



The use of buy back guarantee clauses in mortgage agreements

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Abstract

A guarantee agreement is an accessory agreement between a third party and the creditor concerning the debtor's debts, as per Article 1820 of the Indonesian Civil Code. Principally, a guarantor is not obliged to pay unless the debtor defaults. The use of buy back guarantee clauses in mortgage agreements is not explicitly regulated by law. This term has only developed as a customary practice in business contracts. This study aims to analyze the legal certainty of buy back guarantee agreements, the legal relationships between the parties in fulfilling obligations, and the realization of buy back guarantees by developers to banks. The research method is normative legal research (juridical normative) using data from court decisions, legislation, and relevant literature. The results show that buy back guarantee agreements ensure legal certainty. Banks can enforce such agreements if explicitly stipulated. Consumers and developers act as buyers and sellers, while banks and developers are bound by guarantee agreements. Banks can transfer the risk if the debtor defaults. In the realization of buy back guarantees, banks can hold developers accountable if consumers default. The principle of subrogation occurs when the developer settles the consumer's debt to the bank; even if the consumer's debt is written off, the developer can still claim from the consumer. The Tangerang District Court Decision No. 665/Pdt.G/2018/PN. Tng emphasizes the importance of buy back guarantees in mitigating default risks. It is recommended that banks and developers exercise caution in drafting guarantee agreements and consider potential situations triggering the buy back guarantee. The involved parties should pay attention to legal and contractual aspects related to buy back guarantees in mortgage agreements and provide input to lawmakers.

Keywords: Agreement, buy back guarantee, mortgage

Introduction

Indonesia is one of the most populous countries in the world. Equitable development, particularly in housing across the country, is a dream for the Indonesian nation. The high number of Indonesians in the lower-middle economic class makes it difficult for people to access private housing. Mortgage (hereinafter referred to as KPR) is one of the means that facilitate Indonesians in owning homes with financing assistance from banks. In the implementation of KPR, three parties are involved: the developer, the consumer, and the bank providing the financing. Basically, a credit agreement is a standard clause agreement. A standard agreement is a benchmark used as a guideline for every consumer who establishes a legal relationship with a business actor, which is standardized or fixed.

Sutan Remi Sjahdeni also explains that a standard agreement is an agreement in which almost all clauses are standardized by the user, and the other party essentially has no opportunity to negotiate or request changes. One party only has two choices: to agree or disagree, each with its own consequences.

In the implementation of KPR, banks as creditors tend to want guarantees for the repayment of credit from debtors. Therefore, the concept of buy back guarantee emerged as a form of guarantee. A buy back guarantee is a third-party guarantee agreement for the obligations between the debtor and creditor, which is only executed if the debtor defaults or cannot fulfill their obligations under the credit agreement.

The buy back guarantee is currently widely used in providing mortgage facilities. This guarantee occurs because the housing project financed by the bank is still under construction by the developer, and the land certificate processing is still ongoing at the Land Office, so it cannot

yet be used as a collateral object. In such conditions, the bank will accept the guarantee, although the collateral binding cannot be perfectly executed through mortgage rights.

This concept differs from the concept of repurchase regulated in the Civil Code. In a buy back guarantee, the developer as the seller is responsible for repurchasing the goods already bought from the debtor to settle the debtor's debt to the creditor. This creates legal consequences for the developer, creditor, and debtor.

Buy back guarantees are often used in KPR because the housing project financed by the bank is still under construction by the developer, so it cannot yet be used as collateral. However, there are no explicit regulations governing the use of buy back guarantees in KPR agreements. This indicates a normative ambiguity in the legislation.

In practice, buy back guarantee agreements can be made between creditors and developers without involving debtors. This can lead to ambiguous legal consequences, especially concerning the buy back price that may not refund the down payment already made by the consumer. Additionally, if the house's sale price increases, this can also pose a problem in executing agreements with buy back guarantee clauses. Therefore, it is necessary to discuss the legal certainty of using buy back guarantee clauses in mortgage agreements.

Discussion

1. Legal Certainty

Legal certainty regarding the buy back guarantee clause in agreements pertains to the necessity of norms and regulations concerning guarantees. These legal norms regulate and secure the relationship between the guarantor

and the guarantee recipient (creditor) as a result of a specific debt obligation (credit) with a guarantee (particular object or person).

A contract or cooperation agreement serves as written evidence or documentation indicating the desire and intention of two or more interested parties to collaborate, detailed within the contract. Such contracts typically include a project description and the contributions of each party as outlined in the agreement clauses.

Substantially, contracting can be understood as an action where one or more persons promise to perform something in good faith. Contracting or making agreements is a concrete manifestation of this.

It is crucial for the bank and developer to pay attention to every word in the cooperation agreement document, as signing the contract imposes legal obligations on the parties to contribute according to the written agreement. An agreement forms a binding consensus in a legal condition involving one or more legal subjects with reciprocal rights and obligations. Such commitments can arise from agreements between two or more parties or due to statutory provisions.

Buy Back Guarantee Practice

In banking practice, particularly in mortgage loans (KPR), the buy back guarantee agreement is a legal strategy employed by banks to mitigate credit and legal risks. Specific conditions prompt banks to use buy back guarantee agreements with third parties (developers), such as when the credit agreement between debtor and creditor involves collateral that cannot yet be secured.

In everyday practice, buy back agreements often occur with immovable objects like land or houses. Practically, these agreements resemble fictitious sales, essentially constituting loans with collateral, simulating a pawn relationship. The goal is to strengthen the creditor's position against the debtor and third parties.

Customary law does not recognize buy back agreements, considering them merely as pledges. Since land transfer transactions are governed by customary law under Article 5 of the Basic Agrarian Law (UUPA), which does not recognize buy back sales, pledges are used instead. Thus, under the UUPA, buy back sales of land or houses should be null and void.

In the evolving property market, developers need financing partners, such as banks, to facilitate home purchases through mortgages (KPR). Banks recommend buy back agreements because developers are better acquainted with their customers' characteristics and abilities, ensuring safer and less risky operations. However, these agreements can lead to complex issues if default occurs, particularly if the agreement is informal and not notarized, posing risks, especially to the bank as the creditor.

When consumers use a bank's mortgage facilities, the bank expects the developer to act as the first filter for potential debtors. For developers, this cooperation, reflected in the buy back agreement, should simplify the mortgage process and enhance their reputation.

If developers must repurchase problematic units, it is hoped that future sales will yield significant price increases. However, many subsidized houses currently face negative equity, where the house price drops below the total debt due to factors like substandard materials or damages, leading to new losses and issues from the buy back guarantee clause.

Developers may fail to fulfill the buy back guarantee due to internal factors (lack of capability or experience) or external factors (economic conditions post-COVID-19 pandemic or other disasters).

3. Internal and External Factors of Buy Back Guarantee Failure

Internal factors include the developer's lack of capability to complete the project, dishonesty about their legal status, inexperience, or failing to meet consumer expectations regarding construction progress. External factors, like economic conditions post-pandemic or natural disasters, can also cause failure.

To mitigate these risks, banks aim to anticipate such issues. Given the individual nature of the guarantee, relying on good faith between parties is crucial, as the agreement lacks executory power. A specific written provision regulating buy back guarantees should be established to ensure legal certainty for all parties involved.

The principle of freedom of contract does not yet provide legal certainty. If all guarantees are regulated by law, especially regarding execution mechanisms, future disputes would be easier to resolve, such as when a developer defaults, and execution cannot be enforced without a lawsuit, which can be time-consuming. If regulated by law, assets could be directly executed, providing better legal certainty.

Buy back guarantees are not classified as property guarantees since the agreement's subject is not an object. They are surety agreements where, if the debtor defaults, the guarantor buys back the house as the credit collateral. The sale proceeds cover the debtor's remaining outstanding mortgage debt. The guarantor, in a buy back guarantee, assures the creditor of the debtor's performance, but if the debtor defaults, the developer (as guarantor) fulfills the debtor's obligations to the creditor.

The guarantor in a buy back guarantee acts as a surety, providing a guarantee if the debtor defaults. This form of surety in banking credit is essentially accessory, only activated upon debtor default. Buy back guarantees emerge from agreements requiring good faith from all parties to ensure legal protection.

In practice, not all guarantors (developers) immediately fulfill their obligations when debtors default, contrary to the agreement's intent to protect parties, especially banks, from credit facility losses. The lack of clear regulation in the Civil Code or other laws raises concerns about legal certainty for such agreements.

The Civil Code does not regulate guarantees for repurchasing collateral but only the right to repurchase from seller to buyer as stipulated in Article 1519. The absence of regulations on buy back guarantees implies that these agreements serve as accessories to existing collateral guarantees with executory power.

Legal implications of buy back guarantees may weaken the creditor's position concerning the guarantor's assets if default occurs. Such agreements should have legal effects similar to other guarantees, allowing for asset execution if necessary. Despite not being explicitly regulated, buy back guarantees are commonly used in credit agreements to mitigate bank losses.

Conclusion

The conclusion of this discussion is that buy back guarantee agreements frequently occur in banking practice, particularly in managing credit and legal risks. To ensure legal certainty and protect all parties' interests, clear and specific regulations must be applied to these agreements. Cooperation contracts and agreements must be carefully formulated with good faith from all parties to minimize risks and strengthen the creditor's position. Understanding the contract content is crucial in preventing future issues and disputes. Buy back guarantee agreements have legal implications for debtors, creditors, and guarantors, involving the developer's performance towards the bank due to the debtor's default. To ensure legal certainty for buy back guarantee agreements, it is essential to stipulate clearly and explicitly that the creditor can demand performance from the curator even if the developer defaults or is declared bankrupt. Without such provisions, the agreement lacks executory legal certainty. Although buy back guarantees lack specific legal grounding, they are often used in cooperation and credit agreements to anticipate bank losses.

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