

Research Article

Legal Consequences of Creditor's Name Change in Syndicated Loan Agreement**Pambudi Wiyono¹, Pujiyono²**¹ Student of Master Program of Notary, Universitas Sebelas Maret Surakarta, Indonesia² Lecturer at Faculty of Law of Universitas Sebelas Maret Surakarta, Indonesia

Abstract: The present study discussed the legal consequence of the creditor's name change and the consideration used by the Supreme Court Judge no. 1300 K/Pdt/2013. The present study was categorized as doctrinal legal study using case study approach. The data were collected through library research. Syllogism was employed as the analysis technique of this legal writing. The change of creditor's name in a syndicated loan, as it happens to "PT. Bank Finconesia" that changes its name to "PT. Bank Agris" cause problems since the new name "PT. Bank Agris" is not mentioned in the loan agreement no. 8 dated 28 November 1995. The making of syndicated loan agreement should be based on article 1320 and 1338 of the Indonesian Civil Code. The Supreme Court no. 1300/K/Pdt/2013, the supreme court has made an incorrect decision by granting the plaintiff's lawsuit as the syndicated creditor. It is incorrect because, in the syndicated loan agreement, the creditors had agreed to appoint a facilitating agent who acts legally as representative of the creditors, it makes the facilitating agent is authorized to have a direct relation with the debtors, especially in filing a lawsuit to the court.

Key words: Creditor's name change, agreement, syndicated loan.

Introduction

Banking is one of the strategic sectors as both intermediary institutions and the supporting financial system that takes essential role in the economic development process. As an intermediary institution, bank intermediates the parties who have excessive funds and those who lack and need funds (Kasmir 2014:2).

Addressing this issue, syndicated loan is a solution for the risk that potentially borne by the creditor when a credit risk is considered too high for the creditor .

In syndicated bank loan, a group of banks and financial institutions work together to lend a specified amount where the bank is not capable of providing it individually (Mugasha and Agasha: 1996).

Syndicated loan in Indonesia plays a role as the bridge between capital constraint and development. Thus, the bank moves in loan activities and other services; it serves financial needs and advances the development for all economic sectors.

A credit agreement contains some elements, namely, legal subject, legal object, obligation, and time (Ariyani 2013:59). The legal subjects in a loan agreement are the debtor and the creditor. In granting a loan, the bank should concern with its customer's ability to repay its debt, and the bank's ability to provide loan, and the bank's ability to afford the credit risk.

A problem arises when the debtor defaults and the creditor cannot make any warning or collect the payment because they should wait the legal action from the facilitating agent. The facilitating agent does not perform its obligation, which financially harms the creditors. It occurs like in the case claimed by the debtors i.e PT. Bank Agris and PT. Bank

Commonwealth as the plaintiff I and II, against their debtors PT Geria Wijaya Prestige as the defendant. Other defendants in their lawsuit as the creditor are PT Bank Windu Kentjana International. Tbk, Fireworks Ventures Limited, and Minister of Finance of the Republic of Indonesia Cq. The Head of State Credit and Auction Management (KP2LN) Jakarta, as co-defendant I, II, and III (MA 2013). Based on Deed of Meeting on the Change of Article of Association, "PT Bank Finconesia" change its name to be "PT Bank Agris" No 146 dated 18 July 2008, it is made by and before Sutjipto, S.H., M.Kn., A notary official in Jakarta (evidence P-1); And the Decision of Minister of Law and Human Right of the Republic of Indonesia no AHU-45703.AH.01.02. of 2008 On the approval of the deed of change of Article of association dated 29 July 2008, it is legally proven that PT Bank Finconesia changes its name to PT Bank Agris". (Evidence P-2)

Methodology

The present study was categorized as doctrinal legal study, this employed case study approach since the object of the study is only one case, i.e., debtor's default in syndicated loan due to the change of creditor's name which does not comply with Loan Agreement no. 8 dated 28 November 1995. Accordingly, the creditor makes a request for cassation in Supreme Court Decision no. 1300 K/Pdt/2013 to find out the legal implication of creditor's name change and the consideration used by the Supreme Court Judge in making the decision. The sources of data of the study were primary legal material, i.e., relevant law, and secondary legal

material i.e., books legal dictionary, and legal journals. The data were collected through library research. Syllogism was employed as the analysis technique of this legal writing.

Discussion

Legal Implication of Creditor's Name Change

In general, syndicated loan have same legal basis /credit scheme with that of non-syndicated loan (bilateral). Regulation concerning this credit is involved in Contract law regulated in Book III of Indonesian Civil Law, however, the definition of obligation is not regulated there. Contract law is a part of law of property(Vermogensrecht) with open system. Open system refers to a system where people may engage based on agreement, any agreement about anything the people want, both regulated or not regulated in law (Umardani 2016).

Creditor's obligation in syndicated loan should be in accordance with the provision regulated in the clauses of Syndicated Loan agreement. Banking prudential principle is crucial when granting a syndicated loan for a project, considering that the legal lending limit (BMPK) of the bank is exceeded by the issuance of BMPK Exception Letter by Bank Indonesia, and the Letter of Guarantee issued by Minister of Finance as the representative of Indonesian Government (BI 2005).

Besides, prudential principle is a form of risk control by implementing the prevailing regulation and provision. The philosophical basis of prudential principle in banking is community trust in bank. Accordingly, to protect the community's fund, the bank should firmly apply prudential principle so that it is always in healthy, liquid, solvent, and profitable (Usanti 2014:58).

Syndicated loan agreement functions to regulate the relationship between the leading bank and the member of syndication regarding the financing project. By this agreement, when there is a conflict of interest, policies, and principles, the agreement can be the basis to settle the conflict (Sjahdeini 2010:30). Syndicated loan is different from the typical loan, there are some banks that become creditors (the member of syndication), there is an agent, and there is only one debtor, and all concerning parties are bound in one main document, namely Syndicated Loan Agreement (Ibid :2).

From the creditor's point of view, the main consideration in syndicated loan is the spreading of credit risk since the risks are borne together according to the funding portion of each syndication member. The limitation of lending has been regulated by Bank Indonesia, which is known as 3L (Legal, Lending, Limit). Further, regulation on BMPK also makes the bank cannot give a huge amount of loans (Kusumaning Tuti et al. 2008:8).

Syndicated credit also applies a contract like other typical credits so that a proper knowledge regarding the legal aspect of the syndicated loan agreement, Given that there are many members in syndicated credit. This will minimize the potential deviation.

The syndicated loan agreement should determine in detail who the facilitating agent is, and what are the duties of that facilitating agent. Facilitating agent does not represent the

debtors but the syndication creditor member. Each member of the syndication grants authority to the facilitating agent based on the authorization letter agreement to act on their behalf. The creditor members of syndication appoint the facilitating agent in performing legal relationships in dividing the amount of each credit and in dividing the credit yield based on the agent appointment, which is usually stated in the security sharing agreement.

The primary function of the facilitating agent is mechanical and administrative in nature. For instance, they become the middleman in giving credit to the debtor and accept the installment from them, receiving and forwarding the documents determined in the conditions precedent clauses, calculating the interest rate if it is determined as floating, forwarding financial information and other information to the debtors. Although the facilitating agent's authority is merely administrative, it is also possible for them, if approved by the majority of the creditor, to perform necessary and beneficial legal action regarding the agreement (Yuhassarie dan Harnowo 2004:75).

The nature of the credit in the syndicated loan is usually transferable (transferable loan facility) as it is regulated in syndicated loan agreement. The credit transfer, in Indonesia, is done using cessie method(Article 6113 of Indonesian Civil Code) . This method considers the credit transfer from the old creditor (cessus) to the new creditor (cessionaries) as valid if it is done through an authentic deed, or in private, and prevails after it is informed to the debtor. (Boediono 2013:42).

The change of creditor's name in syndicated loan, as it happens to "PT. Bank Finconesia" that changes its name to "PT. Bank Agris", cause problems because the new name "PT. Bank Agris" is not mentioned in the loan agreement no. 8 dated 28 November 1995.

The defendant is default since they do not fulfill its obligation to pay the principal, the interest, and the penalty although the plaintiff had warned the defendant several times, to date, the defendant does not have any goodwill to meet their obligation.

The defendant stated, in banking law perspective, Loan Agreement no. 08 of 1995 was known as syndicated loan. By paying attention to the credit agreement, it could be known that the facilitating agent was Bank PDFCI, not PT. Bank Windu. Regarding the standing and the authority of facilitating agent, it is stipulated in the Loan Agreement as follows: "Facilitating Agent refers to Bank PDFCI who acts as the representative of the creditor, as it is stipulated in paragraph 10.2 of article 10 of the Loan Agreement."

Thus, the facilitating agent holds rights and authority on the creditor's behalf to file a lawsuit based on the loan agreement. The creditor members are no longer able to directly act on their own without the facilitating agent, in this case is Bank PDFCI, including filing a lawsuit.

The defendant concludes that the plaintiff files the lawsuit directly and on their own without the facilitating agent, which is considered unauthorized act, given that the plaintiff is not the facilitating agent.

The making of syndicated loan agreement should be based on article 1320 and 1338 of Indonesian Civil Code. Article 1338

paragraph (1) of Indonesian Civil Code reads “ All valid agreement apply to the individuals who have concluded them as law.” It could be interpreted that all individuals or legal subjects may make any agreement with anyone about anything in the desired form (Budhayati 2009:236).

The use of the two articles above is based on article 1319 of Indonesian Civil Code, which reads: “All agreements, whether or not known under specific titles, shall be subject to the general provisions, which shall be the subject of this and the previous title.” “This title” in article 1319 refers to book III of Indonesian Civil Code concerning agreement, while “previous title” in that article refers to book II of Indonesian Civil Code regarding Law on object. Both agreement with specific title (the article that has been regulated in the Civil Law for instance, sale-purchase agreement, renting agreement, gift agreement, exchange agreement, and so forth) and the unknown agreement (has not been regulated in Civil law, for instance: leasing agreement, agency agreement, loan agreement, rent-purchase agreement, and others) should adhere to the stipulation of Article 1319 of Indonesian Civil Code.

Article 1319 provide the basis that the provision of each agreement made by the concerning parties should adhere to Book II and Book III of Indonesian Civil Code as long as it has not been stipulated by new regulations. In other words, any agreement, including the making of syndicated loan agreement, should adhere to Book II and Book III of Indonesian Civil Code. Book II and Book III of Indonesian Civil code regulating the Law of object and Law of Agreement should be used as a general guideline in making syndicated loan agreement.

The analysis of Supreme Court Decision no. 1300K/Pdt/2013 based on the Positive Law

In the Supreme Court Decision regarding default dispute, register no. 1300/K/Pdt/2013 dated 19 August 2013, a case between PT. BANK AGRIS (d/h. PT. BANK FINCONESIA), as the Requester for cassation I, who were plaintiff; and PT. BANK COMMONWEALTH, as the Requester for Cassation II, who was co-defendant IV; against PT. GERIA WIJAYA PRESTIGE, as the defendant; and: PT. BANK WINDU KENTJANA INTERNATIONAL. Tbk.; FIREWORKS VENTURES LIMITED; MINISTER OF FINANCE OF THE REPUBLIC OF INDONESIA cq. THE HEAD OF STATE CREDIT AND AUCTION, as the respondent on cassation, who were co-defendant I,II and III.

The Plaintiff is one of the parties in Loan Agreement no. 8 dated 28 November 1995, where the creditors are PT. Bank PDFCI; PT. Bank Multicor; PT. Bank Rama; PT. Indonesian Investments International Bank (PT Indovest Bank); PT. Bank Finconesia; PT. Bank Arta Niaga Kencana; PT. Bank Dharmala.

“PT. Bank Finconesia” change its name to “PT. Bank Agris”. The Plaintiff is the creditor, while the defendant is the debtor. As the member of syndication, the plaintiff possesses legal relationship with the defendant, as stated in Loan Agreement no. 8 of 28 November 1995.

The defendant is default since they do not fulfill its obligation to pay the principal, the interest, and the penalty although the

plaintiff had warned the defendant several times, to date, the defendant does not have any goodwill to meet their obligation.

Thus, the plaintiff experiences financial loss, which until 7 January 2011, all of defendant’s obligations toward the Plaintiff are US\$20,389,661.26 and Rp10.000.000.000. The plaintiff claims that there is no article in the Loan agreement no. 8 dated 28 November 1995 That forbids the plaintiff to file a lawsuit and directly ask the defendant to repay its debt. Although the plaintiff has repeatedly requested the co-defendant I to carry out its function as the Facilitating and Guarantying agent to regain the plaintiff’s right, co-defendant I still does not perform its function. Accordingly it is reasonable for the plaintiff to request a repayment directly to the defendant.

Co-defendant I does not make maximum attempt to secure the creditor’s and its own right and obligation. Co-defendant I supposes to actively collect and/or perform legal action to ask the defendant to repay its debt to the creditors. To date, it has been more than 15 (fifteen) years the defendant fores not perform its obligation.

Whereas the defendant, in its rebuttal, the plaintiff (PT. Bank Agris) holds no capacity/authority to file a lawsuit based on loan agreement no. 08 dated 28 November 1995 because the plaintiff is not the facilitating agent.

The defendant stated, in banking law perspective, Loan Agreement no. 08 of 1995 was known as syndicated loan. By paying attention to the credit agreement, it could be known that the facilitating agent was Bank PDFCI, not PT. Bank Windu.

Regarding the standing and the authority of facilitating agent, it is stipulated in the Loan Agreement as follow:

“Facilitating Agent refers to Bank PDFCI who acts as the representative of the creditor, as it is stipulated in paragraph 10.2 of article 10 of the Loan Agreement.”

Thus, the facilitating agent holds rights and authority on the creditor’s behalf to file a lawsuit based on the loan agreement. The creditor members are no longer able to directly act on their own without the facilitating agent, in this case is Bank PDFCI, including filing a lawsuit.

The defendant concludes that the plaintiff files the lawsuit directly and on their own without the facilitating agent, which is considered unauthorized act given that the plaintiff is not the facilitating agent.

Regarding the plaintiff’s claim, Central Jakarta District Court decides in decision no. 27/Pdt.G/2011/PN Jkt.Pst, dated 18 August 2011.

In the first appeal on the defendant's request, the District Court decision was annulled by Jakarta High Court with decision no. 187/PDT/2012/PT DKI, dated 17 July 2012. Then, the plaintiff attempts a cassation. Then Supreme Court make a consideration and injunction that justify the High Court decision that annuls the District court decision is incorrect in implementing the law, by taking these considerations:

That the High Court (Judex Facti) has ignored the standing or the existence of Bank PDFCI as the facilitating agent in

syndicated loan agreement. Evidently, it is no longer exist since it has been taken over by the government through liquidation, and that fact is associated with the legal relationship between the defendant as the debtors and the plaintiff as the creditor. It is proven that the debtor is default since it does not pay its debt more than 10 years after the due date.

That by considering the proprietary principle, the collection attempted by the plaintiff through a quo claim, can be justified, because PT. Bank PDFCI as the facilitating agent is no longer exist;

That for more than 10 (ten) years PT. Bank PDFCI is liquidized) or its liquidator neglects to perform collection/ to handle the syndicated loan, according to the Supreme Court, the plaintiff's action is proper and justifiable, and does not exceed its authority;

While regarding the reason of requester for Cassation II, it is based on the consideration that their reason cannot be justified since *Judex Facti* (District Court/ High Court) is not wrong in implementing law, considering that the debt the Requester I/ Plaintiff i.c. PT.Bank Agris is limited to its credit, while regarding the credit transfer from the requester II/co-defendant IV i.c PT Bank Commonwealth to other parties is not the obligation of the requester I/Plaintiff, it is the right of requester for cassation II i.c. Co-defendant IV i.c. PT Bank Commonwealth to file a lawsuit against defendant as the debtor;

To consider, that based on the considerations above, without needs to consider other reasons for cassation, the Supreme Court has enough reasons to grant the cassation from requester I: PT. Bank AGRIS (d/h. PT. Bank FINCONESIA) and reject the Cassation Requester II: PT. Bank COMMONWEALTH and annul the Jakarta High Court no.187/PDT/2012/PTDKI dated 17 July 2012 that annul the Jakarta District Court decision no. 27/Pdt.G/2011/PN Jkt.Pst, dated 18 August 2011, and the Supreme Court rules this case by taking over the injunction of District Court since it is considered correct.

Based on the author's analysis of the Supreme Court no. 1300/K/Pdt/2013, the supreme court has made incorrect decision by granting the plaintiff's lawsuit as the syndicated creditor. It is incorrect because in the syndicated loan agreement, the creditors had agreed to appoint a facilitating agent who acts legally as representative of the creditors, it makes the facilitating agent is authorized to have direct relation with the debtors, especially in filing a lawsuit to the court. The legal consideration of Jakarta Supreme Court judges no. 187/PDT/2012/PT DKI is correct regarding the plaintiff's authority in filing a lawsuit since the plaintiff is not the facilitating agent.

The Supreme Court judge's decision that grants the syndicated creditor's claim is correct only inf the creditor is not involved in credit syndication. The creditor holds a legal relationship with the debtor so that the creditor holds right in filing a lawsuit directly against the debtor. However, if the creditor is bound in a syndicated loan agreement and has appointed a facilitating agent to mediate the syndicated

creditors and the debtors, the syndicated creditor should come along with the facilitating agent if they want to file a lawsuit against the debtors.

In regulatory legislation, there is no explanation about the facilitating agent's duty. The absence of explanation is because in syndicated loan agreement, the principle of freedom of contract is applied, where the law gives the concerning parties freedom to make any agreement containing anything, which includes the authority of the concerning parties. Provisions in the agreement are the law for its makers, binding them to adhere to and implement the provision. (Kristianto 2009:16).

According to Indonesian law, an agreement should firmly states about the effectuation of a clause, especially regarding the authority of the concerning parties. This is important because Indonesian Civil Code does not have a specific chapter regulating syndicated loan. If an agreement does not firmly state the concerning parties' authority, any matter that is not firmly regulated in the agreement should be settled under the provisions of Indonesian Civil Code. Following Indonesian Civil Code, when a matter does not have clear provision in contract law, that matter will refer to the judges' decision.

Conclusion

The change of creditor's name in syndicated loan, as it happens to "PT. Bank Finconesia" that changes its name to "PT. Bank Agris", cause problems because the new name "PT. Bank Agris" is not mentioned in the loan agreement no. 8 dated 28 November 1995. The making of syndicated loan agreement should be based on article 1320 and 1338 of Indonesian Civil Code.

The Supreme Court no. 1300/K/Pdt/2013, the supreme court has made incorrect decision by granting the plaintiff's lawsuit as the syndicated creditor. It is incorrect because in the syndicated loan agreement, the creditors had agreed to appoint a facilitating agent who acts legally as representative of the creditors, it makes the facilitating agent is authorized to have direct relation with the debtors, especially in filing a lawsuit to the court

Recommendation

It is highly necessary to have a regulation on systematic syndicated loan agreement so that the concerning parties in syndicated loan understand the legal provision on the validity of legal action, especially those regulated in syndicated loan agreement, which determine the legal standing of the concerning parties, especially for the new creditor. The syndicate creditors need to understand the clarity of each parties' legal standing.

In order to guarantee the legal certainty, it is better for the judge who handles syndicated loan case to understand the concerning parties based on the agreed syndicated loan agreement.

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