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LEGAL PROTECTION OF CREDITORS AND DEBTORS THROUGH NOTARIAL DEEDS IN BANKING CREDIT AGREEMENTS

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Abstract

Bank credit plays a vital role in economic development, but is often associated with legal risks such as default, the use of unilateral clauses, and disputes over collateral enforcement. Both creditors and debtors require strong legal protection to ensure fairness and certainty in credit agreements. This article examines the role of notarial deeds as an instrument of legal protection for both parties in bank credit transactions. This research uses a normative legal research method with statutory, conceptual, and comparative approaches. The primary legal materials include the Civil Code (KUHPerdata), the Banking Law, and the Notary Law (Law No. 2 of 2014). A comparative analysis was also conducted with the Dutch and German legal systems to highlight international best practices. The results show that notarial deeds provide both preventative and repressive legal protection. For creditors, notarial deeds guarantee legal certainty, enforceable powers, and protect against the risk of default. For debtors, notarial deeds serve to prevent detrimental clauses, ensure transparency of obligations, and strengthen equality in contracts. Furthermore, the notary's preventive role strengthens contractual fairness by protecting both parties from potential future disputes. The conclusion of this study confirms that a notarial deed is not merely an administrative requirement, but rather a legal protection instrument that balances the interests of creditors and debtors. Optimizing this role requires increased notary professionalism, regulatory harmonization, and stricter oversight.

Keywords: Notary, Legal Protection, Creditors, Debtors, Bank Credit Agreements.

INTRODUCTION

Credit agreements are the backbone of banking activities and play a pivotal role in driving economic development. In Indonesia, banks act as intermediaries, channeling funds from those who have excess capital, such as savers and investors, to those who require financing for working capital or investments. This process of financial intermediation is crucial for promoting economic growth and ensuring the flow of funds within the economy. While the importance of credit agreements in driving economic progress cannot be overstated, they also bring with them a range of legal complexities that can lead to disputes, particularly regarding default and imbalances in the rights of the parties involved, namely creditors and debtors.

In the context of Indonesia, these challenges are exacerbated by the widespread use of standardized agreements, which are typically drafted by financial institutions. These standard agreements often tend to favor creditors, potentially leaving debtors at a disadvantage. The use of such agreements raises important questions about fairness, transparency, and legal certainty in credit transactions. Disputes arising from these issues can lead to prolonged legal battles and financial instability, which can have detrimental effects on both parties. It is, therefore, crucial to explore ways in which legal protections can be afforded to both creditors and debtors in order to minimize risks and ensure fairness in banking practices.

One of the most significant instruments of legal protection in credit agreements is the notarial deed. Notaries are public officials who are authorized to draw up authentic deeds, ensuring that these documents are legally binding and serve as valid evidence in case of disputes. The involvement of notaries in the creation of credit agreements helps to ensure legal certainty and clarity regarding the rights and obligations of the parties involved. A notarial deed provides both preventive and repressive protection for creditors and debtors, making it an essential tool in minimizing legal risks and preventing disputes.

While previous studies have predominantly focused on the protection of creditors through notarial deeds, the protection of debtors' rights has often been overlooked. Creditors are typically seen as the primary beneficiaries of notarial deeds, given that these deeds help secure their interests in case of default, guarantee the enforceability of collateral agreements, and ensure that their rights are prioritized in the event of bankruptcy. However, the role of notaries in protecting debtors' interests is equally important. Debtors, like creditors, need legal safeguards to prevent exploitation and ensure that they are not subject to unfair terms in their agreements. Thus, there is a pressing need to explore how notarial deeds can serve to protect both parties equally, ensuring that credit agreements are fair, transparent, and balanced.

This research aims to analyze the role of notarial deeds in providing legal protection for both creditors and debtors in banking credit agreements. Specifically, it seeks to examine how notarial deeds can act as a preventive measure by reducing the likelihood of disputes and defaults, as well as a repressive tool that can be used to resolve conflicts when they arise. By addressing this gap in existing literature, this study intends to offer a more comprehensive understanding of how notarial deeds can enhance the fairness and legal certainty of credit agreements, benefiting both creditors and debtors alike.

Furthermore, this research aims to answer several critical questions. First, how do notarial deeds provide legal protection for creditors and debtors in banking credit agreements? Second, how effective are notarial deeds as preventive instruments in minimizing banking disputes? And third, how can notarial deeds serve as repressive tools when conflicts arise, ensuring that both parties' interests are protected and legal disputes are resolved efficiently?

Through this investigation, this study will contribute to the ongoing discourse on the role of notaries in banking transactions and their importance in safeguarding the legal rights of both creditors and debtors. By analyzing the effectiveness of notarial deeds in providing legal protection, the findings of this study will provide valuable insights into how the legal system can be enhanced to foster fairer and more transparent banking practices, ultimately promoting greater trust and stability in Indonesia's financial sector.

LITERATURE REVIEW

The Role of Notaries in Legal Transactions

The profession of notary has its roots in ancient Rome, where scribes, or "notarii," were responsible for recording speeches and legal documents. Over time, the role of notaries evolved from simple record-keepers to legal professionals responsible for drafting and certifying important legal documents. In the modern legal system, notaries are public officials empowered to draw up authentic deeds, which are legally binding and carry significant evidentiary power in court proceedings. The notarial profession is recognized as one of the oldest branches of law, and notaries are expected to act impartially and in accordance with the law to ensure fairness and legal certainty in the agreements they oversee.

In Indonesia, the notarial profession is governed by Law Number 2 of 2014 concerning the Office of Notaries, which amended the previous Law Number 30 of 2004. According to Article 1, Number 1 of this law, a notary is defined as a public official who is authorized to prepare authentic deeds and perform other duties as stipulated by law. The notary's role is critical in banking credit agreements, as it ensures that the rights and obligations of both parties are clearly documented and legally enforceable. Notaries are tasked with ensuring that the terms of the agreement are fair, transparent, and compliant with existing legal norms, thus providing legal protection for both creditors and debtors.

Legal Protection for Creditors

The legal protection of creditors in banking credit agreements is an essential aspect of ensuring the stability and security of the banking system. Notarial deeds serve as a mechanism to guarantee the rights of creditors by providing clear and enforceable evidence of the agreement between the parties. The primary function of notarial deeds in this context is to provide legal certainty regarding the terms of the credit agreement, ensuring that both creditors and debtors are bound by their respective obligations.

Notarial deeds provide creditors with several forms of legal protection. Firstly, they offer preventive legal protection, which is designed to mitigate the risks of future disputes. A notarial deed creates a legally recognized document that is admissible in court, ensuring that creditors have access to the strongest form of evidence in case of a dispute. Moreover, notarial deeds can include collateral agreements, such as mortgages or fiduciary rights, which give creditors a claim on the debtor's assets if they fail to repay the loan. This ensures that creditors have a higher priority in the event of bankruptcy or default, providing them with greater financial security.

Secondly, notarial deeds offer repressive legal protection in the event of a dispute or default. If a debtor defaults on their obligations, creditors can execute the collateral through a public auction or parate executie mechanism, which is expedited through the inclusion of an executorial clause in the notarial deed. This clause grants the creditor the ability to enforce the agreement without the need for a lengthy lawsuit. As a result, notarial deeds help creditors recover their funds more quickly and efficiently, reducing the financial risks associated with loan defaults.

The importance of notarial deeds in creditor protection is further emphasized by the priority status that creditors enjoy when their credit agreements are notarized. In the event of bankruptcy, creditors with notarial deeds and secured collateral have preferential rights over unsecured creditors, enabling them to recover their debts before other creditors. This priority status significantly enhances the protection afforded to creditors and ensures that their interests are safeguarded.

Legal Protection for Debtors

While the protection of creditors is often highlighted in the literature, the role of notarial deeds in protecting debtors' rights is equally important. Debtors, like creditors, need legal safeguards to prevent exploitation and ensure that they are not subject to unfair or one-sided contract terms. Notarial deeds serve as a tool for protecting debtors from potentially detrimental clauses that could adversely affect their rights and interests.

Debtor protection is primarily achieved through the preventive role of notaries. Notaries are obligated to explain the contents of the credit agreement to the debtor, ensuring that they fully understand their rights and obligations. This explanation serves to prevent the inclusion of unilateral clauses that could be harmful to the debtor. For instance, notaries are required to refuse any clauses that are unlawful or violate public policy, as stipulated in Article 16 of the Notary Law (Law No. 2 of 2014). By doing so, notaries help ensure that the agreement is balanced and fair, preventing the debtor from being subject to exploitative terms.

Furthermore, notaries play a repressive role in protecting debtors when disputes arise. If a debtor believes that a clause in the agreement is unjust or detrimental, they have the right to challenge it through litigation or alternative dispute resolution mechanisms, such as mediation or arbitration. The notarial deed serves as a crucial piece of evidence in these proceedings, providing the debtor with a strong position in court. In addition, debtors can challenge the enforcement of collateral if the proper legal procedures are not followed, ensuring that their rights are upheld in case of default.

Notaries also help ensure transparency in credit agreements, reducing the likelihood of disputes arising due to misunderstandings or lack of clarity. By explaining the terms of the agreement to both parties and ensuring that the agreement is fair and balanced, notaries play a crucial role in protecting the interests of debtors while ensuring that the creditor's rights are also respected.

The Preventive and Repressive Roles of Notaries

The dual role of notaries in providing preventive and repressive legal protection is a key element of their function in banking credit agreements. The preventive role focuses on minimizing the potential for disputes by ensuring that the agreement is fair, transparent, and legally sound from the outset. This is achieved through the notary's obligation to explain the terms of the agreement, ensure compliance with legal norms, and reject clauses that violate public policy or the law. By doing so, notaries help prevent conflicts before they arise.

The repressive role of notaries comes into play when a dispute occurs or when a default takes place. In these situations, notarial deeds serve as strong evidence in legal proceedings, providing both creditors and debtors with the ability to enforce the terms of the agreement. The executorial clause in the notarial deed allows creditors to quickly enforce the agreement and execute collateral in the event of default, while debtors can use the notarial deed to challenge unfair or unlawful clauses in the agreement.

In both preventive and repressive capacities, notaries play an essential role in ensuring that banking credit agreements are fair, transparent, and legally enforceable. By providing legal certainty and protecting the rights of both creditors and debtors, notaries contribute to the overall stability and fairness of the banking system.

METHOD

This research employs normative legal research methods with statutory, conceptual, and comparative approaches. The primary legal materials include the Civil Code (KUHPerdata), the Banking Law, and the Notary Law (Law No. 2 of 2014). A comparative analysis was also conducted with the Dutch and German legal systems to highlight international best practices.

RESULT AND DISCUSSION

Legal Protection for Creditors

A notarial deed provides legal certainty for both creditors and debtors. Creditors benefit from authentic evidence, enforceable powers, and a valid collateral agreement structure (fiduciary, mortgage). The primary focus of legal protection for creditors in bank credit agreements is to ensure the safe repayment of loaned funds. This protection can be classified into two forms: preventive and repressive.

Preventive legal protection is provided through the existence of legal instruments that guarantee the certainty and legal standing of the creditor from the outset of the agreement. First, a notarial deed drawn up in the form of an authentic deed provides legal certainty regarding the contents of the credit agreement, as stipulated in Article 1868 of the Civil Code. With an authentic deed, the parties obtain complete and valid written evidence regarding their respective rights and obligations. Second, credit guarantees (collateral), such as mortgages, fiduciary rights, or pledges, serve as binding instruments, ensuring the creditor's status as a preferred creditor. Thus, if the debtor defaults, the creditor has the privilege of executing the collateral before other creditors. Third, an executorial clause can be included in the credit agreement. This clause grants the credit agreement the same enforceability as a legally binding court decision. Consequently, if a default occurs, the creditor can immediately file for execution without having to go through a lengthy lawsuit process.

Repressive protection applies when a dispute or default actually occurs. First, the creditor has the right to execute the collateral through a parate executie mechanism or a public auction in accordance with statutory provisions. Second, the evidentiary power of a notarial deed as an authentic deed provides the creditor with a strong position in court. An authentic deed serves as perfect written evidence, making it easier for the creditor to prove civil disputes. Third, preferential rights also apply to the creditor in the event the debtor is declared bankrupt. Their status as secured creditors gives them priority over concurrent creditors to receive payment from the proceeds of collateral execution. Thus, through both preventive and repressive instruments, creditors receive comprehensive legal protection to ensure the safe repayment of loaned funds and ensure legal certainty in banking practices.

Legal Protection for Debtors

Debtors receive protection from unilateral clauses. Notaries are obligated to explain the legal consequences, rights, and obligations, thus ensuring transparency and fairness.

The importance of legal protection for debtors is to prevent losses resulting from unilateral clauses and to maintain legal certainty. Debtor protection can be divided into:

a. Preventive (before a dispute). Notaries are required to provide an explanation of the contents of the deed so that the debtor understands their obligations and the legal consequences that arise. Furthermore, notaries are obligated to refuse the inclusion of clauses that are unlawful or detrimental to one of the parties (Article 16 of UUJN No. 2 of 2014). Although pacta sunt servanda applies in this credit agreement, the principle of equality of bargaining position must still be ensured to ensure the agreement is not unequal.
b. Repressive (in the event of a dispute). Debtors have the right to challenge standard clauses they deem detrimental, in accordance with consumer protection principles. This can be done by the debtor through litigation (court proceedings) or non-litigation (arbitration, mediation, or settlement).

Furthermore, the debtor can also refuse to enforce the collateral if it does not comply with legal procedures.

With the involvement of a notary in bank loans, the public (creditors and debtors) will feel more secure and legally protected. This is because the notary's position is impartial to either the creditor or the debtor, as stated in Law Number 30 of 2004 concerning the Office of Notaries, and one of the contents of the Notary Oath of Office is "that I will carry out my office honestly, diligently, and impartially," which is expected to provide a sense of justice for all parties. Agreements made through a notarial deed have three (3) significantly greater powers than agreements made through private deeds. These powers include:

a) having external/outward evidentiary power for the benefit or benefit of everyone, not just the parties. The external evidentiary force of an authentic deed is based on the principle of "acta publica probant sese ipsa," which means that a deed that appears to be authentic and meets the specified requirements is considered authentic until proven otherwise. Therefore, the uniqueness of an authentic deed as evidence lies in its external evidentiary force. Conversely, a private deed does not have external evidentiary force. This is because the signature on a private deed can still be denied. The requirement to confirm or deny the signature for signing a private deed is the determining factor. Therefore, if it is denied, the private deed does not have external evidentiary force.
b) It has formal evidentiary force, where the deed proves and guarantees the truth/certainty of the date of the deed, the authenticity of the signatures contained in the deed, the identities of the persons present, the location where the deed was made, and the truth that the parties have explained as described in the deed. Meanwhile, in deeds made privately, the evidentiary power only covers the fact that the information is given if the signature is acknowledged by the person who signed it or is deemed to have been acknowledged as such according to law.
c) has material evidentiary power for the parties. However, for the benefit of third parties, the assessment of the material evidentiary power is left to the judge's consideration, where the material evidentiary power of an authentic deed must be considered as true, that the

parties have actually appeared before a public official (Notary), on the day and date stated in the deed, and they have explained what was written in the deed, which of what is explained in the deed is true. Meanwhile, the material evidentiary power of a private deed occurs if the private deed is acknowledged by the person to whom the deed is used or is deemed to be recognized according to the law for those who sign it, their heirs and people who receive rights from them, the content of the information on the private deed applies as true to the person who made it and for the benefit of the person for whom the statement was made. In this way, a private deed provides proof that it is for the benefit of the person to whom the signer wishes to provide evidence, while the other party only has the power of independent evidence.

A private agreement that is notarized, i.e., read and explained by a notary, also has greater force than an unofficial agreement. This is because the date and signature are guaranteed, and the contents of the deed are explained by the notary. However, the signing of the deed cannot imply or deny that the notary did not understand what he or she signed.

By drawing up a credit agreement before a notary (in a notarial deed), or by having a notary legalize and read and explain the credit agreement, the notary will prevent the loss of important documents because the notary maintains an archive of the credit agreements made before him or her. Therefore, based on the reasons above, it can be concluded that a credit agreement drawn up with the involvement of a notary can provide legal certainty and protection for both parties (both creditor and debtor).

Preventive and Repressive Role of Notaries

As a neutral public official, a notary public serves to prevent disputes by ensuring compliance with legal principles, maintaining contractual balance, and rejecting clauses that conflict with public policy. The notary's preventive role is to prevent disputes between creditors and debtors from the initial stages of contract formation. This primary function is realized through the notary's obligation to maintain the validity, clarity, and balance of the contents of the credit agreement (Habib Adjie, 2008).

In general, it can be said that a notary has several roles regarding the implementation of their duties regarding bank credit agreements. These roles include providing legal certainty through an authentic deed. Here, a credit deed prepared by a notary is an authentic deed as referred to in Article 1868 of the Civil Code, which has full evidentiary force, so that the agreement has a strong and clear legal basis from the outset. The notary's role is to provide an explanation of the agreement's contents. In this case, the notary notaries not only act as formal recorders but also have an obligation to explain the rights and obligations of the parties so that the debtor and creditor fully understand the consequences of the credit agreement. This is in line with Article 16 paragraph (1) letter a of the Notary Law (Law No. 2 of 2014), which emphasizes that notaries are obliged to act honestly, independently, and impartially.

In their capacity as public officials, notaries must refuse to include clauses that conflict with the law, morals, or the interests of either party (Tan Thong Kie, 2000, p. 152). This action protects debtors from unilateral clauses and provides legal certainty for creditors that the agreement cannot be canceled due to a flawed will. Although banks tend to be more dominant as creditors, notaries are obligated to maintain the principle of equality of bargaining position so that the resulting agreements are not exploitative (Subekti, 2014).

In their preventive role, notaries function as gatekeepers of justice, ensuring that bank credit agreements not only protect the interests of creditors but also guarantee the rights of debtors, ensuring that the resulting agreements possess legal legitimacy, contractual fairness, and the power to prevent potential disputes (Gunawan Widjaja, 2007).

In addition to their preventive role, notaries also have a repressive role, providing legal protection in the event of disputes or defaults in bank credit agreements. Habib Adjie (2008) states that this repressive function is closely related to the legal force of authentic deeds drawn up by notaries.

Article 1868 of the Civil Code states that an authentic deed has perfect evidentiary force, so that in the event of a dispute in court, both creditors and debtors can use a notarial deed as valid evidence. This facilitates the judge's assessment of material truth and expedites the dispute resolution process. If the debtor defaults, the credit deed containing an executorial clause can be immediately executed without having to go through a lengthy lawsuit process (Gunawan Widjaja, 2000). This execution can be carried out through the parate executie mechanism or public auction of the collateral object, as stipulated in Article 6 of Law Number 4 of 1996 concerning Mortgage Rights.

Thus, in accordance with the provisions of Article 55 of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations, creditors recover their rights more quickly and efficiently. In the event a debtor is declared bankrupt, creditors whose credit agreements are notarized and secured by collateral have preferential rights or a higher status than concurrent creditors.

Notaries play a key role in ensuring that collateral binding is carried out in accordance with procedures, thus providing creditors with maximum legal protection during the bankruptcy process. For debtors, the certainty of legal procedures for collateral execution is carried out in accordance with statutory provisions, thus ensuring their rights remain protected (Tan Thong Kie, 2000). This demonstrates that the notary's repressive function not only favors the interests of creditors but also balances the debtor's legal standing.

Thus, the notary's repressive role is inseparable from the existence of the authentic deed itself. The notarial deed serves as a crucial instrument that enables the resolution of disputes to be carried out quickly, reliably, and fairly, while simultaneously maintaining a balance between the interests of creditors and debtors. This strengthens the notary's position as a guarantor of legal certainty and a guardian of contractual justice in banking practices.

CONCLUSION

A notarial deed is a crucial instrument that balances the rights and obligations of creditors and debtors in bank credit agreements. An authentic deed serves both a preventive and repressive function, thereby reducing the risk of disputes. Optimizing the role of notaries requires increased professionalism, harmonization of laws and regulations, and more effective oversight. In the granting of bank credit, notaries play a crucial role in ensuring legal certainty for both debtors and creditors, including ensuring the date is certain and that the deed is signed on the same day.

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