

BANK GUARANTEE CLAIMS AS COLLATERAL FOR BENEFICIARY IN CONSTRUCTION PROJECTS

PRAWITRA THALIB^{1*}, MOHAMAD NUR KHOLIQ², OSCARIUS YUDHI ARI WIJAYA²

Faculty of Law, Postgraduate School Universitas Airlangga¹

Postgraduate School Universitas Airlangga²

Akademi Sekretari dan Manajemen Indonesia (ASMI) Surabaya³

Prawitra@fh.unair.ac.id¹

Nkholiq02@gmail.com²

artaprima@gmail.com³

Abstract - One type of credit facility that is currently widely used in banking institutions in business circles is bank guarantees. In practice, a bank guarantee as a guarantee certificate given by a bank to the project owner on behalf of the contractor, the value of the bank guarantee must be the same as the guaranteed project value. This study will analyze and find out about bank guarantee claims as collateral for beneficiary in construction projects. This research is a normative juridical research and is descriptive-analytical in nature, namely making a systematic study of the facts including describing the applicable regulations. As for the claim from the bank guarantee, there are no special provisions regarding the procedures or conditions in the Banking Law or in the OJK Regulation, and the regulation on bank guarantees as regulated in the SEBI and the Decree of the Board of Directors of Bank Indonesia does not technically regulate regarding claims of bank guarantees in construction projects, whereas in practice bank guarantees are almost absolutely necessary in every construction project.

Keywords: Bank Guarantee, Construction, Beneficiary.

Table of Contents

INTRODUCTION

1. Definition and Characteristics of Bank Guarantees According to Laws and Regulations
2. Implementation of Bank Guarantee as a Guarantee for Construction Projects
3. Responsibility of the Parties in the Implementation of Bank Guarantee as a Guarantee for Construction Projects in the Event of Default
4. Legal Efforts to Overcome Default in the Implementation of Bank Guarantees Construction Projects
5. Procedures for Claiming Bank Guarantees in Construction Projects

CONCLUSION

INTRODUCTION

Banking institutions have a very important and strategic role to increase economic growth because one of the benchmarks of a country's progress is its economic progress and the backbone of economic progress is the business world. Thus, banks are financial institutions that provide financial services to people who need them (Ari : 2021). As one of the financial institutions that have strategic value in the economic life of a country, especially banks with an excellent corporate image. Banking institutions are intermediaries for parties who have surplus *funds* (*surplus of funds*) with parties who need funds or (*lack of funds*). The function of the bank is engaged in credit activities and various services provided.

There are various types of products or services offered by the bank to the public. In addition to products and services, banks also create variations and patterns of providing credit facilities. With various types of products and services offered by banks, people can easily choose the product that best



suits the needs needed in economic activities and or business activities carried out (Thalib, Hajati, Kurniawan, Aldiansyah : 2021).

One type of credit facility that is currently widely used among businesses is a bank guarantee. A bank guarantee is used as a certificate of guarantee that a bank provides to the project owner on behalf of the contractor. The value of the bank guarantee must be equal to the value of the guaranteed project (Hasibuan: 2011). Banking services such as bank guarantees are indeed used to guarantee the implementation of transactions that occur between parties outside the bank from possible risks that arise in the future. This is indeed in great demand among businesses. Bank facilities such as bank guarantees provide guarantees for the smooth running of a transaction or business that is being carried out. The party holding the bank guarantee will get confidence or a sense of security from the possibility of an action from another party that is considered harmful.

Bank guarantees are all guarantees received or provided by a bank for certain parties, either individuals or business entities, which are stated by the bank to be fulfilled their obligations from the guaranteed party to other parties as recipients of guarantees if at a certain time it has been determined that the guaranteed party cannot fulfill its obligations or payment (default). In Bank Guarantee, the bank binds itself to the benefit of people to guarantee or become a guarantor or insurer for its customers. Bank Guarantee has a form of agreement that follows the principal agreement (*accessoir*) which is reviewed from a legal point of view, is a debt insurer agreement (*borgtocht*) as regulated in Book II Chapter XVI. In Book II of Chapter XVI, namely Articles 1820 to 1850 of the Civil Code, it is explained that banks act as insurers.

The Bank issues a bank guarantee as a written acknowledgment whose contents agree to bind itself to the recipient of the guarantee within a certain period and conditions if in the future it turns out that the guaranteed party does not fulfill its obligations to the recipient of the guarantee. The beneficiary of the guarantee trusts the bank as a guarantor by adhering to the public's trust in the bank which is the main capital of the bank. If the guaranteed party violates the payment promise, the beneficiary of the guarantee believes that the bank will replace the position of the guaranteed party to fulfill the obligation (Dariwu: 2016).

Bank guarantees at this time are increasingly important because there is often a procurement project of goods and services (*supplier*) that is agreed upon but cannot be completed properly by the contractor, even the project is simply abandoned by the contractor. To avoid this risk, the project owner asks for a bank guarantee from the contractor, because with the bank guarantee, the completion of the project gets two guarantees, namely the contractor and the bank guarantee so that it is stronger.¹

The implementation of the procurement of goods and services, especially in the field of construction, is an activity that is full of risks and considerable costs. The possibility of things that are not cool in a project planning such as implementation failures, delays and all things in the form of defaults on the contract will later cause losses to service users, so to guarantee the work to get work results that are in accordance with the time and quality promised by the contractor, a guarantee is needed. The bank as the guarantor will guarantee the implementation of the work of procurement of goods and services. One form of guarantee provided is in the form of a bank guarantee (Dariwu: 2016).

The bank guarantee application submitted by the customer is in accordance with the type and amount of bank guarantee requested or required by the employer as a service user. Not all customers who submit a bank guarantee request will be issued. Given that any provision of a bank guarantee may give rise to obligations that contain previous risks, the bank must conduct research and review of factors of credibility, bona fideity, and historical approach to the past performance of the guaranteed party and the recipient of the guarantee.

Overcoming the risk of bank guarantee expenditure, the bank will first ask the customer for a *counter guarantee* as a guaranteed candidate whose cash value is at least equal to the nominal value stated in the bank guarantee. The counter guarantee can be in the form of cash or current account deposits, deposits, securities, or assets owned by the applicant. In the event of a default by the customer as a guaranteed party, the bank as the guarantor will replace the position of the guaranteed party to fulfill the guaranteed obligations to the recipient of the guarantee.

The provision of a bank guarantee allows risks to occur. The risks that may be experienced by the bank include the bank losing funds because the guaranteed party defaults on the agreed bank guarantee agreement. Default causes losses for the bank, so efforts need to be made to resolve this matter. Therefore, it is necessary to examine the legal protection for bank guarantees carried out by the bank if the applicant defaults in the procurement of goods and services with the tender owner, both private and government parties.

In fact, making a bank guarantee claim is not so easy. Given the bank sometimes puts forward the principle of prudence which makes the bank guarantee claim process hampered because the bank needs to prove also about the disbursement or the claim is qualified or not. Considering that there are no special provisions regarding procedures or conditions in the Banking Law or in the OJK Regulations, and regulations on bank guarantees as stipulated in the Bank Indonesia Circular Letter (referred to as SEBI) and the Decree of the Board of Directors of Bank Indonesia do not regulate technically regarding bank guarantee claims in construction projects. Therefore, it is necessary to have further discussions regarding "**Bank Guarantee Claims as Collateral for *Beneficiary* In Construction Projects**".

This research uses a normative juridical research meode, a literature law research conducted by examining literature materials or mere secondary data. The data used is secondary data as a basis for research by tracing laws and regulations and literature related to research problems (Dariwu: 2016). The research specification is descriptive-analytical, that is, it makes a systematic review of the facts including describing the applicable regulations. The data is analyzed using normative methods as it includes existing laws and regulations as positive legal norms (Sukanto dan Mamudji 2006).

This research has three objectives, namely individual goals, practical goals, and research objectives. The purpose of the individual goal is to contribute to the development of science, especially in the context of Banking Law. Its practical goal is to obtain a concrete concept or picture of the practice of bank guarantee claims as collateral in construction projects. The results of this study are expected to have useful value for parties who have involvement in bank guarantees consisting of banks, contractors, and project owners.

1. Definition and Characteristics of Bank Guarantees According to Laws and Regulations

In Bank Indonesia Circular Letter Number 23/7/UKU 18 March 1991 concerning the Provision of Bank Guarantees in point number 4.1 that a Bank Guarantee is an *accessoir* agreement in terms of law is an insurer agreement (*borgtocht*) regulated in the Third Book of Chapter XVII Article 1820 to Article 1850 of the Civil Code in which the bank acts as an insurer. Then, basically in the legal perspective on the existence of a Bank Guarantee, all banks can issue bank guarantees or bank guarantees, but this must be in accordance with the provisions in Law Number 7 of 1992 concerning Banking and laws and regulations related to this matter. An example of relevant legislation is the Circular Letter of the Board of Directors of Bank Indonesia No.11/110/KEP/DIR/UPPB dated 29 March 1977 concerning the Provision of Guarantees by Banks and the Provision of Guarantees by Non-Bank Financial Institutions which has been refined by bi Board of Directors Decree No.23/88/KEP/DIR dated 18 March 1991 concerning the Provision of Bank Guarantees (Decision Letter of Bank Indonesia Directors concerning the Provision of Bank Guarantees).

It can be concluded, Bank Guarantee is a guarantee provided by the bank for the benefit of the customer, which is intended to provide guarantees to the recipient of the guarantee (third party) that the bank will fulfill the customer's obligations to the recipient of the guarantee (third party) if the customer defaults (does not fulfill obligations) to the recipient of the guarantee (third party), as agreed. Therefore, the characteristics of a bank guarantee can be classified as a conditional obligation to indemnify with a certain amount of money. Regarding the terms of payment of indemnity it must be expressly stated in the text of the bank guarantee. From this can be drawn the character of the bank guarantee, namely first, as a conditional obligation, the bank guarantee is obliged to pay if the conditions are met. Second, the conditions are met if the recipient of the bank guarantee has submitted in full the conditions requested. Another characteristic is that the Bank Guarantee is only valid for one transaction, the validity time of the bank guarantee is up to the expiration date of the period specified as the clause stated in the bank guarantee letter concerned (Rutten:2013).



2. Implementation of Bank Guarantee as a Guarantee for Construction Projects

Its implementation the guarantee required in a construction project is a guarantee issued by banks in the form of a bank guarantee. Bank guarantee is defined as the giving of a written promise from the bank to the obligee for a certain period of time, amount and necessity that the bank will pay the principal's obligations in the event that the person concerned defaults to the obligee. A bank guarantee, as its nature, is a guarantee from a bank where certain conditions and conditions are needed in order for the guarantor to carry out its obligations.² The condition referred to is the existence of an event of default or default or non-fulfillment of obligations by the guarantee to the party receiving the guarantee. It is this principle that must be firmly held and understood by the whole society about bank guarantees. Or in other words, a bank guarantee is a guarantee provided by a bank with the aim of providing a guarantee to the receiving party that the bank as the guarantor will fulfill all obligations as promised if the applicant does not fulfill its obligations the guaranteed party in this case is the contractor or the contractor is a company- companies that are individuals who are legal entities or legal entities engaged in midwivesg the implementation of contracting. Contractors can be individuals or legal entities, both government and private. For government projects the contractor must be incorporated (Trisnamansyah:2018).

One of the duties of the bank in issuing a Bank Guarantee, for the benefit of its customers with the aim of providing assistance that is in the nature of supporting customers who make a purchase does not require bank credit. Bank Guarantee is given to carry out the construction of the project by an agreement between the contractor and the provider of the project construction work, for the purchase of goods, and to obtain a Customs Income Statement (KPP) for goods whose Letter of Credit (L/C has not been paid in full by the importer (Naja:2005).

The types of Bank Guarantees offered by banks are as follows (Suyatno,2003):

1. Bid Tender Bond Bank Guarantee is a takeover of the obligation to pay by the guarantor at the request of the tender participant (Principal) to the tender organizer (Bouwheer) where the applicant takes the obligation to pay to the tender organizer up to a certain amount of money if the participant does not fulfill his obligations in being nominated as the winner of the tender.
2. Performance Bond Bank Guarantee is a takeover of the obligation to pay by the guarantor (Guarantor) at the request of the supplier / contractor (Pricipal) to the buyer / employer (Beneficiary) where the guarantor takes over the obligation to expand to the buyer / employer until a certain amount of money if the supplier / contractor does not meet its obligations in the realization of work in accordance with what has been promised.
3. Advance Payment Bond Bank Guarantee is a collection of the obligation to pay by the guarantor at the request of the contractor to the project owner (Bouheer) to guarantee the receipt of the project advance payment received by the contractor from the project owner .
4. Retention Bond Bank Guarantee is a takeover of the obligation to pay by the guarantor at the request of the contractor to the project owner in order to guarantee maintenance of the project that has been completed by the contractor .

The mechanism for applying Bank Guarantee at this bank is that the applicant for Bank Guarantee must meet the following conditions :

- a) The applicant must already have an active current account with the Bank.
- b) Submit a written application letter equipped with :
 1. Auction invitation (for Bank Guarantee Bid/Tender)
 2. Work Order / appointment (for Bank Guarantee Implementation)
 3. Employment contract (for Down Payment Guarantee Bank)
 4. Minutes of submission (for Bank Guarantee Maintenance)
 5. The counter warranty provided.

Every guarantee provided by the bank is always guided by the provisions and regulations- set by the government and central bank as well as in the prevailing habits among banks. Since the bank guarantee contains a certain level of risk, it is necessary to consider this risk so that in providing a bank guarantee, the guaranteed party is required to provide a counter warranty. So it can be said that every guarantee given to the bank guarantee is absolute and inviolable because it creates a fairness

where the bank is obliged to provide a guarantee and the recipient of the guarantee is obliged to fulfill its requirements so as not to overlap in the future (Klasiček, Ivatin 2018).

The bank requires the applicant for the bank guarantee to provide a guarantee against the bank guarantee issued, because in the event of a default, administratively the bank guarantee will change the post to the credit given because in the credit terms the collateral guarantee must be provided. All this is in order to ensure the fulfillment of rights and obligations as well as legal certainty. The difference between a bank guarantee and a credit is that the bank guarantee is provided in the form of a certificate (bank guarantee offer, bank guarantee of implementation, bank guarantee of down payment, and bank guarantee of maintenance), while credit is given directly in the form of funds either in cash or in the form of over booking (Risfa:2020).

3. Responsibility of the Parties in the Implementation of Bank Guarantee as a Guarantee for Construction Projects in the Event of Default

The supervision carried out by the guaranteeing bank is qualificative and quantifiable with the aim of obtaining an overview of the financial situation and assets and the course of the guaranteed company. The supervision carried out by the Bank on the supervision carried out by bank guarantee / guaranteed users is to administratively record the due date of the bank guarantee and supervise the guaranteed current account. The step taken by the Bank if the bank guarantee is due is to transfer administratively from the bank guarantee into the creditor's account or shelter account.

If there is a default in the contracting agreement, the contracting party (the project leader) first gives a reprimand so that the contractor (guaranteed) fulfills its obligations as promised within a reasonable period of time and if the contractor continues to ignore it then if the contractor is deemed to have committed default as specified in Article 1238 of the Civil Code, which reads the debtor is negligent if he by warrant or deed has been declared negligent and this the debtor must be deemed negligent by the lapse of the allotted time. But if the possibility is closed or absent, then the bank will still carry out the payment as promised in the bank guarantee agreement (Devi, Ningsih:2018).

In principle, all agreements are based on the agreement of the parties who are binding themselves and must be executed by the parties who agreed to it in an agreement for example A has entered into an agreement with B and then B enters into an agreement again with a third party, then if the second agreement is considered to be detrimental to the debtor, according to Article 1341 of the Civil Code the debtor may request the cancellation of the agreement, an agreement may occur unlawful acts if the act is classified as an attempt to hinder the implementation of the agreement. De facto with the ongoing agreement the process of transfer of rights has occurred, but de jure there is still a process to go through, obviously contrary to the principle of propriety.¹⁸ If there is a second agreement entered into with the other party that is detrimental to one of the parties to the first agreement, then the process of making the second agreement can be categorized as unlawful. The difference between default and tort, default on everything desired (agreement) by the parties, in order to fulfill the contents of the agreement, while the act against the law is for something that is not desired (not agreed upon) by the parties beforehand therefore for the existence of the act can be asked for compensation, unlawful acts are not only against the written law, but acts that violate the unwritten law are also considered as unlawful acts, acts that hinder the achievement of the agreed goals, then the acts can be categorized as acts in bad faith or bad faith acts. Good faith here means that the parties honestly seek to realize what was agreed upon, if there are actions that hinder the agreed intention then it can be said to be an act of bad faith or bad faith. According to p. 1365 of the Civil Code concerning the consequences of unlawful acts, there is an obligation for parties who commit unlawful acts to provide compensation for losses incurred (Pangaribuan 2019).

Basically, all agreements are based on the agreement of the parties who are binding themselves and must be executed by the parties who agreed to it in an agreement if for example A has entered into an agreement with B and then B enters into an agreement again with a third party, then if the second agreement is considered to be detrimental to the debtor, according to Article 1341 of the Civil Code the debtor may request the cancellation of the agreement, an agreement may occur unlawful acts if the act is classified as an attempt to hinder the implementation of the agreement. De facto with the ongoing agreement the process of transfer of rights has occurred, but de jure there is still a

process to go through, obviously contrary to the principle of propriety. If there is a second agreement entered into with the other party that is detrimental to one of the parties to the first agreement, then the process of making the second agreement can be categorized as unlawful. The difference between default and tort, default on everything desired (agreement) by the parties, in order to fulfill the contents of the agreement, while the act against the law is for something that is not desired (not agreed upon) by the parties beforehand therefore for the existence of the act can be asked for compensation, unlawful acts are not only against the written law, but acts that violate the unwritten law are also considered as unlawful acts, acts that hinder the achievement of the agreed goals, then the acts can be categorized as acts in bad faith or bad faith acts. Good faith here means that the parties honestly seek to realize what was agreed upon, if there are actions that hinder the agreed intention then it can be said to be an act of bad faith or bad faith. According to p. 1365 of the Civil Code concerning the consequences of unlawful acts, there is an obligation for parties who commit unlawful acts to provide compensation for losses incurred (Yuanitasari: 2017).

As is well known, bahwa default is negligence in carrying out what has been promised either in part or in whole (giving something, doing, and not doing) in a conditional agreement, if the conditions specified in the agreement are not met, then the agreement is considered to have never existed this is a problem arising from the bank guarantee as one of the conditions terms of an agreement. Pthere is a basis, in a bank guarantee or bank guarantee that acts as an insurer is a bank. The bank bears its customers to fulfill obligations due to the existence of a basic agreement, namely a certain agreement from a third party with the bank customer. Without a principal agreement that requires a bank guarantee, insuring will never occur. This shows that the insurer agreement carried out by the bank with a guaranteed manner known as the bank guarantee agreement is *accessoir*.

There is no clause governing the existence of prohibitions and or no legal hindrance to. And basically the provision of a bank guarantee is absolute if it has met all the requirements of this matter in order to achieve justice for both parties and to ensure legal certainty. Basically, if you sort out from the parties, among others, for the Bank, the issuance of a bank guarantee is one of the sources of bank income. From the issuance of the bank guarantee, the bank obtains income from provisions/wages, administrative fees, and interest charged. In addition, banks can also operate bank guarantee funds (deposits) submitted by customers in the field of credit. For the guaranteed party, the bank guarantee serves as a means of obtaining a guarantee of trust that he will carry out the achievements as promised. This means that the bank supports customers so that their business or business activities run well and smoothly.

If you look at the parties, among others, for the Bank, the issuance of a bank guarantee is one of the sources of bank income. From the issuance of the bank guarantee, the bank earns income from provisions, administrative fees, and interest charged. In addition, banks can also operate bank guarantee funds (deposits) submitted by customers in the field of credit. For the guaranteed party, the bank guarantee serves as a means of obtaining a guarantee of trust that he will carry out the achievements as promised. This means that the bank supports customers so that their business or business activities run well and smoothly.

For the applicant, the bank guarantee functions as a guarantee for the implementation of an achievement that has been promised. Bank guarantee is a guarantee of insured against the risks that will arise if the debtor defaults. On the other hand, people can also reap the benefits of bank guarantee transactions, namely increasing the flow of goods and payment traffic, smooth development, and improving public welfare. With a bank guarantee, buying and selling goods can occur between parties who have not trusted each other. Arus the importation of goods from abroad or other regions is becoming smoother, and the implementation of the construction of projects is also getting smoother.

The legal remedy to overcome defaults in the implementation of bank guarantees as a project guarantee in financing construction projects is if there is a claim from the recipient of the bank guarantee and results in the disbursement of the bank guarantee by the bank issuing bank guarantee as the guarantor bank. And can only be submitted by the holder of the bank guarantee certificate if it does not exceed the period in accordance with the clause stated in the bank guarantee letter (i.e. 14 days or 30 days from the end of the bank guarantee). In addition, it must submit the original document

of the bank guarantee letter to the issuing bank of the bank guarantee. If the issuer of the bank guarantee or *guarantor* is forced to pay compensation or claims filed by the holder of the bank guarantee or *bouwheer* must first be made a deed of subrogation.

4. Legal Efforts to Overcome Default in the Implementation of Bank Guarantees Construction Projects

Guarantees in bank guarantees are intended as an action on the part of the guarantor or the bank to guarantee that if someone does not fulfill their obligations, for example paying their debts, then the bank will carry out or take over the obligation. While the counter guarantee or counter guarantee is well known in the bank guarantee agreement. What is meant by *counter guarantee* or adequate counter guarantee is that the counter guarantee requested by the bank from the applicant for the bank guarantee is of sufficient value to cover losses that may be borne by the bank if the provision of the bank guarantee on time must actually be realized or disbursed.

Issuance of guarantees carried out by banks, the bank always requires a counter guarantee or counter guaranty whose value is determined by bank policy but is usually equivalent to the value of the guarantee stated in the bank guarantee. This is intended to limit the risks that occur in the issuance of bank guarantees. The counterparty guarantee does not have to be in the form of cash, but in the form of demand deposits, deposits, securities, or others deemed safe by the bank. The nature of the counterparty guarantee can be in the form of material or immaterial guarantees, such as credit guarantees. In the case of the opponent's guarantee in the form of material, it is necessary to carry out an assessment and binding of the opponent's guarantee in accordance with the applicable legal provisions accompanied by other actions (Puspasutari, Agung:2018).

The agreement to provide a bank guarantee, the start and end date (due date) of a bank guarantee is always listed in the paper, bilyet, or certificate of the bank guarantee concerned. Thus, the bank guarantee expires if the original bank guarantee is returned, the expiration date of the bank guarantee claim period has been exceeded without any claims from the bank guarantee recipient and there is a statement from the bank guarantee recipient regarding the release of claim rights on the bank guarantee concerned.

The party guaranteed by the bank defaults, a claim will arise from the recipient of the bank guarantee and result in the disbursement of the bank guarantee by the issuing bank of the bank guarantee as the guarantor bank. Therefore, it must be noted that claims for payment of bank guarantees can only be submitted by the holder of the bank guarantee slip if it does not exceed the time period in accordance with the clauses stated in the bank guarantee letter (ie 14 days or 30 days from the end of the bank guarantee). In addition, it should also be noted that the recipient of the bank guarantee must submit the original document of the bank guarantee letter to the issuing bank of the bank guarantee.

Based on the subrogation deed previously made, the bank that issues the bank guarantee together with the guaranteed customer makes a credit agreement deed. This is done before a notary in accordance with Article 1401 paragraph (2) of the Civil Code which requires the two forms of agreement above to be made with an authentic deed (Prasnowo, Badriyah:2019). Submission of a claim that will be made by the recipient of the beneficiary or *bouwheer* bank guarantee, there are several conditions that must be met, namely: First, carried out by beneficiary or *bouwheer* or the applicant in writing by attaching a Certificate of Default stating that the applicant or the bank customer has defaulted in accordance with the underlying transaction and the original bank guarantee slip or other documents required by the bank guarantee (if any); Second, it is carried out during the validity period of the bank guarantee and no later than the expiration of the claim period. If the claim is received after the expiration of the last claim period, the submission cannot be served; Third, the submission of a claim or claim period is a maximum amount of the nominal bank guarantee. For the bank as the issuer of the bank guarantee in making payments for submitting claims that have been made by the *bouwheer* or beneficiary guarantee to the bank because the guaranteed party or the applicant has defaulted, it can be done in the first way, the bank must pay every submission of claims or claims made by the applicant, as long as it has fulfilled the terms and conditions of the claim stated in the bank guarantee within 7 (seven) working days.

Then the second way that must be done by the bank in the context of claim payment is that the bank is obliged to first examine the provisions that apply to the bank guarantee slip submitted by the beneficiary. If the bank guarantee is subject to Article 1832 of the Civil Code, then the bank will pay the claim after the execution of the asset that is the collateral for the bank guarantee transaction. Meanwhile, if the bank guarantee is subject to the provisions of Article 1832 of the Civil Code, then the payment of the claim to the *beneficiary* or *bouwheer* must be made no later than 7 (seven) working days after receipt of the claim (Anwari:1980).

Legal efforts to overcome default in the implementation of bank guarantees as project guarantees in financing construction projects are if there is a claim from the recipient of the bank guarantee and results in the disbursement of the bank guarantee by the issuing bank of the bank guarantee as the guarantor bank. And can only be submitted by the holder of the bank guarantee slip if it does not exceed the time period in accordance with the clauses stated in the bank guarantee letter (ie 14 days or 30 days from the end of the bank guarantee). In addition, you must submit the original document of the bank guarantee letter to the issuing bank of the bank guarantee. If the issuer of the bank guarantee or *guarantor* is forced to pay compensation or the claim submitted by the holder of the bank guarantee or *bouwheer* must first be made a deed of subrogation.

5. Procedures for Claiming Bank Guarantees in Construction Projects

In a guarantee there are usually 2 (two) contracts:

- a. *Principle Contract* contains certain obligations of a party, for example obligations regarding delivery or levering or payment.
- b. *Contract of Guaranty*, the party that guarantees the contract, the bank.

To obtain the desired bank guarantee in accordance with the purpose of its use, a person or entrepreneur or agency / institution that applies to obtain a bank guarantee from a bank must meet several conditions or procedures that have been set by the bank concerned in terms of providing a bank guarantee. Meanwhile, the bank that issues the bank guarantee is in the form of a written statement or written promise whose contents agree to bind itself to the recipient of the guarantee in order to fulfill the guaranteed obligations within a certain period of time and with certain conditions in the form of payment of a certain amount of money if it is guaranteed in the future it turns out that it does not fulfill its obligations to the recipient of the guarantee (Rutten:2020).

Basically, a Bank Guarantee can be submitted for disbursement if the principal or contractor defaults because he did not carry out the project in accordance with the Tender Agreement or Employment Contract. And the party who submits the Bank Guarantee disbursement is the Obligee as the recipient of the Bank Guarantee Guarantee, submitting a claim together with the documents and evidence of default from the Principal to Directory of Bank Indonesia No.11/110/KEP/DIR/Uppb dated 29 March 1977 concerning the Provision of Guarantees by Banks and the Provision of Guarantees by Non-Bank Financial Institutions which has been Bank that issued the Bank Guarantee. Based on the Circular Letter of the Board of Directors of Bank refined by the Decree of the Board of Directors of BI No.23/88/KEP/DIR dated 18 March 1991 concerning the Provision of Bank Guarantees (Decree of the Board of Directors of BI concerning the Provision of Bank Guarantees) in bank disbursements Conditional Guarantee, This guarantee is a guarantee that occurs due to a conditional agreement, so that it can give rise to the obligation to pay the bank concerned a certain amount if the guaranteed party defaults on the promise, such as a Letter of credit (L/C). Meanwhile, in the unconditional disbursement of bank guarantees, the guarantee will be disbursed if the provisions in the contract are not met without having to prove loss situation. This guarantee is usually given by the Bank to its customers.

In disbursement of Bank Guarantee, the Bank also continues to refer to the Precautionary Principle. In the Banking Law, it is explained in principle that based on Article 2 of Law No. 7 of 1992 as amended by No. 10 of 1998 concerning Banking explains "Indonesian banking in conducting its business based on economic democracy using the principle of prudence" . Therefore, when there is a request for Bank Guarantee disbursement, the Bank must refer and review in detail before disbursing the bank guarantee (Ramon:2019). This is also done to avoid unwanted things such as unlawful acts or defaults by parties who want to disburse bank guarantees but the bank does not know. Therefore, the

application of the precautionary principle is carried out to avoid these risks. The embodiment of the precautionary principle in disbursement of Bank Guarantee is by conducting field verification and checking the work carried out by contractors in carrying out construction work.

CONCLUSION

A bank guarantee is basically an additional agreement (*accessoir*) made between the bank and the customer as an applicant, for the benefit of a third party as a beneficiary. In this case, the bank guarantee has almost the same characteristics as the *bortoght* as stipulated in the BW, but the bank guarantee must also follow the provisions stipulated in the Banking Act, especially regarding the precautionary principle. Moreover, the claim from the bank guarantee does not have any special provisions regarding the procedures or conditions in the Banking Law or in the Financial Service Authority Regulations. Regulation on bank guarantees, as stipulated in Bank Indonesia Leaflet and Directory Decree sent by the Board of Directors of Bank Indonesia, does not regulate technically regarding bank guarantee claims in construction projects, whereas in practice bank guarantees are almost absolutely necessary in every construction project. Therefore, it is necessary for bank guarantees, especially regarding claims for disbursement from bank guarantees, to make technical rules that agar does not cause multi-interpretation and can at least minimize disputes between contractors and project owners.

REFERENCES

Book

- [1] Achmad Anwari, *Garansi Bank Menjamin Berhasilnya Usaha Anda*, Jakarta: Balai Aksara, 1980.
- [2] H.R Daeng Naja, *Hukum Kredit dan Bank Garansi*, Bandung: PT. Citra Aditya Bakti, 2005.
- [3] Malayu Hasibuan, *Dasar - Dasar Perbankan*, Jakarta : PT. Bumi Aksara, 2011.
- [4] Peter Mahmud Marzuki, *Penelitian Hukum Edisi Revisi*, Jakarta: Kencana Prenada Media Group, Cet.13, 2017.
- [5] Soerjono Sukanto dan Sri Mamudji, *Penelitian Hukum Normatif: Suatu Tinjauan Singkat*, Jakarta: Rajawali Pers, 2006.
- [6] Thomas Suyatno, *Kelembagaan Perbankan*, Jakarta: PT. Gramedia Pustaka Utama, 2003.

Journal

- [7] Ade Hari Siswanto, "Karakteristik Hukum dan Pelaksanaan Bank Garansi Dalam Jaminan Kontrak Jasa Konstruksi", *Lex Jurnalica* Vol. 14 No. 1, 2017.
- [8] Aryo Dwi Prasnowo dan Siti Malikhatun Badriyah. "Implementasi Asas Keseimbangan Bagi Para Pihak dalam Perjanjian Baku." *Jurnal Magister Hukum Udayana (Udayana Master Law Journal)*, Vol. 8, No. 1, 2019.
- [9] Asser Rutten, "Penafsiran Kontrak Menurut Kitab Undang-Undang Hukum Perdata dan Maknanya Bagi Para Pihak yang Bersangkutan," *Jurnal Hukum Ius Quia Iustum*, Vol. 20, No. 2, 2020.
- [10] Denish Davied Dariwu, "Bank Garansi Sebagai Pengalihan Kewajiban Apabila Terjadi Wanprestasi Oleh Nasabah Menurut Kitab Undang-Undang Hukum Perdata Pasal 1831 & 1832", *Lex Crimen* Vol. V, No. 7, 2016.
- [11] Deviana Yuanitasari. "The role of public notary in providing legal protection on standard contracts for Indonesian consumers." *Sriwijaya Law Review*, Vol. 1, No. 2, 2017
- [12] Dubravka Klasiček, dan Marija Ivatin. "Modification or Dissolution of Contracts Due To Changed Circumstances (*Clausula Rebus Sic Stantibus*)." *Pravnivjesnik*, Vol. 34, No. 2, 2018
- [13] Kumalasari, Devi, dan Dwi Wachidiyah Ningsih. "Syarat Sahnya Perjanjian Tentang Cakap Bertindak Dalam Hukum Menurut Pasal 1320 Ayat (2) KUH Perdata." *Jurnal Pro Hukum*, Vol. 7, No. 2, 2018.
- [14] Muhammad Irayadi, "Asas Keseimbangan Dalam Hukum Perjanjian." *Jurnal Hermeneutika*, Vol. 5, No. 1, 2021.
- [15] Nabiyla Risfa. "Penerapan Doktrin Penyalahgunaan Keadaan (*Undue Influence*) Sebagai Alasan Pembatalan Perjanjian Kerja Di Pengadilan Hubungan Industrial." *Masalah-Masalah Hukum*, Vol. 49, No. 2, 2020.
- [16] Ni Made Puspasutari, dan Anak Agung Sagung Laksmi Dewi. "Tinjauan Yuridis Asas Keseimbangan Dalam Kontrak Pengadaan Barang / Jasa Pemerintah." *Kertha Wicaksana*, Vol. 12, No. 2, 2018.
- [17] Pangaribuan. "Permasalahan Penerapan Klausula Pembatasan Pertanggungjawaban Dalam Perjanjian Terkait Hak Menuntut Ganti Kerugian Akibat Wanprestasi." *Jurnal Hukum & Pembangunan*, Vol. 49, No. 2, 2019.

- 
- [18] Prawitra Thalib, and Faizal Kurniawan. "Fungsi Lembaga Penjaminan Simpanan Dalam Membangun Sistem Perbankan Yang Solid Demi Kelangsungan Pembangunan Infrastruktur di Indonesia." *Jurnal Manajemen Aset Infrastruktur & Fasilitas*, Vol. 2, 2018.
- [19] Prawitra Thalib, S. Hajati, Faizal Kurniawan, & Komari Aldiansyah. "The Urgence Regulation Of Business Activities On Islamic Microfinance Institution According Law No. 1 Year 2013 Of Microfinance Institutions". *Arena Hukum*, Vol. 14, No. 2, 2021.
- [20] Purnama Trisnamansyah. "Syarat Subjektif dan Objektif Sahnya Perjanjian dalam Kaitannya dengan Perjanjian Kerja." *Syar Hukum: Jurnal Ilmu Hukum*, Vol. 15, No. 2, 2018
- [21] Tiar Ramon. "Kriteria Keseimbangan Dalam Perjanjian Kredit Bank Untuk Mewujudkan Keadilan Komutatif." *Jurnal Hukum Ius Quia Iustum*, Vol. 26, No. 2, 2019.
- [22] Wijaya, Oscarius Yudhi Ari. "Strategi Customer Relationship Marketing: Upaya Meningkatkan Citra dan Keputusan Konsumen Menabung di Bank BRI Surabaya." Klaten: Lakeisha, 2021, h.116

Legislation

- [23] Kitab Undang-Undang Hukum Perdata (BW);
- [24] Undang-Undang Nomor 18 Tahun 1999 tentang Jasa Konstruksi (Lembaran Negara Republik Indonesia Tahun 1999 Nomor 54, Tambahan Lembaran Negara Nomor 3833).
- [25] Undang-Undang Nomor 10 Tahun 1998 tentang Perbankan (Tambahan Lembaran Negara Republik Indonesia No. 3790).
- [26] Peraturan Pemerintah Nomor 29 Tahun 2000 tentang Penyelenggaraan Jasa Konstruksi (Lembaran Negara Republik Indonesia Tahun 2000 Nomor 64, Tambahan Lembaran Negara Republik Indonesia Nomor 3956).
- [27] Peraturan Pemerintah Nomor 30 Tahun 2000 tentang Penyelenggaraan Pembinaan Jasa Konstruksi (Tambahan Lembaran Negara Republik Indonesia No. 3957).
- [28] Peraturan Presiden Nomor 54 Tahun 2010 tentang Pengadaan Barang/Jasa Pemerintah.
- [29] Peraturan Kepala Lembaga Kebijakan Pengadaan Barang/ Jasa Pemerintah Nomor 6 Tahun 2012 Tentang Petunjuk Teknis Pengadaan Barang Dan Jasa Pemerintah.
- [30] Surat Edaran Bank Indonesia Nomor 11/11 UPPB Tanggal 28 Maret Tahun 1979.
- [31] Surat Keputusan Direksi Bank Indonesia Nomor 23/88/KEP/DIR tanggal 18 Maret 1991.
- [32] Surat Edaran Direksi Bank Indonesia Nomor 23/7/UKU tanggal 18 Maret 1991.