
Legal Consequences of The Implementation of Reimbursement of Rights or Subrogation in Credit Activities

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ABSTRACT

This research aims to find out and analyze the legal consequences and inhibiting factors arising from the Implementation of Reimbursement of Rights or Subrogation in Credit Activities according to the provisions of the Kitab of the Civil Law. This research uses a sociological or empirical type of research with a qualitative approach. The results of this study show that the legal consequences arising in the implementation of reimbursement of rights or subrogation in credit activities cause losses to the creditor due to the implementation of subrogation not running properly and resulting in a *blacklist* to the debtor and to third parties who do not carry out their obligations. Internal inhibiting factors are in the form of lack of information from the bank related to subrogation, also debtors often do not understand repayments and the absence of good faith from debtors while the inhibiting factors faced externally are in the form of third parties who pledge a decrease in economic capabilities, lack of knowledge of third parties related to the existence of subrogation procedures and the absence of good faith on the part of the third party in settling the remaining credit payments.

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1. Introduction

The independence that has been achieved by a country must be followed by the implementation of development in various fields. The independence obtained by a country in various ways has an explicit main purpose, namely the prosperity of the people. The prosperity in question reflects the desired progress and well-being in building the country.¹

Every country is racing to improve human resources and technology. The demands of the growing era force every country to carry out development so as not to be left behind. Indonesia as part of the world community is ready to be unprepared and must also strengthen the implementation of development in all fields of life, both in the political, social, cultural, and economic fields in order to realize welfare and equality with other countries. National development efforts that are being carried out by the government require cooperation from all parties so that they can be carried out properly. The help of various parties is indispensable because basically each party cannot meet its own needs without the help of the other party. ² To achieve national development, it requires cooperation between the government and the community in order to support each other and encourage the growth and development of economic sectors, both State-Owned Enterprises (BUMN), the private sector, and cooperatives.

Based on Law Number 10 of 1998 concerning amendments to Law Number 7 of 1992 concerning Banking, each of the definitions of "Banking" and "Bank". Article 1 number (1) explains: "Banking is everything that concerns banks, including institutions, business activities, and ways and processes in carrying out their business activities. "

Then in number (2) explains the meaning of the Bank, namely: "A bank is a business entity that collects funds from the public in the form of deposits and distributes them to the public in the form of credit and or other forms in order to improve the living standards of many people"

The development and development of the economy in a country largely depends on the dynamic development and real contribution of the banking sector³. A bank is a financial institution that is a place for individuals, private business entities, state-owned enterprises, and even government institutions to store their funds. Through crediting activities and various services provided, the bank serves financing needs and launches a payment system mechanism for all sectors of the economy. ⁴ Banks in disbursing their

¹ Christea Frisdiantara dan Imam Mukhlis, *Ekonomi Pembangunan sebuah Kajian Teoretis dan Empiris*. Malang: Lembaga Penerbitan Universitas Kanjuruhan Malang. 2016. Hal 1

² Gentur Cahyo Setuino, dkk. *Cidera Janji Dalam Perjanjian Kredit Jaminan Fidusia*. *Jurnal Transparansi Hukum*, Vol. 04 No. 01 / Januari 2021. Hal 62

³ Greydi Normala Sari. *Faktor – Faktor Yang Mempengaruhi Penyaluran Kredit Bank Umum Di Indonesia (Periode 2008.1 – 2012.2)*. *Jurnal EMBA* Vol. 1 No. 3 September 2013. Hal 932

⁴ Chatamarrasjid Ais, *Hukum Perbankan Nasional Indonesia*. Jakarta: Kencana. 2020. Hal 5 – 6

funds, among others, through the provision of credit are one of the sources of funds for development, because the spinning of the wheels of the business world is very dependent on the credit issued by the bank which will be used as capital to do business⁵.

Man is *a homo economicus* and every human being always strives to meet his needs. The needs of a man who is variegated according to his dignity are always increasing, while the ability to achieve something he wants is limited. This causes man to need help to fulfill his desires and thoughts. In the event that he makes an effort, then to increase his efforts to increase the usefulness of something he needs help in the form of capital. Assistance from banks in the form of additional capital is often referred to as "Credit".⁶ Credit is one of the bank's business activities in distributing funds to the public, as an intermediation institution must be able to carry out its functions properly and optimally.⁷ Istilah credit which means a capital loan, understood as a profitable instrument but still has risks. Because the creditor ultimately demands the debtor to repay the capital loan that has been issued including interest, and the costs. In terms of creditors receiving interest payments and fees – these costs are an advantage behind the risk that always looms, namely failure to repay. In this case, the principle of "*high risk high return*" really applies.⁸

But as we all know that an agreement in practice is not as easy as planned. The expectation that the agreement will run well and smoothly and on time in its repayment often makes it difficult for the bank to receive payments from the debtor and this is what causes the credit given to become problematic which results in default for the debtor. If the debtor does not fulfill his agreement (default) or in agreements where the statement of negligence is not conveyed to the debtor, but is not heeded by him, then the debtor is said to have not fulfilled the agreement.⁹

A reason that has experienced a default, this is a burden on the bank as well as a loss, because the bank's capital has not been able to return on time due to late payments made by the debtor. An act can be referred to as default if the debtor commits an omission to carry out the achievement. This is as stipulated in article 1238 of the Civil Code. In the article, there is a requirement of good faith which is the *unsumya*. In the event of an agreement to give or hand over something, then the debtor is obliged to assume good faith to fulfill it. Debtors who neglect or default on promises cause losses to creditors. The

⁵ Fajrina Aprilianti Dwiputri. Prinsip Kehati-Hatian Dalam Menganalisis Jaminan Kebendaan Sebagai Pengaman Perjanjian Kredit Perbankan. *Acta Diurnal*, Volume 1, Nomor 2, Juni 2018. Hal 135

⁶ Dodi Oktarino. *Hukum Bisnis Perjanjian Kredit dan Jaminan Pemegang Saham*. Banten: Guepedia. 2020. Hal 21 – 22

⁷ Ety Mulyati. Asas Keseimbangan Pada Perjanjian Kredit Perbankan Dengan Nasabah Pelaku Usaha Kecil. *Jurnal Bina Mulia Hukum*, Volume 1, Nomor 1, September 2016. Hal 37

⁸ *Ibid.* Pg 22

⁹ Sedyo Prayogo. Penerapan Batas-Batas Wanprestasi dan Perbuatan Melawan Hukum dalam Perjanjian. *Jurnal Pembaharuan Hukum*, Volume III No. 2 Mei – Agustus 2016. Hal 284

deeds of the nu debtor are determined to be in default¹⁰.

Credit risk is a result of the failure or inability of the debtor to return the loan amount obtained from the bank along with the interest in accordance with the predetermined or scheduled period of time.¹¹ So usually when the bank has experienced losses, the bank starts making summons attempts to forced withdrawals and confiscation of collateral goods. However, in banking activities to avoid this, the debtor often prepares by using a third party to be willing to pay the debts, in this case it is temporary to buy time for the return of capital. This is often referred to as the practice of subrogation.

Subrogation is the "replacement" of the position of the creditor party by a third party in the agreement, as a result of payments made by third parties on the debts owed by the debtor to the creditor' party.¹²

In the Civil Code subrogation is regulated in Articles 1400 - 1403. In its content, Article 1400 of the Civil Code explains the Subrogation or replacement of the rights of the debtor by a third party, who pays to the debtor, it occurs either because of the agreement or because of the law.

The problem is that even though efforts have been made to implement subrogation, perhaps because it has become an innate human trait, namely like to break promises, there are also many difficulties faced by Bank Mandiri as a creditor. Many of the debtors break their promises to pay their debts, causing legal consequences for creditors, debtors and third parties.

2. Method

The research raised by the researcher is a type of sociological or empirical research. Sociological or empirical legal research is the law of reviewing or looking at itself from elements outside of itself (law), namely social phenomena in the world of reality (empirical) that affect legal behavior both personally individually, as well as institutionally society and legal institutions that exist. The data obtained, both primary data and secondary data, will be processed and analyzed to produce a conclusion which is then presented descriptively to provide a clear and directed understanding of the results of the study later. The data analysis used is an analysis that seeks to provide a clear and concrete picture of the research problems discussed qualitatively through an empirical approach. Furthermore, the data is presented descriptively, namely by explaining, describing, and describing according to the problems that are closely related

¹⁰ Dwi Arianti Ramadhani. Wanprestasi dan Akibat Hukumnya. *Jurnal Yuridis*, Vol. 15 No. 17, Desember 2012. Hal 48

¹¹ Achmad Chosyali dan Tulus Sartono. Optimalisasi Peningkatan Kualitas Kredit Dalam Rangka Mengatasi Kredit Bermasalah. *Law Reform*, Volume 15, Nomor 1, Tahun 2019. Hal 99

¹² Moh. Luthfi Mahrus, dkk. Analisis Pencatatan Piutang Subrogasi Pada Perusahaan Penjaminan. *Jurnal Riset Terapan Akuntansi*, Vol. 4 No. 1, 2020. Hal 36

to this research.¹³

3. Analysis and Discussion

3.1 Implementation of Replacement of Rights or Subrogation in Credit Activities in accordance with the provisions of the Civil Code

Provisions regarding subrogation are regulated in Article 1400 of the Civil Code. Mentioned in the Article subrogation is the replacement of rights by a third party who pays to the creditor. Subrogation can occur both through agreements and because it is prescribed by the Law.¹⁴

Article 1401 of the Civil Code regulates the subrogation that occurs due to a promise, where a third party replaces the position of the debtor or the creditor.¹⁵

1. When the creditor, by accepting payments from a third party, stipulates that this person will succeed him in exercising his rights, his claims, his privileges and mortgages against the debtor; this subrogation must be expressly stated and carried out simultaneously with the time of payment.
2. If the debtor guarantees a certain amount of money to pay off his debt, and stipulates that the person who lends the money will take over the rights of the creditor, in order for this subrogation to be valid, both the loan agreement and the token of repayment, it must be made by authentic deed, and in the letter of the loan agreement the money must be explained that the money was borrowed in order to pay off the debt. Meanwhile, in the letter of repayment, it must be explained that the payment is made with money lent by the new creditor.

This subrogation is carried out without the help of creditors.

Subrogations that occur due to the Law are described in Article 1402 of the Civil Code, namely:¹⁶

1. for a creditor who pays off the debt of a debtor to another creditor, who by virtue of his privilege or mortgage has a higher right and on that creditor first;
2. for a buyer of an immovable item, who uses the money of the price of the goods to pay off the creditors, to whom it is considered in the mortgage;
3. for a person who is bound to pay off a debt together with another person, or for another person and it is in his interest to pay that debt;
4. for an heir who has paid the debts of the inheritance with his own money, while he receives the inheritance with the privilege of holding a record of the state of the estate.

¹³ Nurul Qamar, dkk. Metode Penelitian Hukum. Makassar: CV Social Politic Genius (SIGn). 2017. Hal 5

¹⁴ Jifer Naki. Subrogasi Sebagai Salah Satu Alasan Hapusnya Perikatan Menurut Kitab Undang Undang Hukum Perdata (BW). Lex Privatum Vol. VII/No.1/Jan/2019. Hal 36

¹⁵ Tim Redaksi BIP, Himpuan Peraturan Perundang - Undangan Indonesia KUHPer (Kitab Undang Undang Hukum Perdata), Jakarta: Penerbit Bhuana Ilmu Populer. 2018. Hal 354

¹⁶ *Ibid*

Article 1403 of the Civil Code specifies, "the subrogation stipulated in the preceding articles, occurs both against the persons insured and against the debtors , such subrogation cannot prejudice the rights of the debtor if he receives only partial payment; in this case he may exercise his rights, as to what remains to be owed to him, ahead of the man who gave him a partial payment".¹⁷

Non-performing loans that occur in banks are basically the risks contained in any crediting by banks. The risk can be in the form of circumstances where the credit cannot return in a timely manner. The debtor's negligence in paying debts to creditors has consequences for the prosecution of rights - creditor rights that can be divided into two types of rights, namely the right of origin and the right of conversion, the right of origin referred to is the right of fulfillment of achievement arising from the engagement itself and the right of conversion is a right that arises from a default, in exchange for the debtor's achievement, which is in the form of giving something or doing something, can be sued in the form of compensation for a certain amount of money, then there is a conversion.¹⁸

In principle, Article 1313 of the Civil Code explains that an agreement is an act in which one or more persons bind themselves to one or more other persons or interested parties. In this case, subrogation certainly requires interested parties who can then be said to be third parties who will make payments for the repayment of the credit.

Subrogation which is considered to be one of the ways that can be used to settle non-performing loans, namely through the replacement of bank rights by third parties based on the Notarial Deed, in connection with third parties paying part or all of the remaining debt of the debtor to the bank does not always run effectively and as it should.

One example of a case that occurs in an independent bank where a third party acting as a guarantor of a receivables agreement between the debtor and the creditor, because until the deadline for the date of repayment promised it turns out that the debtor is incapable and no longer has good faith to pay it the debt to the creditor, that's why the creditor collects the debt on the debtor to a third party as the guarantor, but what should be a guarantor who should be able to settle the debtor's obligations is not able to make full repayment but only makes partial payments because the guarantor feels burdened if he

¹⁷ *Ibid*

¹⁸ John Satrio, *Hukum Perikatan yang Lahir dari Perjanjian*, Buku II. Bandung: PT Citra Aditya Bakti. 2011. Hal 363

has to make payment of the remaining debt of the debtor in full.¹⁹

Because of the partial payment made by the third party, the subrogation that occurs is certainly not able to provide legal certainty for creditors. What should the creditor get the fulfillment of his rights from a third party who replaces the debtor by repaying the debt debt actually only gets part of what it should be. In the event that only part of the debtor's obligations are compromised, the Bank is still domiciled as a creditor so that the financing contract and collateral goods and binding agreements do not need to be handed over to third parties.

The legal consequences that arise if the implementation of this subrogation proceeds properly are:

1. First Party (creditor: Bank)
 - a. The bank has an obligation to receive payments from third parties on behalf of the debtor or payments from the debtor on borrowed money from third parties
 - b. Transferring the rights and claims it has to third parties against the debtor
2. Second Party (debtor)
 - a. The debtor receives financial assistance from a third party to repay the debtor's debt to the creditor. So that the debtor can be free from all claims of what is owned by the first creditor
 - b. Accepting third parties who were previously guarantors to become new creditors
 - c. Returning loan money repayment of debts to third parties
3. Third Party (guarantor)
 - a. Make payments on debtors' debts to creditors
 - b. Accepting the transfer or replacement of rights and positions from the first creditor

On the contrary, a legal debate arising from the non-implementation of this subrogation effort as appropriate is that in addition to causing losses to the bank as a creditor because it does not get the fulfillment of its rights from the debtor or from third parties who should repay their debts also causes legal consequences against debtors and third parties, namely by *blacklisting* the name of the debtor in the bank system which results in the debtor and third parties not being able to apply for credit again in the future due to the actions of the debtor and third parties who do not fulfill their obligations.

Seeing this, legal certainty is very important for the parties involved in this subrogation agreement, because if later something does not happen, one of the parties can ask the judiciary to resolve it, especially the party who feels aggrieved, but in this case when one

¹⁹ Based on the results of an interview with Mrs. Ria A. Ariesta as an employee of Bank Mandiri Gorontalo City Branch on March 24, 2022

of the parties still shows good faith, if this problem can still be resolved amicably.

At Bank Mandiri, apart from being known as subrogation, there is also another way that can be used in resolving non-performing loans, namely the transfer of debts to third parties or known as novation. Novation is an agreement that causes the elimination of an agreement which at the same time arises another agreement in lieu of the original engagement. As stated by M. Fuady in his book entitled "Contract Law (From the Point of View of Business Law" that novation is a process of changing the old agreement by a new treaty, which causes the old agreement to be abolished, so that the next applicable is a new agreement with changes to its terms and conditions, and or with changes to the parties to the agreement.

Compared to subrogation, subrogasi is the right of the creditor (Bank) to a third party due to the payment of kewajiban – the obligation of the customer (repayment) to the creditor by the third party. With the subrogation, the receivables bond between the creditor and the debtor is not deleted, nor do all the promises attached to the old agreement remain valid and move to the new creditor who made the payment.

3.2 Inhibiting Factors Faced in the Implementation of Reimbursement of Rights or Subrogation in Credit Activities

Based on the cases that occurred at Bank Mandiri related to the implementation of this right replacement or subrogation, the inhibiting factors encountered in the implementation of this subrogation include:

1. Internal Factors (faced by the Bank as a creditor)
 - a. The lack of the Bank in providing information related to the subrogation procedure so that this can then be an obstacle when asking third parties to make payments for the remaining debt. Whereas if this subrogation procedure is affirmed from the outset from the moment the contract agreement is entered into then presumably this may avoid the third party from paying part of it and the execution of the subrogation can be carried out accordingly.
 - b. Debtors mostly lack understanding of the repayment procedure and do not have good faith in this case the debtor actually quits his obligations in paying off the debt – his debt to the bank plus the debtor becomes difficult to contact.

This condition then causes the bank to have difficulty in carrying out the subrogation, that the customer does not have good faith and is difficult to know his whereabouts, so the steps taken by the bank are to approach the heirs or relatives. This is done to convey that the person concerned is having responsibility for his bad debts. So that through this method, it is hoped that there will be cooperation from the heirs to support the second party, so that the second party can immediately settle its obligations to the bank even

though there is a guarantee. However, if the settlement requires a lot of time and costs a lot of money, then the auction or execution of the guarantee will be carried out.

2. External factors (from third parties replacing the debtor)

- a. When the pledged party experiences a decline in economic capability and does not communicate this with the bank. So that when the credit given to the debtor experiences congestion and requires a third party as a guarantor to pay, the guarantor experiences difficulties and feels burdened by the payment. This is if it can be communicated from the beginning and if the debtor is also open to the conditions he experiences, the bank will make various efforts that can be made as much as possible to ease the burden on the debtor and the credit provided can still run smoothly so that this communication can be a *win win solution* for both parties.
- b. The third party is not aware of the term subrogation which is the transfer of the right of the creditor to a third party if the third party in this case makes pure or full payments to the first creditor and when the implementation of the subrogation is carried out, the third party gets the right to win according to the amount of debt that has been previously paid to the creditor to the debtor against the debtor.
- c. Third parties do not have good faith
This is due to the third party feeling that they are not using the money obtained through the credit agreement between the debtor and the creditor so that when the creditor then collects the remaining debt of the debtor to the third party, the third party is reluctant to make payments on the remaining debt so that the implementation of this subrogation becomes protracted and the credit that should be able to be settled does not get legal certainty

4. Conclusion

The implementation of subrogation which is said to be one of the ways that can be used to resolve non-performing loans, namely through the replacement of bank rights by third parties based on the Notarial Deed, in connection with the third party paying part or all of the remaining debt of the debtor to the bank does not always run effectively. A legal challenge arising from the non-implementation of this subrogation effort as appropriate is that in addition to causing losses to the bank as a creditor, it also has legal consequences against debtors and third parties, namely by *blacklisting* the names of debtors and third parties on the bank system. The inhibiting factors in the implementation of this subrogation are influenced by both internal and external factors.

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