
Research Article**A Legal Analysis on Novation of Joint Business Loan Due to Debtor's Divorce****Didik Agung Sulisty¹, Burhanudin Harahap²**¹Student of Master Program of Notary, Universitas Sebelas Maret Surakarta, Indonesia²Lecturer at Faculty of Law of Universitas Sebelas Maret Surakarta, Indonesia

Abstract: The present study aimed to analyze the novation of joint business loan due to the debtor's divorce. The study employed normative legal approach. The data were collected using literature study on relevant documents and books.

Following the discussion, novation due to divorce should be firm and obvious for the husband as a new debtor, this is in line with article 1415 of Indonesian Civil Code. Moreover, novation should comply with article 1320 of Indonesian Civil Code. The old debtor, who was consisting of two people, is substituted by the husband as the new debtor. This substitution frees the wife from the obligation to repay the debt. The husband agrees and completely accepts the debt renewal. Due to this substitution, the creditor is no longer allowed to ask payment from the wife even if the husband is declared bankrupt unless the novation explicitly states that the creditor can ask the payment from the wife.

Keywords: Novation, Credit, Divorce.**Introduction**

Bank credit involves requirements stated in a credit agreement (Ibrahim, 2003 pp.2). Customer, as an applicant, stands only options to accept or to reject the clauses stated in agreement, either partially or wholly (Sjahdeni, 2009 pp.3).

Credit agreement can be defined as an agreement between a creditor and a debtor regarding money or bills provision, which obliges a party (especially the debtor) repays his debt and its interest (based on agreement) regulated in prevailing regulation in a certain period of time (Rahardjo, 2010 pp.6).

The validity of an agreement is determined by requirements stated in article 1320 of Indonesian Civil Codes. Article 1320 provides a general guideline of how an agreement should be made (Badruzaman, 2001 pp.161).

Marriage does not always result in good things. When the conflict cannot be settled, they usually end in divorce. The story and the reasons underlying a divorce is not always peaceful situation (Syarifudin, Turatmiyah, & Yahannan, 2012 pp.21).

Marital debt that is used as a business capital can be categorized as joint obligation considering that marital debt is used by the spouses for their interest and agreement. Regarding loan agreement the spouses made, in which they cannot repay the debt together due to divorce, debt renewal, or novation is made.

The implementation of debt renewal due to changes in debtor is regulated in article 1413 paragraph (2) of Indonesian Civil Code. Debtor's changes cannot be applied without the creditor's involvement. Creditor does not only have to accept the new debtor but also agree with the discharge of the old debtor (Boediono, 2013). In debt renewal process, the new debtor and the bank sign the debt renewal deed.

Research Methodology

The present study was a normative legal research. The study

employed statute approach, an approach using legislation and regulation (Marzuki, 2005 pp.93), and conceptual approach (Ibrahim, 2006 pp. 300). Statute approach was carried out by analyzing all legislation and regulation related to the issue understudied, namely, legal analysis on novation of joint business credit due to debtor's divorce. In carrying out statute approach, the principle of *lex speciali derogate legi generali* was implemented. This was a descriptive study, this study presented a detailed, systematic, and impartial data and depiction regarding the issue understudied.

The primary legal material of the study was Indonesian Civil Code (KUHPPerdata) and Act no. 10 of 1998 on Amendment of Act no. 7 of 1992 on Banking. The analyses on the primary and secondary data were made after conducting observation, classification, processing, and evaluation so that its validity is ensured (Sugiono, 2008 pp.225). The drawing of conclusion is made using qualitative method by describing it using systematic sentences deductively. This was done to provide a clear answer for the issue understudied, which is presented descriptively.

Discussion

Capital constraint emerges as one of the inhibiting factors of business advancement, either before or after marriage (Manurung, 1996). One of the attempts made to overcome such a problem is applying a bank credit, of which requirements have been determined in a credit agreement (Ibrahim, 2003).

In making a credit agreement, in general, bank will not necessarily grant a credit without paying attention to the debtor's collateral (Fuady, 2002). Collateral functions as a mean of protection for the creditor, it aims to guarantee the debtor's repayment (Annisa, 2014).

The law of agreement is associated with the making and the implementation of a promise. Promise can be defined as a statement regarding something that may, or may not happen in

the future (Gary and Jentz, as cited in Khairandy,2009). Agreement should be differed from promise. Although promise is made based on agreement, yet it does not result in legal consequences. Consequently, if the promise is broken, there will be no legal consequences or sanctions (Mertokusumo,2004).

Article 1381 of Indonesian Civil Code mentions a number of manners resulting in discharges of agreement. One of them is the renewal of debt, or novation. Novation is divided into three types, objective novation, passive-subjective novation, and active-subjective novation (Sutarno,2005).

Novation refers to the changing of old contract to new contract with changes of term and condition, or changes regarding the concerning parties.

Novation here refers to the making of new debt contract due to the change of object of contract, debtors, or creditor, which acts as the substitute of the old contract. As a result, the old contract is annulled. Accordingly, it is clear that the legal consequence brought by novation is that the old contract is annulled and is substituted with the new contract (Gultom,2014).

As an agreement, novation should comply with the principle of agreement regulated in article 1313, which reads "An agreement is an act pursuant to which one or more individuals bind themselves to one another." Following the description mentioned above, it can be said that an agreement refers to two or more legal subject who bind themselves to perform an agreed action (Lestari, 2016).

Many factors that result in troublesome credit, these factors may arise from either the creditor or the debtor. From the creditor's side, the problems may occur due to shallow analysis. While from the debtor, this can be caused by two reasons, intentional, where the debtors deliberately intend not to perform their obligation to the creditor, and accidental, where the debtors are willing to repay their debt, yet they fail due to problems. One of the accidental factors of debtor's default is divorce (Sjahdeini,2008).

The main legal consequence of a divorce is that the husband and the wife are disallowed to have intercourse. However they are allowed to reconcile as long as they meet the stipulation of religious stipulation. Following Islamic law, reconciliation is allowed. However, article 41 paragraph (3) of Act no. 1 of 1974 on Marriage states that. The Court can oblige an ex-husband to provide a livelihood, or to have an obligation for his ex-wife (Djamil, 2007).

When there is prenuptial agreement, the marital properties are automatically considered jointly owned, both those obtained throughout marriage, or those obtained before marriage. Article 119 of Indonesian Civil Code State that From the moment of execution of the marriage, it shall arise by law joint marital property between the spouses to the extent that no other stipulations have been made in the pre-nuptial agreement. Regarding property, there are always assets and liabilities. Without prenuptial agreement, the assets and liabilities are automatically held by the two parties. In addition article 120 of Indonesian Civil Law reads "With regards to assets, the joint marital property includes all current or future movable and

immovable property of the spouses, and property obtained free of charge, unless the testator or the donor has specified otherwise (Saragih et.al, 2007).

Divorce result in a problem regarding who will be responsible for the unpaid debt, considering that the debt agreement is agreed by the husband and the wife

The bank actually can choose not to make a novation when it wants to perform an Execution of High Encumbrance. Still, from the bank's side, the bank intends to have a repayment without performing Encumbrance Right execution. Whereas from the debtor's point of view, it is regret if their collateral is executed, besides while they are capable of continuing to repay the debt. Accordingly, novation is made for the creditor's and the debtor's interest. The bank will invite divorced spouses and discuss their unsettled debt.

Due to the contract changes, it should be called novation (Ghasemzadeh,2004). In a novation, the previous obligation is deleted and is substituted by the new ones. Meanwhile, in assigning debt, there is no debt or obligation that is annulled, and the debt is given from the debtor to the third party in the same status. When the third party acknowledges it, the obligation is discharged from the old debtor.

The regulation states that in an agreement, each concerning party holds rights and obligations according to the provision stated in the agreement. The problem settlement with this novation can be carried out if there is debt agreement, this is done if the debtor truly cannot repay his/her debt, then, if there is damage experienced by either debtor or creditor, they can make a legal attempt, i.e., novation (Permana,2019). Novation combines and simplifies these two legal attempts (Katouzian,2004).

The primary effect of novation is the discharge of prior obligation, and the establishment of new obligation. Accordingly, in a novation, the obligation assignment with the same status has not occurred since the prior obligation is no longer exists. Novation should mention the subject and the time when the obligation cannot be assigned to others. Both debtor and creditor should discharge their obligation and substitute it with the requested obligation (Alidousti, 2016).

The debtor who is no longer capable of performing his/her obligation due to divorce while the business still runs is required to make debt renewal (novation). The old debtor, who was consisting of two people, is substituted by the husband as the new debtor. By this substitution on, the wife, as old debtor, is discharged from the obligation to pay debt to the creditor. The new debtor agrees and completely accepts the novation; accordingly, he accepts all transfer of right and obligation of the old debtor to the bank. The new debtor substituting the old debtor should meet criteria as a new debtor. The old debtor (wife) whose obligation has been discharged due to this substitution, the creditor is no longer allowed to ask payment from the wife even if the husband is declared bankrupt, unless the novation explicitly states that the creditor can ask the payment from the wife (Satrio,1981).

This is in line with article 1233 of Indonesian Civil Code which reads " All obligations arise either from agreements or law" Obligations that arise from agreement are different from

obligations arise due to law. The former is voluntary in nature, where the parties are free to make an agreement using freedom of contract. With regard to obligations arising from law, the obligation of the concerning parties may arise without their intention.

Lately, in contemporary Islamic law, there is also known term 'Iltizam' as synonym of obligation. Iltizam was used to refer to obligation that arises from one party's willingness, and sometimes, it is used to refer to obligation that arises from an agreement (Ridwan,1999). Agreement, in contract law, means a legal action based on an agreement, resulting in legal consequences (Burhanuddin,2009).

Novation due to divorce should comply with regulation stated in Article 1415, which reads Debt novation must not be presumed; the intention to that effect must be obvious from the deed. One's willingness to make a debt novation should be clear and firm. Due to novation, a new debt is made (based on new contract), accordingly, a novation should comply with the requirement of contract validity. The validity of a contract is determined by requirement stated in article 1320 of Indonesian Civil Code, among others.

Conclusion

Novation due to divorce should be firm and obvious for the husband as a new debtor, this is in line with article 1415 of Indonesian Civil Code. Moreover, novation should comply with article 1320 of Indonesian Civil Code.

The old debtor, who was consisting of two people, is substituted by the husband as the new debtor. This substitution frees the wife from the obligation to repay the debt. The husband agrees and completely accepts the debt renewal.

Due to this substitution, the creditor is no longer allowed to ask payment from the wife even if the husband is declared bankrupt, unless the novation explicitly states that the creditor can ask the payment from the wife

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