SINOMICS JOURNAL
International Journal of Social Science, Education, Communication and Economics
ISSN (e): 2829-7350 | ISSN(p): 2963-9441

Corporate Guarantee Legal Certainty Provided Without Shareholder Approval

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Abstract

The agreement providing a corporate guarantee does not provide a limit on the nominal amount that will be guaranteed by the corporate guaranteed provider because the corporate guarantee provider will guarantee the entire debt including interest, fines, fees and other amounts of money that must be paid. In Indonesian limited liability company law, directors are required to seek shareholder approval in the case of pledging more than fifty percent of the company's assets, but in practice, approval from shareholders is not always required to provide a corporate guarantee. Especially in the case of corporate guarantees known as limited corporate guarantees, where the guarantee value does not exceed fifty percent of the Company's total assets. The aim of this research is to analyze the legal certainty of providing corporate guarantees without shareholder approval for credit applications whose value is less than fifty percent of the Company's assets. This type of research is normative juridical, namely a type of research with a conceptual approach. This research has the result that a corporate guaranteed agreement to guarantee the value of a credit facility whose value is not more than 50% of the company's assets provided without shareholder approval does not provide legal certainty.

Keywords: corporate guarantee, shareholders, company.

INTRODUCTION

The parent company as an independent business entity can legally provide guarantees to third parties for agreements carried out by its subsidiaries. This is called a corporate guarantee, where the parent company provides guarantees for credit obtained by its subsidiaries. The guarantee provided is usually in the form of an agreement between the creditor and a third party which guarantees payment of the obligations of the debtor or debtor.

Guarantees are generally categorized into two types: personal guarantees and material guarantees. Material guarantees are different from personal guarantees because they involve separating a portion of the guarantee provider's assets to be used as collateral for payment of the debtor's debt. This could be the debtor's own assets or the assets of a third party. In contrast to material guarantees, personal guarantees do not involve the separation of part of the guarantor's assets. Instead, individual guarantees cover all of the guarantor's assets as a whole. This type of guarantee gives the creditor the right to take "verhaal" action against all of the debtor's assets in order to obtain repayment of his receivables.

The definition of the debtor's assets in general or as a whole, includes all assets owned by the guarantor. There are no assets specifically separated or allocated as collateral, as is the case in material collateral. Thus, when a company, such as a limited liability company, acts as a guarantor in a corporate guarantee agreement, it means that the company provides collateral for all of its assets as a debt guarantor. Besides that, Article 102 paragraph (1) of the Company Law states:

"(1) The Board of Directors is obliged to request approval from the GMS to: (a) Transfer the company's assets; or (b) Serve as collateral for debts from the company's assets; which constitutes more than 50% (fifty percent) of the company's total net assets in 1 (one) or more transactions, whether related to each other or not. "This transaction is a transfer transaction of the company's net assets that occurs within a period of 1 (one) financial year or a longer period of time as regulated in the Company's Articles of Association."

Based on Article 102 paragraph (1) of the Company Law, actions involving the provision of collateral for the company's assets must obtain approval from the General Meeting of Shareholders (hereinafter referred to as the GMS). Therefore, if the directors of a limited liability company intend to provide collateral in the form of a corporate guarantee, they must seek approval from the GMS. This is because this action will have an impact on the company's entire assets, where the corporate guarantee agreement does not provide a limit on the nominal amount that will be guaranteed by the corporate guarantee provider because the corporate guarantee provider will guarantee the entire debt including interest, fines, costs and so on. – another amount of money that must be paid.

In practice, approval from the GMS is not always required to provide corporate guarantees. Especially in the case of corporate guarantees known as limited corporate guarantees, where the guarantee value does not exceed 50% (fifty percent) of the company's total assets. In this situation, corporate guarantees are often provided without obtaining approval from the GMS, even though the act of providing a corporate guarantee does not provide a limit on the nominal debt that must be paid and will even cover all fines, interest and other costs that must be paid by the debtor. This has the potential to give rise to legal implications in the event that the debtor fails to pay off his debt, the corporate guarantee provider is obliged to pay off the debtor's obligations including all interest, fines and other costs to the Bank, considering that there is no nominal limit on the obligations that must be paid by the corporate guarantee provider. It is possible that the debt value which was originally no more than 50% (fifty percent) of the assets of the company providing the corporate guarantee may ultimately exceed 50% (fifty percent) of the company's assets because there are fines, interest and other costs that must be paid even though the corporate guarantee was provided. This was carried out by the board of directors without obtaining approval from shareholders.

Providing a corporate guarantee to guarantee credit whose value is not more than 50% of the company's assets, which is given without shareholder approval, raises the question of whether the agreement is valid and legally binding. Thus, in this research the author raises the problem, namely how legal certainty is the provision of a corporate guarantee without the holder's approval. shares for credit applications whose value is less than 50% of the company's assets.

METHOD

This research falls into the category of normative juridical research, which is also known as doctrinal research. The approach used is a conceptual approach. With a focus on

ISSN (e): 2829-7350 | ISSN(p): 2963-9441

collecting data, on analyzing the application of rules or norms in positive law as well as legal concepts from doctrine provided by legal experts.

RESULTS AND DISCUSSION

Legal Certainty of Providing Corporate Guarantee Without Shareholder Approval for Credit Applications with a Value of Less Than 50% of the Company's Assets

The banking sector with its strategic position as an intermediary institution and supporting the banking system is a very determining factor in national development. Banks as financial intermediary institutions have the main task of collecting public funds in the form of savings and channeling them back in the form of credit. Banks have a strategic role in national development which requires trust from the community so that they carry out their main tasks well. Along with the development of the business world and the need for capital for legal entities in Indonesia, various business transactions have emerged that have not been clearly regulated in Indonesian laws and regulations. One of them is the provision of a corporate guarantee by a third party which is a legal entity to guarantee the credit facility provided by the creditor to the debtor. The concept of corporate guarantee itself is to state that the provider of the corporate guarantee commits himself to fulfilling the debtor's obligations if the debtor does not fulfill his obligations.

*Corporate guarantees*is insurance provided by a legal entity. Judging from its nature, collateral guarantees are included in individual guarantees, namely the existence of a third party (legal entity) which guarantees debt repayment if the debtor fails to fulfill its obligations (default). This individual guarantee can not only be provided by individuals, but also by legal entities which are legal subjects. In general, there are no specific provisions regarding the requirements for a Limited Liability Company (PT) to provide a corporate guarantee. Apart from guarantees in the form of goods (material guarantees), guarantees can also be in the form of personal guarantees which in the Civil Code are known as guarantees (borgtocht) which are regulated in Articles 1820 to 1850 of the Civil Code. When a PT provides a corporate guarantee, the PT's obligations are in principle the same as the obligations of the debtor itself. Corporate guarantee guarantees the ability to pay the debtor's debt if the debtor is unable to pay it, because what is guaranteed is the PT entity, this is related to the PT's assets as a whole. PT has its own assets that are separate from the assets of its management and shareholders. Even though the PT acts as a guarantor, the legal consequences will affect the assets of the PT concerned.

It is concluded that the guarantee or guarantor regulated in Articles 1831 to Article 1850 of the Civil Code states that a guarantor or guarantor is also considered a debtor who has the obligation to pay off the debtor's debt to the creditor or creditors. In accordance with article 1131 of the Civil Code which states:

"All the debtor's property, whether movable or immovable, whether existing or new that will exist in the future, is the responsibility for all his obligations."

So, if a PT provides a corporate guarantee, the PT's assets are used as collateral to pay off the debtor's debt guaranteed by the company. Therefore, providing company guarantees or corporate guarantees must comply with several legal provisions, including the Company

Law which regulates legal entities as guarantors. According to Article 102 paragraph (1) of the Company Law, directors must obtain approval from the GMS to use company assets as collateral for debt if the value exceeds 50% (fifty percent) of net assets in one or more transactions.

However, corporate guarantees are often given without prior approval from the GMS because they assume that the value of the guaranteed debt is no more than 50% (fifty percent) of the company's assets, so it is deemed unnecessary to obtain GMS approval to provide the corporate guarantee, even though it is actually an agreement. Corporate guarantees do not set limitations on the amount of obligations that must be paid off by the corporate guarantee provider because the obligations of a corporate guarantee also include paying off the amount of interest, fines and other costs that are the obligation of the debtor so this could potentially cause the guarantee to exceed 50% (fifty percent) of company assets. Providing a corporate guarantee also does not limit the extent of the assets pledged by the corporate guarantee provider to guarantee the debt of the debtor, so based on Article 1131 of the Civil Code, all assets belonging to the corporate guarantee provider can be used as collateral.

The binding of corporate guarantees is usually carried out by entering into a corporate guarantee agreement between the corporate guarantee provider and the notarized creditor. The corporate guarantee agreement is an accessoir, namely an additional agreement that arises because there is a main agreement, in this case, namely a credit agreement between the creditor and the debtor. Article 1320 of the Civil Code explains the legal conditions for an agreement, namely agreement, competence, a certain thing and a lawful cause. Article 1337 of the Civil Code confirms that a cause is considered prohibited if it conflicts with the law, norms of decency or public order, meaning that in making an agreement if in the process it violates the provisions of the law then the agreement does not meet the objective requirements for the validity of the agreement so that it can result in the agreement being null and void by law.

Based on the matters described above, the creation of a corporate guarantee agreement to guarantee credit facilities with a value of no more than 50% of the company's assets provided without shareholder/GMS approval violates the provisions as regulated in Article 102 of the Company Law for the following reasons:

1. There is no limit on the value of company assets guaranteed in providing a corporate guarantee; And
2. Even though the value of the credit guaranteed is no more than the value of 50% of the company's assets, the provisions in the corporate guarantee agreement require the corporate guarantee provider to bear the entire amount owed including interest, fines and other costs whose value is not yet clear and there is no limit so that in the end The debt value can be more than 50% of the assets owned by the company.

Because it does not comply with the rules in Article 102 of the Company Law, the corporate guarantee agreement can be said to not meet the legal requirements of the agreement, namely a lawful reason so that the corporate guarantee agreement to guarantee credit facilities whose value is no more than 50% of the company's assets provided without shareholder approval has the potential to be invalidated. by law.

Based on the matters described above, a corporate guarantee agreement to guarantee the value of a credit facility whose value is not more than 50% of the company's assets provided without shareholder approval does not provide legal certainty. Legal certainty means that there are clear norms that can be used as a guide for people who are bound by these regulations. The definition of legal certainty can be interpreted as the existence of clarity and firmness in the application of law in society, so that it does not give rise to many misunderstandings. Legal certainty refers to the application of law that is clear, permanent and consistent, where its implementation is not affected by subjective circumstances. According to Lawrence M. Friedman, a Professor at Stanford University, to achieve "legal certainty," we need support from three main elements, namely: legal substance, legal apparatus, and legal culture. The absence of clear regulations in Indonesia regarding the provision of guarantees by a limited liability company shows that there is no legal substance that regulates this matter so that the current regulations do not provide legal uncertainty regarding corporate guarantee practices in Indonesia.

According to Maria SW Sumardjono, the normative concept of legal certainty requires the availability of statutory regulations that can be implemented operationally and support their implementation. Empirically, the existence of these laws and regulations must be carried out consistently and consistently by the human resources that support them. A regulation is considered certain when it formulates the rule clearly and logically. The imperative of clarity avoids ambiguity or multiple interpretations, while being logical leads to the establishment of a consistent system of norms without conflict between norms. Considering the rapid development of business transactions in Indonesia in terms of capital of a PT legal entity and the large number of corporate guarantee practices, there should be clear rules regarding the provision of guarantees by a PT as a legal entity (corporate guarantee). The government needs to formulate rules and regulations in terms of corporate guarantees. guarantee so that in the future the practice of providing corporate guarantees can protect the rights of creditors and shareholders of the corporate guarantee provider itself.

CLOSING

Conclusion

In a corporate guarantee there is no limit on the value of the company's assets guaranteed in providing a corporate guarantee and although the value of the credit guaranteed is no more than the value of 50% of the company's assets, the provisions of the corporate guarantee agreement require the corporate guarantee provider to bear the entire amount owed including interest, fines and other costs whose value is not yet clear and there is no limit so that in the end the debt value could be more than 50% of the assets owned by the company. A corporate guarantee agreement to guarantee the value of a credit facility whose value is no more than 50% of the company's assets provided without shareholder approval does not provide legal certainty. Apart from that, the absence of clear regulations in Indonesia regarding the provision of guarantees by a limited liability company also provides legal uncertainty regarding corporate guarantee practices in Indonesia.

Suggestion

With the rapid development of business transactions in Indonesia in terms of capital of a PT legal entity and the large number of corporate guarantee practices, there should be a need for clear rules regarding the provision of guarantees by a PT as a legal entity (corporate guarantee). The government needs to formulate rules and regulations in terms of providing corporate guarantees. so that in the future the practice of providing corporate guarantees can protect the rights of creditors and shareholders of the corporate guarantee provider itself. The formulation of provisions regarding the provision of corporate guarantees by PTs can be made through amendments to the PT UUPT so that the UUPT can provide legal certainty for corporate guarantee transactions.

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