

Research Article

Legal Protection for Creditor Due To Debtor's Default In Bank Loan AgreementLelly Kurniawati¹, Albertus Sentot Sudarwanto²¹Student of Master Program of Notary, Universitas Sebelas Maret Surakarta, Indonesia²Lecturer at Faculty of Law of Universitas Sebelas Maret Surakarta, Indonesia

Abstract: For bank, loan is one of its core business. In addition to profitability, loan also contains credit risk. Accordingly, Financial Services Authority (OJK) as the supervisory authority of Indonesian banks enforces the credit regulation in Indonesia. This is understandable given that improper credit management may result in bank's revenue from credit sector, which may disturb the bank's health due to the decrease of bank's revenue. Therefore, resolution of problem loan is priority for banks. The present study was categorized as normative legal study, the data were analyzed qualitatively. Various attempts were made to resolve problem loans. One of them through the filing of small claim court. A number of easiness can be chosen because small claim court is relatively quick and cheap. In the future, the government is expected to provide more pathways to make small claim court, including increasing the maximum nominal of the charge.

Keywords: Banking, non-performing loan, small claim court.

Introduction

Bank's business is community trust-based business; accordingly, the bank should be able to safeguard the community interest and trust. It is crucial because the community trusts the bank by saving their money in the bank, which is then used to run the bank's business. By maintaining its health, bank maintains the community trust. One of the bank's businesses that popular among the community is loan. For business people, especially those facing capital constraint, bank loan becomes one of the solutions to increase their capital. Bank's loan is expected to help to develop their business. Meanwhile, for Bank, loan is one of its core business in addition to money transfer, clearing, safe deposit box, and foreign exchange. The loan business has contributed significantly to the majority of banks' profit. However, this business also contains quite a considerable risk. Each bank loan possesses potential credit risk. Accordingly, before a loan application is approved, the bank performs an in-depth analysis of the loan application.

Regarding today's credit problem, several things should be concerned. Starting from less secured loan application process which does not obey the principle of health loan, less secured credit agreement and collateral binding, which potentially results in credit risk. Rashly analysis process affects the credit analysts' accuracy in analyzing loan application. This can also result in loose binding of the loan and the collateral. If it happens, the possibility of credit risk increases.

To decrease credit risk, Bank should implement prudential banking principles and sound loan principles in carrying out its business. The sound loan principle should be implemented since the loan application analysis stage, then the loan liquidation, post-liquidation monitoring, and determination of non-performing loan settlement procedures. Based on

Financial Services Authority no. 42/POJK.03/2017 On the Obligation of Designing and Implementing Loan Policy for General Bank (POJK No. 42/POJK.03/2017), each bank is obliged to implement health loan principle in its business, which should be translated into a written policy, the banks are also obliged to make monthly report of its business to the Financial Services Authority (OJK) as the supervisory body in Indonesia. By implementing health loan principle, bank is able to mitigate risk, which is expected to minimize the credit risk. Credit risk refers to risk of default, where the distributed credit cannot be regained on time following the loan agreement. This default may lead to bank's loss, and when this is not seriously handled, it may affect the bank's health and sustainability.

Every loan contains an agreement. Loan agreement functions as a medium to bind the transaction between the bank and the credit recipient. It holds pivotal role in a loan process. It is pivotal since it contains any matter related to the loan facility.

Accordingly, loan agreement needs special attention both from the bank and the Credit Recipient. In the elucidation of article 8 paragraph (2) of Act no. 8 of 1998 on the Amendment of Act no 7 of 1992 on Banking (Banking Law), point (a) states that the bank should make a written agreement to give a loan. This means that the bank loan agreement should be written either in notary or privately.

Today's competitive banking business demands the banks to be innovative and creative to discover new, competitive loan products. To date, there have been many loan facilities as a result of product innovation. A new, innovative loan facility is expected to be the banking's featured product in community. There are some loans with unique and exciting packages, additional gimmick, relatively simple and quick credit analysis, or even paperless system, as well as other easiness in binding

credit and collateral. These are the result of innovation of banking products.

However, those innovations can be a boomerang for the bank if the offered loan facility does not come along with healthy loan policy as regulated by OJK.

In some banks that focus on loan for small and medium business, many loan products that are found to be far from prudential principle, such as loan with collateral that is not adequately bound, or even collateral-free. It is not precisely collateral-free loan because basically, there is no credit can be given without collateral that is accepted by Bank. Each bank loan contains regulation in article 1131 of Indonesian Civil Code, which reads "All movable and immovable properties of the debtor, either present or future, serve as securities for the personal obligations of the debtor." So, as long as the debt has not been repaid, the debtor is still responsible to pay his debt with all of his properties. Thus, when the debtor defaults, all of his/her properties will be used to repay his debt. This is what so-called as collateral in general meaning (Fuady, 2013).

Actually, the main collateral in loan is the bank confidence in the return of all loan and its interest on time following the agreement. Encumbrance right, mortgage, fiduciary and others, are only seen as complementary. This statement is also stated in article 8 paragraph (1) of Banking Law, In extending Credits or Financing based on Syariah Principles, a Commercial Bank shall have confidence based on thorough analysis on the intention, capability and ability of a Debtor Customer to repay its debt or the financing according to the agreed terms. Further, the elucidation of article 8 paragraph (1) of Banking law state that to obtain such confidence, before extending Credit, the Bank must undertake an accurate appraisal of the character, capability, capital, Collateral, and condition of the economy. Because Collateral is one of the aspects of guarantee for extending Credit, if confidence has been obtained from the other aspect in respect of the ability of the Debtor to repay his debt, Collateral may only take the form of the goods, project, or accounts receivable financed by the Credit concerned. Banks are not required to ask for Collateral in the form of property not directly related to the financed property, activity project, commonly known as "supplementary Collateral". This principle means that the bank is free to determine its loan security as long as the bank is measurably confident with the credit risk.

However, if in practice, this loan faces problems leading to non-performance, the bank should immediately perform any action to save its loan. Bank should make any attempt, either litigation or non-litigation ways to settle the credit. The researcher is interested to study about this phenomenon.

1. Research Methodology

The present study was categorized as normative legal research, it studies regulatory legislation, theories and jurisprudence by qualitatively analyzing the legal material. The data were collected using document analysis to obtain secondary data through literature study, regulatory legislation, court decisions, and relevant jurisprudence concerning bank loan.

2. Discussion

Legal Implication of Debtor's Default

Before liquidating the loan, the bank should analyze the loan application thoroughly on the characteristic, ability, collateral, and business prospect of the prospective debtors. This analysis should adhere to the internal loan provision of the bank, which at least should contain the provisions stated by OJK regulation no. 42/POJK.03/2017, as follows:

The loan agreement is made in written form.

The bank should have confidence with the debtor's capability, which is obtained from a thorough analysis of the debtor's characteristics, capital ability, collateral, and business prospect. Bank should design the procedure in granting loan.

Bank should provide clear information regarding procedure and the requirement of the loan.

Bank is not allowed to give loans with different requirements to the affiliated debtor.

Concerning Dispute Settlement

In general, the regulation on analysis process of loan application, according to OJK, is as follow:

a. The debtor writes loan application containing complete information and meets the requirement stipulated in Bank's loan policy.

b. Bank should verify the validity of the data and information, including the information about debtors in Financial Information Service System (SLIK).

c. Bank should perform in-depth analysis to obtain a clear picture regarding the concept of relationship between the loan application and the loan facility, both from the bank's internal and from the other bank so that all loan facilities can be analyzed.

d. Credit analysis should be impartial, accurate, and objective, describing all information relevant to business and the applicant's data, the assessment on the appropriateness of the project to be funded with a loan. The analysis should be objective, meaning that it is not affected by the parties associated with the loan application.

e. Credit analysis should at least contain assessment on character, capacity, capital, collateral, and condition of economy (5C), furthermore, it should assess the source of repayment, which emphasizes the result of the applicant's business.

f. An accurate legal analysis should be performed to protect the bank from potential risks.

g. For syndicated loan, the analysis should be performed by the syndication member, which should also involve the assessment on the bank which acts as the main bank.

h. The written recommendation on loan applicants should be made based on the result of the analysis.

i. Giving approval.

Basically, loan facility would not be given without any cogent reasons. Bank would perform a number of assessments to the applicant before approving the loan application. One of the bank assessment is done by performing historical check on the

previous loan through OJK's SLIK. Using this assessment, the bank is capable of assessing the applicant's character from the transaction of their previous credit. Debtor's assessment using SLIK is done before performing further analysis.

After the application is approved, it will be translated into a loan agreement. In the process of granting loan, there is an agreement made between the bank and the debtors regarding the period, the interest and other costs as stated in the clauses of loan agreement. The loan agreement should be in written form. This aims to have easiness in proving that there is a loan. A loan agreement can be made privately by the concerning parties. It can also be made before the Notary Official using Notarial Deed. Notarial Deed possesses absolute evidentiary strength (Supramono,2013). Bank loan agreement is categorized as unnamed agreement (*onbeniemde overeentkomst*) because Indonesian Civil Code does not have specific regulation about it. However, bank loan agreement should always adhere to the validity of the agreement as regulated in article 1320 of Indonesian Civil Code. In banking practice, loan agreement is usually made in standard contract. Since it is not obliged to make the agreement in notary or privately, the bank is free to arrange the content of the agreement (Usman, 2001). However, basically, the loan agreement should satisfy 6 (six) minimum requirements, namely, the amount of debt, the interest, due date, and repayment time, payment procedure, *opeinbaarrheiead* clause and collateral (Untung, 2005).

The important role of loan agreement is not only when the loan is liquidated but also when managing the loan. Loan agreement also holds several functions, namely 1) as a primary agreement 2) as the evidence regarding rights and obligation of the parties, and 3) as the instrument to monitor the loan (Hermansyah,2013). The function of loan agreement as the principal agreement which is real in nature is that the loan agreement is determined by the transfer of money from the bank to the debtor. By this principle agreement, there may be a secondary agreement (*accessoir*) for instance, collateral-binding agreement, insurance agreement, personal guaranty agreement, and so forth. The standing of collateral binding agreement that is constructed as *accessoir* of a certain debt means that the existence, transfer, execution, and the annulment of this agreement is determined by the existence, the transfer, and the annulment of loan agreement. Without a certain loan agreement that firmly secure the repayment, there is no collateral binding agreement (Harsono, 2008). The statement about loan agreement should be explicitly mentioned in loan agreement.

The obligation to hand over the collateral is closely associated with the agreement between the concerning parties. In general, the bank as the creditor requires a collateral before approving a loan. Likewise, the Bank's internal regulation and in Regulatory Legislation that regulates about collateral. With collateral, either personal or object collateral, there will be enough guarantee to cover the credit given (Bahsan, 2010). Object collateral often used is land. However, not all land can necessarily become the collateral, only land under a certain

right as regulated in Act no 5 of 1960 on Basic Agrarian Law (BAL) or in regulated in its organic regulation that can be bound as a collateral. This land would be bound with encumbrance right to provide legal certainty for the concerning parties, this right makes the creditor who hold encumbrance right possess preference over other creditors (Harsono,2008). Meanwhile, regarding immovable collateral, it will be bound using mortgage or fiduciary.

After all loan requirements are met, the loan can be liquidated. After the loan is liquidated, the potential risk exists since then. Accordingly, it is necessary to have proper supervision on the liquidated loan. Bank should perform thorough loan monitoring to keep the implementation consistent with the agreement. The supervision is also carried out under the bank's internal policy and prevailing banking regulation by monitoring the debtor's activity through visit, and holding a development so that the debtor can fulfill its obligation.

Regarding the credit quality, it is regulated in Bank Indonesia Regulation. Based on article 10 of Bank Indonesia Regulation no 14/15/PBI/2012 on Commercial Bank Asset Quality Assessment, the quality of a credit is determined by three factors, namely: 1) Business prospect, 2). Debtor's performance, and 3) debtor's payability. The quality of a credit is divided into five groups, namely:

- a. Performing loan, credit is classified into this group when the installment is paid on time following the loan agreement, and no arrear.
- b. Credit with Special Attention (DPK), a credit is categorized as DPK when there is arrear of installment between 1-90 days.
- c. Substandard loan, a credit is categorized as substandard when there is arrear of installment for 91-120 days.
- d. Doubtful loan, a credit is categorized as doubtful when there is arrear of installment for 121-180 days.
- e. Non-performing loan, a credit is categorized as non-performing when there is arrear of installment for more than 181 days.

In the case of debtor's default, the bank should analyze the problem and solve it, preventing it from being protracted to maintain the bank's soundness. The non-performing debtor can affect the bank's soundness. One of the indicator of the bank's soundness is the credit quality.

According to Gatot Supramono (2013), debtor is considered default if the debtor's performance is not in line with the agreement. According to Article 46 of OJK Regulation no.32/POJK.03/2018 on Credit Maximum Limit and Considerable Fund Provision for Commercial Bank (POJK no. 32/POJK.03/2018) , debtors are considered default if:

- a. There is an arrear of principal or interest, or other claims for 90 (ninety) days, although the fund provision has not been in due date.
- b. There is no payment of principal and or interest, or other claims when the fund provision is due.
- c. The other requirements beside the principal and or the interest that is not met, which may result in default.

The common type of default occurs among the community is

the debtor's repayment that is often not in line with the agreement, non-performing loan due to business loss, governmental policies changes, or natural disaster due to their default, all of their properties, based on the loan agreement, will be the security of the repayment. Both the property that is bound as collateral, or the property that have not been used as collateral. This condition is worse when the binding process of credit and the collateral is not done properly. If it happens, when the debtor defaults, it potentially becomes a non-performing loan. In this case, the bank as the creditor loses its preference when taking the repayment, compared to other creditors with strong collateral. Non-performing loan on the debtor's behalf would be difficult to be immediately repaid. Risk of loss due to this phenomenon is that the bank cannot regain its lent fund and receive profit. Eventually, this disturbs the bank's soundness

Empowering Small Claim Court as one of the Attempts of Settling non-performing loans

Although the non-performing loan is never expected, bank has performed various preventive efforts regarding non-performing loan. However, it still occurs. Repressive attempt that is usually made at the beginning of non-performing loan is by saving the credit. To fix non-performing loan, bank saves the credit, which is translated in credit recovery agreement. The legal attempts to save the credit are as follows:

- a. Rescheduling , this is done by changing the schedule, the nominal, and the due date of the credit.
- b. Reconditioning , this is done by changing a part or all conditions of credit, including the due date and the payment schedule.
- c. Restructuring, this is done by changing certain credit condition such as increasing bank fund, converting interest rate.

These attempts bring no result, the credit repayment is done by direct collection or collateral execution. Non-performing loan settlement can also be done through litigation. Through this mechanism, the creditor file a lawsuit to the commercial court. Dispute settlement can also be done through arbitration institution or alternative dispute settlement (APS). However, since the community are more familiar with court than alternative settlement, the settlement is often done through the court. The procedure of civil claim in District Court as the first instance is as follows:

1. The trial is considered open for public (unless it is declared as close for public);
2. The disputing parties (plaintiff and defendant) are asked to enter the trial room.
3. The identity of the disputing parties is checked; if it authorized to a lawyer, the lawyer's certificate is checked.
4. If all disputing parties attend the trial, they are given an opportunities to settle their dispute amicably;
5. When the dispute is unsettled, the trial is continued by reading the claim from the plaintiff;
6. If the reconciliation is achieved, then the court reads it in the form of reconciliation deed, entitled FOR THE SAKE

OF JUSTICE BASED ON ALMIGHTY GOD;

7. If there is no change of agenda, the next agenda is the defendant's answer (it contains exception, rebuttal, request for provisional decision, reconvention claim);
8. If there is a reconvention claim, the defendant also becomes the reconvention plaintiff;
9. Reply from the plaintiff, when the plaintiff is subjected to reconventional claim, his/her position becomes reconventional defendant;
10. In corresponding letter, there is a possibility of intervening claim (voeging, vrijwaring, toesekomst);
11. Before the evidencing, there is a possibility of provisional decision, a decision on granting absolute exception, or intervening claim.
12. Evidencing
13. Begins from the plaintiff by showing evidence letter and witness;
14. It continues by the defendant by showing evidence letter and witness;
15. If necessary, the judge can perform place observation (place of object in dispute);
16. Conclusion from each party;
17. Judges' discussion;
18. Reading Judges' decision;
19. The content of Judges' decision can be in the form of approval of the claim (partial or in a whole); the claim is rejected, or the claim is unacceptable;

However, civil lawsuit upon non-performing loans is not something easy for the bank. In addition to time-consuming, the process requires considerable cost. Accordingly, lawsuit is often avoided by the bank since it is considered less effective in solving a problem. Basically, disputes occur among the community require quick and simple solution with cheap cost and acceptable result for the disputing parties without creating new problems or elongating the dispute (Ariani,2018). Many people prefer to settle their dispute outside the court, although sometimes it does not completely solve the problems.

This condition is in contrast with the principle of judicature authority, namely simple, quick, and cheap judicature. This is firmly stated in article 2 paragraph (4) of Act no. 48 of 2009 on Judiciary Authority. In line with Act on Judiciary Authority, to litigate in court should be simple, it means that the investigation and the settlement should be done efficiently and effectively. Quick principle, it is universal in nature, the settlement should not be protracted. It is known with adagium reads 'justice delayed, justice denied'. Cheap principle, it means that the cost of litigation is affordable.

However, in last decade, the Supreme Court have encouraged the implementation of these three principles. This can be seen from the innovation of information and technology used to search the case and to check the trial schedule through SIPP, and a particular claim called small claim court.

Since 2015, in the first instance court, there is a type of claim that can be used by the bank in settling non-performing loan, namely, small claim court. Like the name, small claim court is the trial carried out in district court in Indonesia for civil case

with the claim material no more than Rp.200,000,000.- (Two hundred million rupiahs), which is done through simple procedure and evidencing, led by a single judge. The legal basis of small claim court is The Supreme Court of the Republic Indonesia Regulation no. 2 of 2015 on the Procedure of Small Claim Court (Perma no. 2 of 2015).

According to Perma no. 2 of 2015, the claim that can be categorized into small claim court is:

- 1.A claim against default or action that violates the law with maximum nominal of 200,000,000.00 (Two hundred million rupiahs). A civil case of which dispute settlement is not done through special trial and land dispute.
- 2.Each party consist of one person, unless possesses same legal interest.
- 3.For the defendant whose domicile is unknown, they cannot be charged as small claim court.
- 4.The defendant and the plaintiff live in same court's legal territory.
- 5.The plaintiff, should register their case to the District Court Secretariat by directly filling the form form small claim court. (The form contains the plaintiff's and defendant's identity, Brief description about the case, and the plaintiff's claim.
- 6.If the plaintiff feels that he/she cannot afford the cost they can make a statement letter to apply for free trial cost.
- 7.In small claim court, provisional claim, exception, reconvention, intervention, plaintiff's reply, defendant rejoinder, or conclusion cannot be applied.
- 8.The plaintiff and the defendant are obliged to attend the trial either accompanied or not accompanied by the lawyer.
- 9.It is led by single judge.
- 10.Small claim court should be ruled no more than 25 (twenty-five) days since the first trial.
- 11.The defendant can only state objections to the decision.
- 12.There is no appeal or cassation.

If seeing the bank's non-performing loan cases with the propensity of increase and weak collateral, with insignificant credit nominal, as long as it is not land-relating problems, small claim court can be a good choice. It can be a good choice because it is easily accessible and is effective for simple civil case due to its final decision. Simple claim court can help the bank to settle non-performing loan, especially small or micro-scale loan with weak collateral binding.

6. Conclusion

Due to debtor's default, the bank lose its revenue from interest and other source as it is stated in loan agreement.

Besides, bank cannot regain the principal which supposes to be able to be used by other debtors. Besides, the bank is burdened due to obligation assigned by OJK to make an allowance of loss from the bank's revenue, of which the amount is determined by the credit quality. Accordingly, the banks should be prudent in approving a loan application. Basically, the bank should be assertive in approving credit liquidation, meaning that the credit is liquidated after all requirements is agreed, including the binding of credit and collateral. This may minimize the credit risk. However, if the preventive

attempts have been made but the non-performing loan still occurs, then for credit with the nominal no more than 200.000.000 .-(Two hundred million rupiahs), small claim court can be done through local district court

7. Recommendation

It is expected that the government, in this case is the Supreme Court of the Republic of Indonesia, make a revision on the maximum amount of claimed material and the domicile of the disputing parties so that the small claim court can be more useful for the banking sector, or business sector in general.

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