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Legal Protection Against Subrogation Without an Authentic Deed as a Binding Agreement in Banking Practices in Indonesia

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ABSTRACT: The practice of subrogation without an authentic deed in the Indonesian banking sector creates significant legal uncertainty. This research analyses the impact of the practice on legal protection for new creditors, particularly in the context of legal protection theory proposed by Isnaeni. This paper uses a normative research method with a literature study approach. The literature study approach is carried out by collecting and analysing secondary data relevant to the research topic. The secondary data can be in the form of primary legal materials which include: laws, regulations, and jurisprudence related to subrogation, authentic deeds, and agreements. Secondary legal materials include books, scientific journals, articles, and other scientific papers. The data collection techniques used in this research are literature searches by conducting literature searches in libraries, the internet, and other sources to obtain primary and secondary legal materials relevant to the research topic and document studies by studying and analysing primary and secondary legal materials that have been collected. The results show that the absence of a notarial deed as authentic evidence makes it difficult to prove the existence of a subrogation agreement, thus hampering the efforts of new creditors to obtain their rights. The form of internal legal protection is by collecting various evidence such as correspondence, witnesses, and transaction evidence. Meanwhile, external legal protection can also be done by filing a tort lawsuit in court. This research also recommends the need to improve regulations and increase legal awareness to overcome these problems.

KEYWORDS: Legal Protection, Subrogation, Authentic Deed, Notary, Banking

I. INTRODUCTION

To fulfil their financial needs, people often cooperate with banking institutions. This relationship is generally established through a credit agreement, where the bank as the lending party, and the customer as the borrowing party. Subrogation often occurs in banking practices. Subrogation is a process where a third party takes on the role of a new creditor, replacing the old creditor but not releasing the debtor from his debts and obligations. Instead, the debtor is now obliged to pay his debt to the third party as the new creditor. Subrogation is regulated in Article 1400 of the Civil Code which reads *Subrogation or replacement of the rights of the debtor by a third party, who pays the debtor, occurs either by agreement or by law.* The result of subrogation is that all rights and obligations of the old creditor are transferred to the new creditor. The new creditor obtains all privileges, property guarantees, and other accompanying rights previously owned by the old creditor.

Subrogation, as the transfer of a creditor's rights and obligations to a third party, generally involves the creation of an autograph deed by a notary public. However, subrogation without an authentic deed is carried out by the bank because the notarial deed requires additional costs that can reduce the bank's profits, in addition, the subrogation process without a notarial deed is considered faster and simpler. However, without a notarial deed as authentic evidence, proving the occurrence of subrogation in the future can be more difficult. Uncertainty regarding the legal status of subrogation without a notarial deed can lead to legal uncertainty for all parties involved.

Like the case contained in the District Court decision number 15/PDT.G/2020/PN.MRT, the panel of judges considered that as the legal facts revealed in the trial, it was clear that although it was not stated in writing, it was firmly, clearly and clearly stated that the defendant or Mr DCT as the debtor and Bank X as the creditor, on 10 July 2020 had agreed and agreed to the entry of a third party, namely the plaintiff or Mr MT, to make cash payments of the remaining debt of the defendant or Mr DCT to Bank X. The panel of judges considered that because the repayment of the remaining debt of the defendant or Mr DCT to Bank X by the plaintiff or Mr MT was a lawful act due to subrogation, the panel of judges was of the opinion that as stated in Article 1401 paragraph (1) of the Civil Code, the plaintiff or Mr MT had rights granted by law to replace the rights of the old creditor and the

defendant or Mr DCT had a legal obligation to the plaintiff or Mr MT for the subrogation event. However, the defendant or Mr DCT filed an appeal to the Court of Appeal.

In the Court of Appeal Decision Number 39/PDT/2021/PT.JMB, the Panel of Judges of the Court of Appeal held that the Appellant or Mr MT with the evidence submitted failed to prove the existence of a subrogation event because there was no agreement or written agreement between the creditor or Bank X and the appellant or Mr MT for the subrogation event in question. The judges of this Court of Appeal decided in their judgement: Firstly, accepting the petition of the Appellant. Secondly, cancelling the decision of the District Court appealed against.

Indonesian law does not regulate the necessity to make subrogation between a new creditor and an old creditor in a written agreement or in an authentic deed. Subrogation carried out between the old creditor and the third party or new creditor does not require an agreement or written consent this is stated in article 1401 paragraph (1) of the Civil Code which reads: *"if the creditor by accepting the payment from a third party, determines that this person will replace his privileges and mortgages that he has against the debtor. This subrogation must be expressly made and executed at the time of payment.*" This article does not mention the need for a written agreement or consent.

This problem arises because this subrogation is done without being equipped with an authentic deed as evidence of the binding agreement. An authentic deed made by an authorised official such as a notary, has stronger evidentiary power than an ordinary agreement. In the absence of an authentic deed, the new creditor who has subrogated the debtor will have difficulty proving that he has legitimately become the new creditor. As a result, the debtor may refuse to pay the debt to the new creditor on the grounds that he never made an agreement with him, the new creditor will have difficulty collecting the debt through legal channels as in the case above. Therefore, the author is interested in examining the legal protection of new creditors in cases of subrogation without an authentic deed as a binding agreement in banking practice in Indonesia..

II. RESEARCH METHOD

This paper uses a normative research method with a literature study approach. The literature study approach is carried out by collecting and analysing secondary data relevant to the research topic. The secondary data can be in the form of primary legal materials which include: laws, regulations, and jurisprudence related to subrogation, authentic deeds, and agreements. Secondary legal materials include books, scientific journals, articles, and other scientific papers. The data collection techniques used in this research are literature searches by conducting literature searches in libraries, the internet, and other sources to obtain primary and secondary legal materials relevant to the research topic and document studies by studying and analysing primary and secondary legal materials that have been collected. The data analysis technique used in this paper is qualitative analysis, namely by analysing qualitative data obtained from primary and secondary legal materials to identify, interpret, and explain the meaning of the data.

III. RESEARCH RESULT

Based on Article 1233 of the Civil Code, it is said that 'Every obligation is born either by agreement, either by law'. The legal relationship between an obligation and an agreement is an agreement that produces an obligation, in other words, an agreement is a valid source of law in addition to other sources. An obligation can be born through an agreement or also because of the provisions of the law. An agreement is an event where one person promises to another person or two people promise each other to carry out something that creates a relationship between the two people. The agreement issues an obligation for those who make it and contains promises or undertakings in written or unwritten form (Subekti, 1987). H. Salim distinguishes agreements into 2, namely international dimension agreements with legal subjects in the form of foreign countries, legal entities, and individuals, and national dimension agreements with legal subjects of the government or Indonesian citizens (Salim HS, 2008). Agreements adhere to an open system as specifically regulated in Book III of the Civil Code, which means giving the widest possible freedom to anyone to enter into agreements about anything as long as the agreement does not conflict with public order and decency. Article 1320 of the Civil Code states the conditions for the validity of an engagement or agreement, namely: (1) The existence of an agreement from the parties who bind themselves; (2) The existence of capacity to perform an agreement; (2) The existence of an object of agreement on a certain matter; (4) Is something halal. Not something that is forbidden.

From the above provisions, it can be explained that an agreement can only be considered valid if there is an agreement from the relevant parties. The parties must have the capacity to enter into an agreement. The capacity referred to here is the ability to become a legal subject, namely being of sound mind and being an adult as stated in Article 330 of the Civil Code, namely 21 years old or married even though not yet 21 years old. The agreement is made on a certain subject matter which is the object of the agreement. The object is not something forbidden and the agreement must be in line with the prevailing laws and norms. The provisions of points (1) and (2) are subjective requirements because they relate to the legal subject itself. If the subjective conditions are not met, the agreement can be cancelled, which means that one of the parties can cancel the agreement, but it is still binding on all parties bound by the agreement as long as it is not cancelled by a judge. While the provisions of points (3) and (4) are objective conditions. If these objective conditions are not met, the agreement is null and void, meaning that from the beginning

the agreement is considered not to exist or never happened. The provisions of Article 1320 do not require an agreement to be made in writing but rather provide freedom to parties who wish to enter into an agreement to determine the form of the agreement themselves as long as it does not conflict with the legislation. Referring to the provisions of the article, the existence of an unwritten agreement is considered valid as long as it fulfils the elements of the agreement as mentioned, namely; agreement, capacity, regarding certain subject matter, and not something that is prohibited or contrary to the applicable legislation in Indonesia.

In civil relations, letters / deeds are indeed made with the intention of facilitating the evidentiary process. R. Subekti states that proof is an effort to convince the judge of the truth of the arguments or arguments in a dispute. The law of evidence itself is a series of rules of order that must be heeded in conducting proceedings before the court, between the two parties who are seeking justice. The definition of proof in the juridical sense according to Riduan Syahrani is the presentation of valid evidence according to the law to the judge examining a case in order to provide certainty about the truth of the event being proven. In a civil case, written evidence is the main evidence, because in civil traffic people often deliberately provide evidence that can be used if a dispute arises, and the evidence provided is usually in writing (Pramono, 2015). One of the written evidence that has perfect evidentiary power (*volledig bewijskracht*) and binding (*bindende bewijskracht*) in the trial process is an authentic deed.

Article 1868 of the Civil Code, explains that *an authentic deed is a deed made in the form prescribed by law, made by or before public servants who are authorised to do so in the place where the deed is made*. An authentic deed is a deed made by an official authorised to do so by the authorities according to the stipulated provisions, either with or without the assistance of the interested parties, which records what is requested to be contained in it by the interested parties. The authentic deed contains the testimony of an official who explains what was done or seen before him (Thamrin, 2011).

Law No. 30/2004 as amended by Law No. 2/2014 on the Office of Notary, especially in Article 1 point 1, regulates the position and authority of notaries as public officials. The law also explicitly mandates that notaries have special authority to make authentic deeds. The position of a Notary as a public official, in the sense that the authority available to Notaries has never been given to other officials, as long as the authority does not become the authority of other officials. In accordance with these provisions, the Notary is the only official authorised to make authentic deeds concerning all acts, agreements, and stipulations required by a general regulation or by those concerned wishing to be stated in an authentic deed, all to the extent that the making of the deed by a general regulation is not also assigned or excluded to another official or person. Notary is an office created by the State based on the law. A person who has a law degree cannot become a Notary without an appointment made by the Minister (Sulihandri & Rifiani, 2013).

Notaries have an obligation to ensure that each party involved in an agreement fully understands the contents and implications of the authentic deed to be signed. This obligation is realised through reading the deed clearly and in detail in the presence of the parties, as well as providing access to relevant legal information. Thus, the principles of fairness and freedom of contract are guaranteed, because the parties can make rational decisions and informed consent before giving consent to the contents of the deed.

In fulfilling their financial needs, people often cooperate with banking institutions. This relationship is generally established through a credit agreement, where the bank as the lending party, and the customer as the borrowing party. Lending is one of the main ways banks generate assets. However, credit is also a risky asset for banks because the funds that have been lent are in the hands of an outside party, the debtor. Every bank strives to maintain the quality of its loan assets so that they remain healthy and productive, as well as collectible. Nevertheless, credit risk is always present. Non-performing loan is a condition where the debtor fails to fulfil its obligation to repay the loan in accordance with the agreement.

Shadli Rolaskhi and his team in the book Financial Accounting Theory and Applications (2022) state that the existence of non-performing loans is unavoidable in banking activities. However, banks always try to minimise the number of non-performing loans so as not to exceed the limit set by Bank Indonesia. Every time a bank provides a loan, there is a risk that must be faced. This risk arises because there is a time lag between the distribution of funds and the time of repayment. During this period, many unexpected things can happen to the debtor, such as death or a change in legal status. Lending is at the heart of the banking business. However, behind the profits, there are risks that must be borne. Credit risk is the possibility that the debtor is unable or unwilling to repay the debt in accordance with the agreement. The longer the credit term, the higher the credit risk. This is because there are more uncertainties that may occur over a longer period of time. Economic fluctuations, such as recession or inflation, may affect the debtor's ability to repay the debt. Factors such as credit history, income, and collateral held by the debtor will affect the level of credit risk. Unforeseen events such as natural disasters, government policy changes, or legal issues may impact a debtor's ability to repay debt.

The existence of collateral or binding of collateral is always present in credit agreements. The binding of collateral can reduce the risk if the debtor fails or is unable to repay the loan, including the principal and interest to be paid, provided that the collateral is secured by a certain agreement. Therefore, collateral serves as a guarantee that the debtor will repay the entire amount owed at a later date when credit is granted. Banks choose to use hak tanggungan as a form of binding collateral. The bank can execute the

guarantee by placing a Mortgage on the debtor's credit guarantee. The practice of transferring receivables to third parties, or subrogation, often occurs in national banking operations (Mamonto, 2018).

According to Article 1382 of the Civil Code, the substitution of creditor rights by third parties is allowed. Subrogation refers to the act of replacing the rights of creditors (Mansur, 2019). Subrogation is regulated in articles 1400 to 1403 of the Civil Code. Subrogation is the process when a third party takes on the role of a new creditor, replacing the old creditor. This does not release the debtor from his debts and obligations. Instead, the debtor is now obliged to pay his debt to the third party as the new creditor (Sukerti, 2016). Regarding subrogation that occurs due to an agreement is regulated in Article 1401 of the Civil Code. Meanwhile, subrogation that occurs due to law is regulated in Article 1402 of the Civil Code. The implementation of subrogation of objects that have been encumbered by mortgage rights will have implications for changes in the rights and obligations of the parties involved in the credit agreement. These changes can raise various legal issues, both for the new creditor, debtor, and third parties or new creditors who have an interest in the object.

Subrogation, as the transfer of the creditor's rights and obligations to a third party, generally involves the making of a notarial deed. Article 1 point 7 of Law Number 2 of 2014 on the Office of Notary explains that*: A notarial deed is an authentic deed made by or before a notary according to the forms and procedures stipulated in the law*. However, subrogation carried out between the old creditor and the third party or new creditor does not require an agreement or written consent as stated in Article 1401 paragraph (1) of the Civil Code which reads: *'if the creditor by accepting the payment from a third party, determines that this person will replace his privileges and mortgages that he has against the debtor. This subrogation must be made explicit and made at the time of payment.*' This article does not mention the need for a written agreement or consent.

Subrogation without an authentic deed is often done by the bank because making an authentic deed before a notary requires additional costs that can reduce the bank's profits. In addition, the subrogation process without a notarial deed is considered faster and simpler. Although the law itself does not require the old creditor and the new creditor to make an agreement or agreement in writing in the form of an authentic deed made before a notary. However, without a notarial deed as authentic evidence, proving the occurrence of subrogation in the future can be more difficult. Uncertainty regarding the legal status of subrogation without a notarial deed can lead to legal uncertainty for all parties involved. Especially for third parties or new creditors who make payments against debtors' debts will experience great losses.

The law exists to provide protection for one's interests through the granting of power to be able to take action to fulfil these interests. The power or what is commonly called rights is given in a measurable manner, both in terms of power and depth (Rahardjo, 2014). Satjipto Rahardjo also links legal protection of a person's interests with human rights in which there is power to fight for a person's interests. Meanwhile, legal protection according to Isnaeni is the theory of civil legal protection. This theory emphasises the importance of balance between public interests, as well as the role of the state in providing legal certainty. M. Isnaeni argues that basically the issue of legal protection is viewed from its source can be divided into two (2) types, namely internal legal protection and external legal protection. The nature of internal legal protection, basically the legal protection in question is packaged by the parties themselves when making an agreement, where at the time of packing the contract clauses, both parties want their interests to be accommodated on the basis of an agreement. Likewise, all types of risks are sought to be warded off through filing through clauses that are packaged on the basis of agreement as well, so that with this clause the parties will obtain balanced legal protection by their mutual consent. Such internal legal protection can only be realised by the parties, when their legal position is relatively equal in the sense that the parties have relatively balanced bargaining power, so that on the basis of the principle of freedom of contract each partner has the freedom to express their will according to their interests. This pattern is used as the basis when the parties assemble the clauses of the agreement they are working on, so that the legal protection of each party can be realised straightforwardly on their initiative. External legal protection made by the authorities through regulations for the benefit of weak parties, in accordance with the nature of laws and regulations that should not be one-sided and partial, proportionally must also be given balanced legal protection as early as possible to other parties (Isnaeni, 2016).

The theory of internal legal protection put forward by M. Isnaeni, which emphasises the agreement of the parties in regulating their legal relations, is ideally applied in the context of a written agreement equipped with clear clauses. However, what if the agreement is not made in writing, as in the case of subrogation without an authentic deed in banking practice? What can be done by the third party or new creditor when the repayment has been made, namely preparing all material truths in the form of testimony from witnesses who are aware of the agreement; correspondence evidence provided by the bank which can be in the form of correspondence, emails, or short messages related to the agreement that can strengthen the evidence; proof of transaction accounts or receipts related to the agreement; and other relevant documents that can be used as evidence. In cases like this, the burden of proof becomes very important. The aggrieved party must be able to prove the existence of the agreement, the content of the agreement, and the violation of the agreement. The stronger the evidence presented, the more likely the judge will decide the case in accordance with the lawsuit.

The theory of external legal protection put forward by Isnaeni emphasises the balance in providing legal protection. In essence, although the state through regulations protects weak parties, balanced legal protection must also be given to other parties involved

in a legal relationship. The new creditor, despite subrogation, is still the weaker party in terms of proof. This is because he must prove the existence of a subrogation agreement and the debtor's default, which in this case is difficult to prove due to the absence of an authentic deed. Isnaeni's theory demands legal protection for the new creditor, even though he loses the case, the engagement is still valid according to the law because it has fulfilled all the elements in Article 1320 of the Civil Code. Possible external legal protection is to consider changes to legislation or new legislation that is more comprehensive, systematic, and more complete regarding subrogation so that this kind of case does not happen again.

The tort lawsuit is also a form of implementation of external legal protection, because through this lawsuit, new creditors can access the judicial system to obtain justice. A new creditor filing a tort lawsuit against a defaulting debtor can also be considered an attempt to obtain legal protection for its rights as a creditor. This lawsuit is a form of legal protection provided by the state through the judicial system. In many cases, tort claims are filed by parties who feel disadvantaged or weak in their bargaining position. Thus, this lawsuit can provide protection for weak parties. In order for a tort claim to be granted, the elements of tort must be fulfilled, namely the existence of a tort, the existence of a loss, and the existence of a causal relationship between the tort and the loss. A tort claim aims to uphold law and justice. By filing a lawsuit, the injured party seeks to ensure that the party who committed the unlawful act is responsible for its actions. The principle of justice is one of the basic principles in law. A tort lawsuit is one way to realise the principle of justice, namely by providing compensation to the injured party and preventing the recurrence of the same act in the future.

Article 1365 of the Civil Code regulates tort in general. This article reads: *Every unlawful act which causes damage to another person, obliges the person who commits the act through his own fault, to compensate for the damage*. In the context of subrogation, Article 1365 can be applied if (1) There is an unlawful act, in this case the debtor commits default or breach of promise by not fulfilling his obligation to pay the debt; (2) There is a loss, namely the new creditor who has made payment for the debt suffers a loss because he does not get his rights as a creditor; (3) There is a causal relationship, namely there is a clear causal relationship between the debtor's unlawful act (default) and the loss experienced by the new creditor. Article 1267 of the Civil Code also regulates the rights of parties whose obligations are not fulfilled in an agreement. This article outlines that the party who does not receive the performance that should be received can choose to force the other party to fulfil the agreement, cancel the agreement, or combine the two options. In the context of subrogation, Article 1267 can be applied by a new creditor to sue a defaulting debtor. The new creditor can choose to (1) Force the debtor to pay the debt, The new creditor can file a lawsuit to force the debtor to pay the debt it has foreclosed; (2) Cancel the agreement, If forcing payment is not possible, the new creditor can cancel the agreement and seek compensation for the losses it has suffered. These two articles complement each other. Article 1267 provides a legal basis for the new creditor to sue the defaulting debtor, while Article 1365 provides a legal basis to seek compensation for the loss caused by the unlawful act. Both Article 1365 and Article 1267 of the Civil Code play an important role in resolving subrogation disputes. Both provide a strong legal basis for the new creditor to sue the defaulting debtor. However, the success of the lawsuit is highly dependent on the strength of evidence owned by the new creditor. Since there is no authentic deed, the new creditor must look for other strong evidence such as correspondence, witnesses, or proof of fund transfer.

IV. CONCLUSION

The practice of subrogation without an authentic deed in Indonesian banking presents its own challenges in terms of legal certainty and protection for the parties involved. Although it is not legally required to have an authentic deed, the absence of authentic evidence has the potential to cause various problems, especially related to proving the existence of a subrogation agreement. Isnaeni's theory of legal protection emphasises the importance of the parties' agreement in regulating their legal relationship. However, in the practice of subrogation without an authentic deed, the agreement is often informal and difficult to prove. On the other hand, Isnaeni's theory also emphasises the importance of external legal protection, especially for weak parties. The new creditor in this case can be considered a weak party due to the difficulty in proving the existence of a subrogation agreement. To overcome this problem, the new creditor can try to collect various evidence such as correspondence, witnesses, and transaction evidence. In addition, a tort lawsuit can be one of the legal options to protect the rights of the new creditor. This lawsuit allows the new creditor to seek compensation for losses suffered due to the debtor's default. However, the burden of proof in such cases is very heavy. Therefore, it is necessary to improve the existing regulations and increase public legal awareness of the importance of making agreements in writing.

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