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Construction of Arrangements for Limiting the Liability of Debtors and Individual Guarantors for Acts of Abuse of Circumstances in Debt and Receivables Agreements

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Abstract: Article 33 paragraph (4) of the Constitution of the Republic of Indonesia of 1945 is a moral message and a cultural message in the constitution of the Republic of Indonesia in the field of economic life, including related to guarantors in debt and receivables agreements regulated in Articles 1820 to 1850 of the Civil Code with the provision that the guarantor is obliged to pay off the debtor's debt to the creditor if the debtor has run out of assets to pay his debts. In practice, the privilege, which is the privilege of the guarantor, is not easy to apply with an act of abuse of circumstances, so that the privilege of the guarantor can be released which results in uncertainty of the limitation of the guarantor's responsibility for the debtor's debt. The problem in this study is how to regulate the limits of legal liability of debtors and individual guarantors in debt and receivables agreements in Indonesia? How is the construction of the regulation of limiting the liability of debtors and individual guarantors in the future for acts of abuse of circumstances in debt and receivables agreements. This research method is normative using secondary data, and analyzed using qualitative descriptive analysis. The results of the study show that the construction of the regulation of limiting the liability of debtors and individual guarantors in the future for acts of abuse of circumstances in the debt and receivables agreement is that the guarantor only bears the principal and interest, with the provision that the creditor is obliged to confiscate and sell the debtor's goods first. This is because the characteristic of debt is the amount of payments made in each period consisting of interest and principal of debt. Therefore, there is a need for a Financial Services Authority Regulation that prohibits banks from making clauses in the guarantee agreement to release their privileges, as well as *judicial review* of Articles 1820, 1831, 1832 number 1 and Article 1833 of the Civil Code at the Constitutional Court related to the release of Guarantor's privileges is contrary to the 1945 Constitution of the Republic of Indonesia and does not have binding legal force.

Keywords: Construction, Guarantor, Debt, Receivables

INTRODUCTION

The Unitary State of the Republic of Indonesia was formed based on its Constitution, namely the 1945 Constitution on August 18, 1945, the day after the Proclamation of

Independence. In the 1945 Constitution, it is stated about the purpose of the state. The country's purpose is contained in the Preamble to the 1945 Constitution which after four amendments, the last in 2002, was given the full name of the 1945 Constitution of the Republic of Indonesia, the country's goal has not changed. The purpose of the state is the main interest of the order of a country. Organizing a country begins with the formation of law as a rule that regulates order in the life of the nation and state.

As affirmed in the Preamble to the 1945 Constitution of the Republic of Indonesia, the goal of the state of Indonesia is to protect the entire Indonesia nation and all of Indonesia's bloodshed, promote public welfare, educate the nation's life and participate in implementing a world order based on independence, lasting peace and social justice.[1] The purpose of this country is then described in the content or body of the 1945 Constitution of the Republic of Indonesia. Its implementation is in the form of various laws and regulations as immovable laws which in the form of moving laws become governments based on law.[2] One of the objectives of the implementation of government based on law is the regulation of treaty law.

Article 1754 of the Civil Code expressly states that:

"A borrowing agreement is an agreement with which one party gives to the other a certain amount of goods that are exhausted due to use, on the condition that the latter party will return the same amount of the same kind and circumstances as well".

Debt and receivables agreements are carried out because as social beings, humans cannot live alone without others. Humans in their lives are also not spared from what is called debt and receivables agreements, both in small and large amounts. The debt and receivables agreement is obtained both credit loans through banks, as well as loans from individuals. As part of the agreement in general, the debt and receivables agreement must meet the conditions for the validity of the agreement as stated in Article 1320 of the Civil Code, namely:

1. Agreed, for the parties;
2. The ability of the parties to make an engagement;
3. A certain thing;
4. Because it is halal.[3]

The terms of the agreement as mentioned above, include subjective conditions and objective conditions. If the agreement does not comply with the subjective conditions in numbers 1 and 2, then the agreement can be canceled, and if the agreement does not comply with the objective conditions in numbers 3 and 4, then the agreement is null and void. Therefore, as an effort to create certainty and fairness for the parties in the debt and

[1] See the Preamble to the Constitution of the Republic of Indonesia in 1945 in the fourth paragraph, namely "Then to form a government of the State of Indonesia that protects the entire nation of Indonesia and all of Indonesia's bloodshed and to promote public welfare, educate the life of the nation, and participate in implementing a world order based on independence, eternal peace, and social justice...". The guarantee of citizen protection has been regulated in several articles, including Article 27 paragraph 2, Article 28 A, Article 28 B paragraph 2, and Article 28 D paragraph 1.

[2] There is a theory that teaches that the law solely wants justice. The theories that teach this are called ethisive theories because according to them, the content of the law must be determined solely by our ethisal consciousness of what is just and what is unjust. These theories are heavy. He exaggerated the level of legal justice, because he did not pay enough attention to the real situation. The law establishes general rules that guide people in their associations. If the law merely wants justice, so it has the sole purpose of giving each person what he deserves, then he cannot form general rules. And this last one is what must be done. It is a condition for him to be able to function. An order of law that does not have general rules, written or unwritten, is impossible. The absence of general rules means real uncertainty, as to what is called fair or unfair. And that uncertainty will always lead to disagreements between people, so it leads to a disorderly situation and not an orderly situation. See L.J. van Apeldoorn, *Introduction to Law*, Translation, translated by: Oetarid Sadino, Pradnya Paramitha, Jakarta, 2009, p. 12.

[3] Subekti, *Law of Treaties*, Intermasa, Jakarta, 2010, p. 17.

receivables agreement, one of the principles that must be considered is the fulfillment of the principle of balance.

According to Sri Gambir Melati Hatta, the principle of balance is understood as the balance of the bargaining position of the parties in determining the rights and obligations in the agreement. The imbalance of positions causes injustice, so it is necessary for government intervention to protect the weak through the uniformity of the terms of the agreement.[4]

Nowadays, the trend is increasingly to show that many agreements in debt and receivables transactions occur not through a balanced negotiation process between the parties, but the agreement occurs in such a way that one party has prepared the standard terms on a printed agreement form and then presented to the other party for approval without giving the other party almost any freedom to negotiate on the the conditions offered.

So strong are the restrictions on the principle of balance as a result of the use of standard agreements by one party, that for the other party the balance that remains is only a choice between accepting it or rejecting it (*take it or leave it*).[5] The imbalance in the debt and receivables agreement has the potential to cause acts of abuse of circumstances.

An act of abuse of circumstances (*misbruik van onstandigheden*) is the existence of economic power (*economisch overwicht*) on one of the parties, which disturbs the balance between the two parties, so that there is no free will to give consent which is one of the conditions for the validity of an agreement. Broadly speaking, the abuse of circumstances is divided into two groups, namely, the abuse of circumstances due to economic superiority (*economische overwicht*) from one party to another party and the abuse of circumstances due to psychological superiority (*geestelijke overwicht*) from one party to the other.[6]

Lebens De Mug, still adds a third group of abuses, namely emergencies (*noodtoestand*), but this opinion is usually included in the abuse group because of economic advantages.[7] The existence of abuse of this situation has the potential to cause losses, especially for the Debtor or to the Guarantor.

This is because in the activities of borrowing and borrowing money that occur in the community, it can be noted that in general, it is often required that there is a debt guarantee by the lender to the borrower. Debt security can be in the form of goods (things), so it is a material guarantee and or in the form of a promise of debt coverage. A physical guarantee gives material rights to the guarantor holder.[8]

This guarantee can be obtained from assets owned by oneself or personal assets owned by parents or owned by other parties who have a relationship or business relationship with the debtor.[9] In order for the bank to exercise its rights and powers over the collateral, the binding of the collateral must be carried out in accordance with the provisions of the applicable law. This is very necessary because if at any time the debtor breaks the promise or there is a default, then the goods used as collateral will be sold through a public auction to cover the debtor's obligations.[10] In addition to the guarantee of immovable goods or movable goods provided by the debtor, there are also other parties that are used as collateral in the credit agreement, namely individual guarantors.

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[4] Agus Yudha Hernoko, *The Law of Agreements on the Principle of Proportionality in Commercial Contracts*, Pradana Media Group, Jakarta, 2011, p. 27.

[5] *Ibid.*

[6] Salim H.S., *Contract Law, Contract Drafting Theory & Techniques*, Sinar Grafika, Jakarta, 2015, p. 127.

[7] *Ibid*.

[8] Astrian Endah Pratiwi, "Debt and Receivables Agreement with Guarantee of Agricultural Land Ownership by the Receivable", *Privat Law* Vol. V No 2 July-December 2017, p. 94.

[9] *Ibid.*

[10] Widjanarto, *Banking Laws and Provisions in Indonesia*, Pustaka Utama Grafiti, Jakarta, 1993, p. 67.

This individual guarantee or *borgtocht* is a guarantee given by the debtor not in the form of an object but in the form of a statement by a third party (guarantor or *guarantor*) who has no interest in either the debtor or the creditor, that the debtor can be trusted to carry out the agreed obligations; provided that if the debtor does not perform its obligations, the third party is willing to carry out the debtor's obligations.[11]

In the Civil Code, personal *guarantees* are regulated in Chapter XVII, which is regarding insurance agreements. Article 1820 of the Civil Code explains that an insurance agreement is an agreement with a third party who agrees for the benefit of the debtor to bind himself to fulfill the debtor's obligation, if in time the debtor himself fails to fulfill his obligations.

Guarantee or insurance is regulated in Articles 1820 to 1850 of the Civil Code. Based on the provisions of the Civil Code, it can be concluded that a guarantor or insurer is also a debtor who is obliged to pay off the debtor debtor to the creditor or creditors if they do not pay the debt that has fallen due and/or can be collected.

In the event that the guarantor is a person, what needs to be considered is the social status and economic status of the guarantor. The bona fide nature of the garantor economically and its social status in the community, is a decisive condition and can be used as a reason for whether the garantor can be accepted by creditors or not. In relation to this personal debtor, if the credit agreement is due, and the debtor is unable to pay the debts, then the debtor can apply for bankruptcy. After the debtor is declared bankrupt,[12] then all his assets are sold by the curator to pay his debts. If the proceeds of the sale are not enough to pay off the debts, then the curator can sell the treasurer to cover the shortfall. So, the garantor will only appear to fulfill its obligations if the (main) debtor has run out of assets to pay its debts.[13]

The problem arises when there is a provision in Article 1832 number 1 of the Civil Code that can eliminate the privilege of the guarantor to demand that the debtor's property be confiscated and sold first to pay off his debt, and also the ambiguity of the norm in Article 1831 of the Civil Code, because there is no limit to the liability of the guarantor for the debtor debt. So that the individual guarantor can bear all debts of the debtor including interest, fines and other costs, even when the new debtor is declared to have defaulted, and the debtor's assets have not been confiscated and sold to pay off the debt. This is as happened in the case when the debtor defaulted, but the creditor actually sued the individual guarantor to pay the debtor's debt as happened between PT. Credo Jaya Karya with PT. Bank Jtrust Indonesia, Tbk and Samuel Tri Mariyono, Aniek Siswanti Djuari, Sutanto Hardjo, Sian Nio/ Eka Setiajawati, Maria Happy Dwie Setiawati, and Daniel Catur Kurnia Setiawan as guarantors.

In this case, PT. Credo Jaya Karya as the Debtor and PT. Bank Jtrust Indonesia, Tbk as the Bank has agreed to make and sign the Working Capital Credit Agreement for Current Account Credit (K.R.K) No. 131 dated September 16, 2016 which was made before Notary Yatiningsih, S.H., M.H., with a total credit ceiling of Rp. 71,000,000,000.00 (seventy one billion rupiah). In the credit agreement, there is a guarantee in the form of Non-Fixed Collateral such as Finished Goods Inventory (Concrete Iron) with an Object value of Rp. 20,071,562,361, (twenty billion seventy one million five hundred sixty two thousand three

[11] M. Yahya Harahap, *Legal Aspects of Agreements*, Alumni, Bandung, 1982, p. 315.

[12] Bankruptcy is the general seizure of all assets of bankruptcy debtors whose management and settlement are carried out by the curator under the supervision of the supervising judge. Bankruptcy is a seizure and execution of all debtor assets with the aim of distributing the assets to pay the debtors' debts to their creditors in a fair or balanced manner, unless there is a creditor who has the privilege of taking precedence. See: Erma Defiana Putriyanti and Tata Wijayanta, "Legal Study on the Application of Simple Proof in Insurance Bankruptcy Cases", *Legal Pulpit* Volume 22, Number 3, October 2010, p. 482.

[13] Syamsudin M Sinaga, *Indonesia Bankruptcy Law*, Tatanusa, Jakarta, 2012, p. 408.

hundred and sixty one Rupiah), and Land and Building Collateral (*Fixed Asset*) in the form of 14 (fourteen) Land Rights.

On May 6, 2019, PT. Bank Jtrust Indonesia, Tbk made a Transfer of Receivables (cessie) to PT. Jtrust Investments Indonesia based on the Deed of Receivables Transfer Agreement (cessie) Number 40, 41, 42, 43, 44, 45, 46, 47, and 48 made before Notary Martina, S.H., so that legally PT. Jtrust Investments Indonesia became a creditor of the debt of PT. Credo Jaya Karya.

Since October 12, 2021, PT. Credo Jaya Karya has never made a payment of principal debt or interest and fines, so it was declared in default with a debt value of Rp 60,816,610,447.00 (sixty billion eight hundred and sixteen million six hundred ten thousand four hundred and forty-seven Rupiah) plus interest of Rp 11,242,537,500.00 (eleven billion two hundred and forty-two million five hundred thirty-seven thousand five hundred Rupiah) and a fine of Rp 4,447,233,050.00 (four billion four hundred and four twenty-seven million two hundred and thirty-three thousand fifty Rupiah).

On May 24, 2023, the creditor filed a lawsuit against PT. Credo Jaya Karya as the debtor and also to Samuel Tri Mariyono, Aniek Siswanti Djuari, Sutanto Hardjo, Sian Nio/ Eka Setiajawati, Maria Happy Dwie Setiawati, and Daniel Catur Kurnia Setiawan as guarantors to the Surabaya District Court with the demands of the Debtor and the Guarantors to pay jointly and severally the debt from PT. Credo Jaya Karya as the debtor.

On Thursday, May 2, 2024, the Panel of Judges ruled that PT. Credo Jaya Karya has committed an act of breach of promise (default) and punished PT. Credo Jaya Karya and all Guarantors to jointly bear the Defendant's debt obligations in the amount of Rp 70,369,703,325.86 (seventy billion three hundred and sixty-nine million seven hundred three thousand three hundred and twenty-five rupiah point eighty-six cents).

Based on the above case, it can be seen that there is a blurring of norms in Article 1831 of the Civil Code, because in the court decision above, it is not stated how much responsibility the Individual Guarantor is in bearing the default committed by the Debtor, so that the legal consequence is that the Guarantor can be the party who is fully responsible for the debtor debt.[14] In addition, there is a need for clarity in the position of the Guarantor between the Creditor and the Debtor, so that the position of the Guarantor should no longer be the same as that of the Debtor. This is because the Guarantor is the party that does not receive direct benefits from the credit received by the Debtor.

METHOD

This study uses the normative law research method, which is research that provides an understanding of norm problems experienced by dogmatic law in its activities of describing legal norms, formulating legal norms (forming laws and regulations), and enforcing legal norms (judicial practice),[15] so that an overview of the limitation of the liability of debtors and individual guarantors in the future can be obtained acts of abuse of circumstances in the debt and receivables agreement.

[14] Article 28G paragraph (1) of the 1945 Constitution of the Republic of Indonesia stipulates that everyone has the right to the protection of themselves, family, honor, dignity, and property under their power, as well as the right to a sense of security and protection from the threat of fear to do or not to do something which is a human right. Based on these provisions, the state is present in providing legal protection to every person living in Indonesia in the form of a sense of security, both personal security and the security of their property. See: Majda el-Muhtaj, *Human Rights in the Constitution of Indonesia*, Prenada Media Group, Jakarta, 2012, p. 10.

[15] I Made Pasek Diantha, *Normative Legal Research Methodology in Legal Theory Justification*, Prenada Media Group, Jakarta, 2016, p. 84.

RESULTS AND DISCUSSION

Regulation of Limits of Legal Liability of Debtors and Individual Guarantors in Debt and Receivables Agreements in Indonesia

Indonesia as one of the developing countries is working hard to be able to realize its national goal, which is to improve the welfare of its people. In this effort, the economic sector is the top priority to improve the standard of living and welfare of the people.[16] People will have more difficulties in the economic field if they are not balanced by quality education and high levels of skills and creativity. The lack of jobs will further weaken the community's economy, therefore the community is not only required to have a quality education but also to have a high level of skills and creativity. This is useful so that people are not only able to find jobs but also be able to create jobs, one of which is by establishing a form of business such as financial services that runs credit (debts and receivables).[17]

Basically, debt by financial services forums (creditors) to debtors is mandatory based on the existence of mutual trust in each other towards debt repayment. Where, the debtor in this case is careful with the legality of the creditor, there is a good attitude towards consumers, actively in collecting accurate and legal information in the forum. The form of protection provided by the debtor to the creditor in terms of binding is the existence of a guarantee burden on the debtor's debt to the creditor with the aim that the debtor pays his debt in a truly accurate manner.[18]

In the provision of loans, there is a relationship between the lender and the recipient of the credit to regulate the relationship between the parties, so it is based on an agreement known as a credit agreement. In an agreement, a principal agreement and *an accessoir* agreement can arise. A condition in which a person or more is bound to another party, because the engagement results in the emergence of other agreements, the first agreement is called the principal agreement, while the other agreement is called *an accessoir* agreement, one of which is related to the individual guarantor.[19]

An individual guarantee or personal guarantee is a guarantee given by a third party to another person (creditor) that states that the third party guarantees the repayment of a loan if the debtor is unable to fulfill financial obligations to the creditor (bank). Another meaning of individual guarantee is a guarantee of a third party that acts to guarantee the fulfillment of obligations from the debtor.[20]

In the individual guarantee law, there is a provision in Article 1831 of the Civil Code that provides privileges for individual guarantors, namely the obligation for creditors to confiscate and sell goods belonging to the debtor first to pay off their debts, before confiscating and selling goods belonging to individual guarantors. However, there is a provision in Article 1832 number 1 of the Civil Code that can eliminate the privileges of the guarantor to demand that the debtor's property be confiscated and sold first to pay off his debt, as well as the ambiguity of the norms in Article 1831 of the Civil Code, because there is no limit on the liability of the guarantor for the debtor debt. So that the individual guarantor can bear all debts of the debtor including interest, fines and other costs, even when the new

[16] Niken Prasetyawati, Tony Hanoraga, "Material Guarantees and Individual Guarantees as Legal Protectors for Receivables", *Journal of Social Humanities*, Vol. 8, No. 1, June 2015, p. 121.

[17] Muhammad Dafa Rizky Pradana, Taufiqurrahman, Farhan Saleh, "Civil Liability of Debtors in Credit Agreements with Individual Guarantees", *Journal of Law Wijaya Putra* Vol. 1 No. 2, September 2023, p. 104.

[18] Dewa Bagus Komang Mahendra Krisna Putra, Anak Agung Istri Agung & I Made Minggu Widyantara, "Withdrawal of Fiduciary Guarantee Objects by Creditors Without a Guarantee Certificate", *Journal of Legal Construction* Vol. 3, No. 2, 2022, p. 391.

[19] Apriliana Mart Siregar, "Settlement of Bad Loans with Personal Guarantee Guarantees for Deceased Persons Before Credit Repayment", *Journal of Juridika Insights*, Vol. 4, No. 2 September 2020, p. 195.

[20] Hermansyah, *Indonesia's National Banking Law*, Kencana, Jakarta, 2005, p. 70.

debtor is declared to have defaulted, and the debtor's assets have not been confiscated and sold to pay off the debt. This is as happened in the case that the author explained in the background.

The author argues that the actions of PT. Jtrust Investments Indonesia which directly sued Samuel Tri Mariyono, Aniek Siswanti Djuari, Sutanto Hardjo, Sian Nio/ Eka Setiajawati, Maria Happy Dwie Setiawati, and Daniel Catur Kurnia Setiawan as individual guarantors is a court fact that shows that based on the provisions of Article 1 of the Insurance Agreement (*Borgtocht*) No. 138,139, 140, 141, and 142 which reads:

> "This insurance is granted by the INSURER to the BANK by relinquishing all and every privileges and exclusions that are granted to a person by applicable laws and regulations to the INSURER, including but not limited to as stipulated in Articles 1430, 1831, 1837, 1843, 1847, 1849 of the Civil Code."

Based on these provisions, Samuel Tri Mariyono, Aniek Siswanti Djuari, Sutanto Hardjo, Sian Nio/ Eka Setiajawati, Maria Happy Dwie Setiawati, and Daniel Catur Kurnia Setiawan as individual guarantors have agreed and agreed to waive/waive the privileges of the guarantor, in accordance with Article 1, which is "waiver of the privileges of the guarantor", that "This Guarantee is given by the Insurer to the BANK by waiving all and every rights privileges and exclusion rights that are granted to a person by the applicable legal regulations to the INSURER, among others but not limited to those stipulated in Articles 1430, 1831, 1837, 1843, 1847, 1849 of the Civil Code."

It is known that the provisions of the articles that were released by Samuel Tri Mariyono, Aniek Siswanti Djuari, Sutanto Hardjo, Sian Nio/ Eka Setiajawati, Maria Happy Dwie Setiawati, and Daniel Catur Kurnia Setiawan as individual guarantors are provisions that are precisely aimed at protecting Samuel Tri Mariyono, Aniek Siswanti Djuari, Sutanto Hardjo, Sian Nio/ Eka Setiajawati, Maria Happy Dwie Setiawati, and Daniel Catur Kurnia Setiawan as an individual guarantor of its obligation not to bear the entire debt of PT. Credo Jaya Karya, especially in Article 1831 of the Civil Code which regulates that the insurer is not obliged to pay creditors unless the debtor fails to pay the debt, in which case even the goods belonging to the debtor must be confiscated and sold first to pay off the debt. However, in reality, the legal protection was released by Samuel Tri Mariyono, Aniek Siswanti Djuari, Sutanto Hardjo, Sian Nio/Eka Setiajawati, Maria Happy Dwie Setiawati, and Daniel Catur Kurnia Setiawan as individual guarantors.

The author argues that the privilege possessed by the individual guarantor as stipulated in Article 1831 of the Civil Code can be released because of the provisions in Article 1832 number 1 of the Civil Code which stipulates that:

> "The insurer cannot demand that the debtor's belongings be confiscated and sold first to pay off his debt:
> 1. if he has waived his privilege to demand that the debtor's goods be confiscated and sold first."

The provision in Article 1832 number 1 of the Civil Code is a legal loophole that can be used by creditors to obtain certainty and a sense of security to the bank as a creditor in releasing credit to debtors who provide credit guarantees in the form of third parties/insurers (*borg*). Based on this, it can be seen that normatively, the state guarantees legal protection to individual guarantors related to the right to demand that the debtor's goods be confiscated and sold first, when the debtor defaults as stipulated in Article 1831 of the Civil Code. However, in practice, this protection does not work, because the bank as a creditor will force the individual guarantor to relinquish his privileges as stipulated in Article 1832 number 1 of the Civil Code.

Construction of Arrangements for Limiting the Liability of Debtors and Individual Guarantors in the Future for Acts of Abuse of Circumstances in Debt and Receivables Agreements

Banking institutions have a function as a collector and distributor of public funds, one of which is to provide credit in the community. Credit includes development aspects such as trade, industry, housing, transportation and so on in this case which supports the country's economic growth. The crediting system aims to protect economically weak communities because it is difficult to provide funds in developing and starting a business.[21]

The crediting system is a solution for people to get funds faster, some economically weak people can take advantage of this facility to develop their businesses. This is because the provision of credit is legal for banks as stipulated in Article 6 letter b and Article 13 letter b of Law Number 10 of 1998 concerning Banking as amended by Law Number 4 of 2023 concerning the Development and Strengthening of the Financial Sector, each of which regulates credit.[22]

The creditor as a lender who provides a loan of money to the debtor, does not want to fulfill the debtor's request immediately in front of the lender, must first discuss several issues, whether the application can be granted or not.[23] One aspect that creditors pay attention to is the guarantee.

Guarantee is a liability that can be valued in money, which is handed over by the Debtor to the Creditor as a result of a debt and receivables agreement or credit agreement or other agreement. Certain items are handed over by the Debtor to the Creditors which are intended as dependents for the loans or credit facilities provided by the Creditors to the Debtor until the Debtor pays off the loan. If the Debtor defaults, certain collateral will be valued in money, which will then be used to repay all or part of the Debtor's loan or debt to its Creditor. In other words, a guarantee functions as a means to guarantee the fulfillment of the Debtor's loan or debt in the event that the Debtor defaults before the loan or debt is due.[24] One of these guarantees is individual guarantees.

Individual guarantee is a guarantee that causes a direct relationship with a certain individual, can only be maintained against certain debtors, against the debtor's assets in general.[25] In another sense, it is said that an individual guarantee is an agreement between a creditor and a third party that guarantees the fulfillment of the debts of the debtor or debtor.[26]

Basically, the guarantee is "*a second pocket to pay if the first should be empty*". Therefore, the guarantor should be "pursued" after the debtor is no longer able to fulfill its obligations. With this philosophy, the law grants the guarantor some privileges in relation to his obligations to the creditor. The most important of these rights is the right to demand first (*voorrecht van uitwinning*) so that the debtor's assets are confiscated and auctioned first before he is asked to carry out his obligations as a guarantor in the event of a default. This is regulated in Article 1831 of the Civil Code which reads: "The insurer is obliged to pay to creditors unless the debtor fails to pay his debt, in which case the goods belonging to the

[21] Trisa Mardeta Putri, Paramita Prananingtyas, Anggita Doramia Lumbanraja, "Implementation of Credit Guarantee Objects", *Notary*, Vol. 13 No. 2, 2020, p. 668.

[22] M. Bahsan, Law *of Guarantee and Credit Guarantee of Indonesia Banking*, Jakarta: Raja Grafindo Persada, 2007, p. 79.

[23] Gatot Supramono, *Debt and Receivables Agreement*, Jakarta: Kencana Prenada Media Group, 2013, pp. 12—13.

[24] Susilowati, "Credit Guarantees in Syndicated Credit Agreements", *Magistra Law Review*, Vol. 3 No. 02, July 2022, p. 84.

[25] Salim HS, *Development of Indonesia's Guarantee Law*, Jakarta: PT RajaGrafindo Persada, 2004, p. 24.

[26] Clara Fransiska Olivia Siahaan, Rica Gusmarani, "The Use of Individual Guarantees in the Practice of Resolving Non-Performing Loans", *Journal of Notary*, Vol. 2, No. 2, July-December 2023, p. 282.

debtor must be confiscated and sold first to pay off the debt".[27] However, in practice, when the Debtor defaults, and the assets that are credit collateral are assets submitted by the Guarantor, the Creditor actually demands the Guarantor to pay off the debts of the Debtor as happened in the case of debts and receivables between PT. Credo Jaya Karya as the Debtor and PT. Bank Jtrust Indonesia, Tbk as a creditor with Samuel Tri Mariyono, et al as the Guarantor which has been explained in the background.

According to the author, there is a decision of the Surabaya District Court Number 488/Pdt.G/2023/PN Sby which decided that PT. Credo Jaya Karya and all Guarantors to jointly bear the Defendant's debt obligations in the amount of Rp 70,369,703,325.86 (seventy billion three hundred and sixty-nine million seven hundred three thousand three hundred and twenty-five rupiah point eighty-six cents), so that there is no clarity as to the exact amount borne by the Guarantor is due to the provisions of Article 1832 number 1 of the Civil Code regarding the waiver of the Guarantor's privileges, which should be based on Article 1831 of the Civil Code, the guarantor is not obliged to pay to the creditor unless the debtor neglects to pay the debt, in which case even the goods belonging to the debtor must be confiscated and sold first to pay off the debt.

The provisions in Article 1832 number 1 of the Civil Code are legal loopholes that can be used by creditors to obtain certainty and a sense of security to the bank as a creditor in releasing credit to debtors who provide credit guarantees in the form of third parties/insurers (*borg*), at the expense of the interests and legal protection of the Guarantor who is a party that does not directly enjoy the credit given by the creditor to the creditor to the debtor.

According to the author, the position of creditors who have money, while debtors need money, makes the position of the parties unbalanced. The imbalance of position is then taken advantage of by creditors by making a standard agreement that has been standardized. Contract standards are agreements that have been determined and have been outlined in the form of forms. This contract is carried out unilaterally by one of the parties, especially the strong economic party against the weak economy.

According to Munir Fuady, the definition of a standard contract is a written contract made by only one of the parties to the contract, in fact often it has been printed in the form of certain forms processed by one of the parties, in which case when the contract is signed is generally severe, the party only fills in certain form data with little or no change in the clauses, Where the other party in the contract does not have the opportunity or only a few opportunities to negotiate or change the clauses that have been made by one of the parties, so that usually the standard contract is only biased the party presented by the standard contract does not have the opportunity to negotiate and is in the position of "*take it or leave it*".[28]

Based on this, it can be seen that normatively, the state guarantees legal protection to individual guarantors related to the right to demand that the debtor's goods be confiscated and sold first, when the debtor defaults as stipulated in Article 1831 of the Civil Code. However, in practice, this protection does not work, because the bank as a creditor will force the individual guarantor to relinquish his privileges as stipulated in Article 1832 number 1 of the Civil Code.

This is certainly ironic, on the one hand, the Guarantor gets protection in Article 1831 of the Civil Code, on the other hand, the Guarantor will lose its protection due to pressure and coercion from creditors to relinquish the privileges of the Guarantor, because until now, the provisions in Article 1832 number 1 of the Civil Code are still valid. Therefore, the limitation of the legal liability of the individual guarantor in a future bank credit agreement that has legal certainty is limited to the principal debt and interest from the debtor, provided

[27] Niniek Suparni, *Civil Code*, Jakarta: Rineka Cipta, 2013, p. 454.

[28] Salim HS, *Development of Contract Law Outside the Civil Code*, Jakarta: Raja Grafindo Persada, 2006, p. 145.

that the creditor is obliged to confiscate and sell the debtor's goods first. This is in accordance with Satjipto Rahardjo's theory of legal certainty in his progressive law, that a societyis an institution that aims to deliver humans, ideally, to a just, prosperous life and make people happy.[29]

The individual guarantor only bears the principal and interest, because the characteristic of the debt is the amount of payments made in each period consisting of interest and principal debt.[30] Meanwhile, fines in the Indonesian Language dictionary are interpreted as punishments in the form of paying a certain amount of money if they are negligent in paying their obligations.[31]

The author argues that the fine is a component of debt caused by the error/negligence of the main debtor who does not carry out his obligation to pay the principal and interest, so it will be unfair if the fault/negligence of the debtor himself, is then borne by the individual guarantor. This is in accordance with Aristotle's theory of distributive justice which states that justice is the distribution of goods and rewards to each person according to his position in society, and wants the same treatment for those who have the same position according to the law.[32]

Based on this, the fairness in the coverage of the credit agreement is adjusted to the position of the debtor and the insurer itself, namely the payment of principal debt, interest, fines and other costs is the obligation of the debtor for his negligence in paying the principal and interest, while the insurer in the case of this study is an individual guarantor, obliged to pay the principal and interest debt, with the provision that the creditor is obliged to confiscate and sell the debtor's goods first.

The author argues that there is a need for a Financial Services Authority (OJK) Regulation that prohibits banks from making clauses in guarantee agreements to release their privileges. The need for OJK Regulation is based on the fact that OJK is an institution that regulates and supervises financial services activities in the Banking sector, Capital Market sector, and IKNB sector, in the context of mobilizing public funds through banking, which for that purpose must be achieved through maintaining the level of public trust in banking.[33] Article 4 of Law Number 21 of 2011 concerning OJK states that OJK was formed with the aim that all activities in the financial services sector are carried out in an orderly, fair, transparent, accountable manner and are able to realize a financial system that grows sustainably and stably, and is able to protect the interests of consumers and the public.

Another thing that can be done is to submit a *judicial review* of Article 1820, Article 1831, Article 1832 number 1 and Article 1833 of the Civil Code to the Constitutional Court. The Constitutional Court has the authority to adjudicate at the first and last level whose decision is final in its purpose, among other things, to test the law against the Constitution of the Republic of Indonesia in 1945. The Court's final decision, as referred to in Article 24C of the 1945 Constitution of the Republic of Indonesia, does not open up opportunities for appeal, cassation or other legal remedies.

The judicial review of Article 1820, Article1831, Article 1832 number 1 and Article 1833 of the Civil Code is based on Article 28G paragraph (1) of the Constitution of the Republic of Indonesia of 1945 which states:

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[29] Satjipto Rahardjo, *Progressive Law, An Indonesia Legal Synthesis*, Yogyakarta: Genta Publishing, 2009, p. 2.

[30] Anis Chariri & Imam Ghozali, *Accounting Theory*, Semarang: UNDIP, 2005, p. 157.

[31] Drafting Team, *Indonesian Language Dictionary*, Jakarta: Pusat Bahasa, 2008, p. 338.

[32] Teguh Prasetyo and Abdul Hakim Barkatullah, *Loc.Cit*, p. 60.

[33] Mutiara Hikmah, "The Function of Bank Indonesia as a Banking Supervisor in Indonesia", *Journal of Law and Development*, Vol. 3 No.4 October-December 2007, p. 518.

> "Everyone has the right to the protection of themselves, their families, their honor, their dignity, and the property under their control, as well as the right to a sense of security and protection from the threat of fear to do or not to do something that is a human right."[34]

Judicial review of Article 1820, Article1831, Article 1832 number 1 and Article 1833 of the Civil Code at the Constitutional Court, namely:

1. Against Article 1820 of the Civil Code (*Staatsblad* Number 23 of 1847 concerning *Bulgerlijk Wetboek Voor lndonesie*) as long as the phrase "fulfilling the debtor's bond" is contrary to the Constitution of the Republic of Indonesia of 1945 and does not have binding legal force as long as it is interpreted as "In addition to all principal and interest debts, including fines and other costs are the responsibility of the insurer".
2. Regarding Article 1831 of the Civil Code (*Staatsblad* Number 23 of 1847 concerning *Bulgerlijk Wetboek Voor lndonesie*) as long as the phrase "pay to creditors" is contrary to the Constitution of the Republic of Indonesia of 1945 and does not have binding legal force as long as it is interpreted as "In addition to all principal and interest debts, including fines and other costs are the responsibility of the insurer".
3. Against Article 1832 number 1 of the Civil Code (*Staatsblad* Number 23 of 1847 concerning *Bulgerlijk Wetboek Voor lndonesie*) is contrary to the Constitution of the Republic of Indonesia of 1945 and does not have binding legal force.
4. Regarding Article 1833 of the Civil Code (*Staatsblad* Number 23 of 1847 concerning *Bulgerlijk Wetboek Voor lndonesie*) as long as the phrase "Creditors are not obliged to confiscate and sell in advance goods belonging to the debtor" is contrary to the 1945 Constitution of the Republic of Indonesia and does not have binding legal force as long as it is interpreted as "The debtor objects object voluntarily surrendering the object that is the debt security".

The judicial review is necessary, because the main concept of the guarantor or insurer is that the new debtor becomes the debtor or has an obligation to pay after the main debtor whose debt is incurred by a breach of promise or default, where the property belonging to the main debtor has been confiscated and auctioned first and if the result is not enough to pay off its obligations, or if the main debtor does not have any property, then the creditor can sue the guarantor or insurer.[35]

CONCLUSION

1. Settings Limitation of Legal Liability of Debtors and Individual Guarantors in Debt and Receivables Agreement in Indonesia, it is regulated in Article 1831 of the Civil Code which stipulates that individual guarantors are responsible for the entire remaining debt which includes principal debts, interest, and fines. However, with the release of the privilege of individual guarantor regulated in Article 1832 number 1 of the Civil Code, there is no limit for individual guarantors to bear the entire debtor debt, without the right to confiscate and sell the debtor's assets first.
2. Construction of restriction settings responsibility debtors and future individual guarantor for the existence of acts of abuse of circumstances In the debt agreement, the guarantor only bears principal and interest debt, provided that the creditor is obliged to confiscate and sell the debtor's goods first. This is due to The characteristics of debt are The amount of payments made in each period consists of interest and debt principal. Therefore, There needs to be a Financial Services Authority Regulation that prohibits banks from making

[34] Indonesia, Constitution of the Republic of Indonesia of 1945, Article 28G paragraph (1).

[35] Rudhy A. Lontoh, Denny Kailimang, Benny Ponto, *Settlement of Debts and Receivables through Bankruptcy or Postponement of Debt Payment Obligations*, Bandung: Alumni, 2001, p. 411.

clauses in guarantee agreements to relinquish their privileges, and also *judicial review* against Article 1820, Article 1831, Article 1832 number 1 and Article 1833 of the Civil Code at the Constitutional Court related to the release of the Guarantor's privileges is contrary to the 1945 Constitution of the Republic of Indonesia and does not have binding legal force.

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