AEC (Asean Economic society) as a consequence of development of the national economy today which shows the direction of an increasingly integrated with the regional and international economy that can support at the same time can also impact unfavorably. Therefore, the necessary policy adjustments in the economy including the banking sector, which is expected to be able to improve and strengthen the national economy.

Such efforts government needs to be done because the banking sector has a strategic position as intermediary and supporting the

BHAKTI - DHARMA - WASPADA

banking system is a crucial factor in the adjustment process in question. Accordingly, it is necessary to improve the national banking system that not only includes the attempt to rescue individual banks, but also to restructure banking system as a whole. National banks restructure a shared responsibility between government, banks themselves and public using bank services.

Mutual accountability can help to maintain health level of national banks so as to contribute to the maximum in the economy nasional. So that guidance and supervision of banks can be done effectively, the authority and responsibility regarding the licensing of banks, which was originally located in the Ministry of Finance, be located in the Leadership Bank Indonesia Bank Indonesia that has the authority and responsibility to assign permissions intact, guidance and supervision of banks and the imposition of sanctions against banks that do not comply with applicable banking regulations. Thus, Bank Indonesia, the authority and responsibility to assess and decide the feasibility of establishing a bank and/or the opening of a branch office.

In the the framework of globalization followed by an increase in the national economy, the growth speed of business and industrial life requires rapid and practical mechanism yet enforceable. Therefore, in implementing banking functions, in addition to the lending agreement between the creditor and debtor set forth in a written agreement also set forth in a deed of acknowledgment of debt grosse, which impacted if the debtor defaults, the creditor instead of filing a lawsuit, to get compliance on account of the but applying for a certificate of recognition grosse implementation of such debt to the District Court.

Guarantee of to get back compliance needs to be taken seriously receivable prudence in protecting banks, among others, held grosse deed acknowledgment of the debt in the future and by the notary who has a definite legal force and can be used to to charge its accounts receivable creditor when the debtor delinquent debts.

Thus, Grosse certificate was legally considered to be true what was stated in it, unless there is evidence of the opponent. This is possible because in the grosse deed notarized acknowledgment of debt was made by the head of "BY JUSTICE UNDER THE ALMIGHTY GOD". Which legally has title equivalent executorial judge's decision which has permanent legal force.

The legal basis of the above provisions contained in Article 224 HIR (Het Herziene Indonesisch Reglement) which reads:

The grosse certificate and mortgage bonds Notary in Indonesia whose head wore the words "In the Name of the King Majesty" magnitude equal to the Judge's decision. In the event of a breach of grosse deed and the notes, then the execution can be requested directly to the Chairman of the District Court is located in the jurisdiction of agreement was made or at another district court in accordance with the agreement made by the parties. In this latter case if the regulations in the the

second paragraph of Article 195 and the next one obeyed.

The words "In the Name of the King Majesty" in accordance with what is contained in Article 6 of Law No. 51 Year 1951 Emergency should read "In the Name of Justice". And according to the Basic Law of Justice No. 14 of 1970, which is still valid, such provision should read "For the sake of Justice Based on Belief in God Almighty". Thus, the the deed acknowledgment of debt and grosse grosse mortgage the deed who wear head.[18]

"For the sake of Justice Based on God" it has a special position in the settlement of debts due to the same magnitude as the verdict of the judge, and not through the usual mechanisms through the examination should the District Court, which stated in of Article 118 HIR.

Strength ekskutorial attached to the the deed grosse further shorten the settlement of debt, if the debtor defaults, the creditor did a short mechanism, which is applied for the execution of the deed to the Chairman grosse District Court where the debtor's residence or domicile which have been in the deed (Article 118 paragraph (1) jo. paragraph (4) HIR). Many cases, where the debtor defaults because they could not pay his debts,[19] result in many requests executorial VERKOOP of the creditors, especially in big cities are classified as business centers and industrial activities.[20]

The implementation of Article 224 HIR practice is hampered due to the negligence of the debtor, such as delaying the the time of payment, the lender may also enter payment negligent bookkeeping account debtor in addition to negligent manufacture of the documents concerned grosse the deed. Whereas the the court and juridical validity of any formal requirement is essential validity of the deed grosse grosse the deed to be equated existence as a decision that contains the value, has the power of execution that can run execution.

Based on observations, document creation grosse certificate is generally mistaken due to lack of understanding and lack of precise sat grosse certificate form of specified in Article 224 HIR. No excessively to say that nearly all grosse certificate that were found often confuse between grosse certificate mortgages grosse certificate recognition of debt. Consequently grosse certificate submitted grosse certificate is unclear shape.

Other bottlenecks in the form of executorial VERKOOP on grosse certificate, that is the result of resistance debtor execute guarantee product constraints due to the resistance of the debtor.

This outlined above are also experienced by PT Bank Artha Graha Branch Denpasar has accounts to Ny. Mariana Oelisa that when the deed had to be executed grosse fairly complicated issue, so that eventually forced to be resolved in the Denpasar District Court. Basically the problems faced by PT Bank Artha Graha in executing the certificate recognition grosse debt is the debtor objected to the presence of execution grosse certificate recognition of debt raised by PT Bank Artha Graha to the Denpasar District Court. Whereas

in the credit agreement, if the debtor in default, the lender has the right to execute guarantee product belongs to the debtor. The presence of the resistance is detrimental to the creditors of the debtor, because the longer the guarantee product was not executed, then the loss will be even greater.

Anticipate further losses as a result of failure by the debtor's repayment of credit facility, Bank eventually take the necessary policies in order to do credit recovery, one of which is to sell guarantee product to reduce the outstanding loan borrowers NPL (Non Performing Loan).

Another problem can arise, namely when guarantee product has been sold and after that is done peroyaan and the proceeds have been used to reduce the outstanding loan borrowers. In general, when it arises from the mistaken understanding that the debtor, especially the individual debtor. Debtor refuses to complete the remaining balance of the loan, assuming that roya conducted by the Bank in order to guarantee the sale of the credit is to be considered to have paid off. This assumption is based on the analogy that the bank may not do roya Mortgage on land that became guarantee product credit unless credit has certainly paid off through the sale of collateral.

Therefore it is very necessary to have counseling to the creditors as well as debtors to understand the rights and obligations of each so that legal protection is to be achieved forming Banking Act can be achieved as a banking function for smooth support national development.

D. Conclusion & Recommendations

a. Conclusion

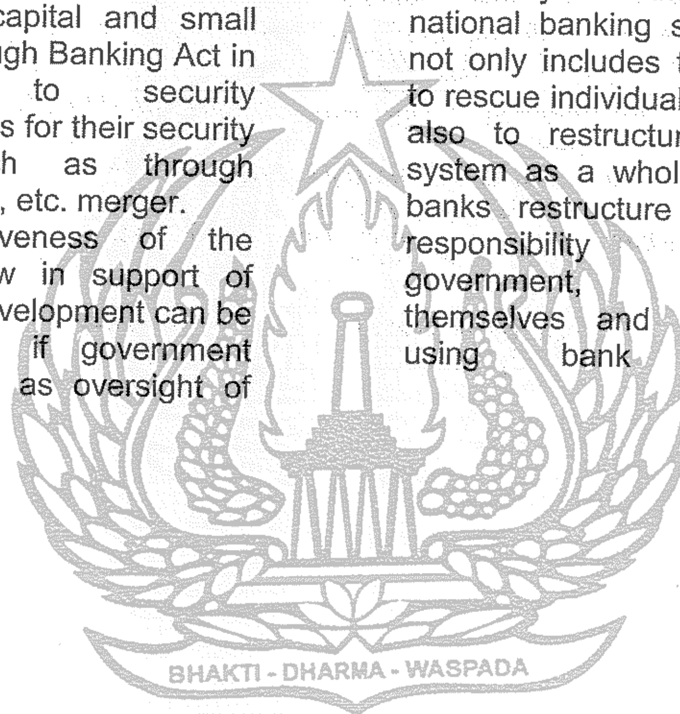
1. Functions and benefits of the Law no.10/1998 on banking in supporting the implementation of development through Credit is supporting economic development through the effectiveness of the Banking Act, but the implementation guarantees the security rights of bank credit is still less certain in its provisions, such as Article 2 of the Banking Act precautionary principle raises a broad interpretation, resulting in the supporting banks may hamper national development.
2. The effectiveness of the Banking Act in relation to the enforcement of security rights in guarantee credit has not been achieved in the implementation is optimal because there is a lack of understanding of the rights of the debtor, and less cautious lenders (implementing the prudential principle) in the selection of the above guarantee security rights which resulted in the legal protection given is less felt as a result of the lack of seriousness of the banks understand that the banking sector has a strategic position as intermediary and supporting the banking system is a crucial factor in the adjustment process of international regional developments as well as supporting national

BHAKTI - DHARMA - WASPADA

development, especially in the field of economic improvement.

b. Recommendation

1. For the Law 10/1998 on Banking effective, which can be helpful in supporting the functioning and implementation of development through credit guarantee security rights should not only sided with the Banking Law to the people who have capital, but also the secondary capital and small capital, through Banking Act in response to security arrangements for their security rights, such as through cooperatives, etc. merger.
2. The effectiveness of the Banking Law in support of economic development can be carried out, if government efforts, such as oversight of banking practices as creditors through, among others, the application of prudential principel seriously, also outreach to the community (the debtor) relating to rights in obtaining a loan, banking sector, which has a strategic position as intermediary and supporting the banking system is a crucial factor in the adjustment process in question. Accordingly, it is necessary to improve the national banking system that not only includes the attempt to rescue individual banks, but also to restructure banking system as a whole. National banks restructure a shared responsibility between government, banks themselves and the public using bank services.



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