A Practice of Loan Sales Facility: Experience and lessons from Indonesia

Agus Suprihanto[1] and Farida Patittingi[2]

[1] *Doctoral Candidate at Graduate School Hasanuddin University, Indonesia. E-mail: agus_suprihanto65@yahoo.co.id*

[2] *Professor, Department of Civil Law, Faculty of Law, Hasanuddin University, Indonesia. E-mail: farida.pada@unhas.ac.id*

Abstract

Syndicated loans during the credit period often emerge the practice of loan sales or sales of loan facility. The research was aimed to analyze and formulate the practice of sales of loan facility in syndicated loans that performed by the approval of Bank agent without the knowledge of the debtor. The method of research is descriptive analytical with sampling technique using literature study and interviews. The conclusion of research in the form of primary and secondary data were conducted by using qualitative juridical analytical methods. The results of research indicates that the process of sales of loan facility from PT. Bank A to PT. Bank D can be canceled due to the rechtstitle (sale and purchase agreement) underlying a cessie agreement and not based on the applicable law. Legal consequences for PT. Bank D (new creditor) for the takeover of credit receivables by making a sale and purchase agreement for credit and cessie agreements from PT. Bank A to PT. Bank D which is done only with the approval of Bank Agent without the knowledge of the debtor and bad credit occurs, then PT. Bank D cannot execute the object of collateral, because PT. Bank D did not register with the Land Agency and Fiduciary Registration Office, so the Mortgage and Fiduciary Rights holders were still on behalf of PT. Bank A and other creditors.

Keywords: Bank, Purchase and Sale, Loan Sales, Loan Facility, Legal Protection

1. Introduction

Economic development, as part of national development is one of the efforts to create a just and prosperous welfare for peoples based on Pancasila and the 1945 constitution.[1] The direction of economic development policy in accordance with the State' Guide Line 1999-2004 is to accelerate economic recovery and create a

[1] Drucker, S., & Puri, M. (2009). On loan sales, loan contracting, and lending relationships. *The Review of Financial Studies*, *22*(7), 2835-2872.

foundation for development that is a stronger priority for sustainable economic development based on a people' economic system.[2]

A strategic role of banking institutions in an economic order has placed banks as the lifeblood of a country' economy, the creation of advanced and health banking institutions can be a parameter of a country' economic strength and progress.[3] Economic actors in investing and other economic activities will certainly need financial assistance to meet capital needs and business development. Funding assistance can be obtained through loans from banks or other financing institutions, therefore banking and other financial institutions play an important role in distributing and collecting public funds.

In Indonesia, this banking function is required to become a development medium, in order to support the implementation of the national development program. The task of the bank is to support national development.[4] One form of loan development that exists today is syndicated loan. Syndicated loans began to grow on the domestic capital market in the United States in the 1950s, while their evolution in the international capital markets in London took place only later in the 1960s. The development of syndicated loans in the international market in London is supported by the fact that loan can be given in all convertible currencies, which is different from the United States market on Wall Street, where syndicated loans are given only in US' dollars even though the recipient of the loan is a foreign party. In the event that syndicated loans are provided in multiple currencies, namely what is commonly called multicurrency loans, funds are provided not only in one currency according to the choice of the loan recipient.[5]

In indonesia, syndicated loans then developed in line with the increasing volume and type of national economic activity, where the financing needs required were also increasingly diverse and continued to increase. In such circumstances, joint financing by several banks in the form of syndicated loans is a rational and positive step given the increasing need for funds and the long construction periods for various types of projects, such as the construction of toll roads, power plant projects and other

[2] Propenas 2000-2004, Act No. 25 of 2000 concerning the National Development Program 2000-2004, Sinar Grafika , Jakarta , 2001, p.21

[3] M. Bahsan, *Hukum Jaminan dan Jaminan Kredit Perbankan Indonesia*,PT RajaGrafindo Persada, Jakarta.2007, p.2.

[4] Ignatius Ridwan Widyadharma, *Hukum Sekitar Perjanjian Kredit*, Universitas Diponegoro, Semarang,1997, p. 11.

[5] Sutan Remy Sjahdeni, *Kredit Sindikasi Proses Pembentukan dan Aspek Hukum*, PT Pustaka Utama Grafiti, Jakarta,1997, p. 1.

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mega projects. Given the large amount of fresh funds required, credit is usually given by several banks, or what is often referred to as syndicated loans.[6]

In implementing the syndicated loan process, there will be several creditors as syndicated participants. Thus, when viewed from a legal aspect, it can be said that syndicated loans are very complex legal relationships from several legal subjects that bind themselves to an agreement. The legal relationship between syndicated loan participants and debtors must be clearly regulated, the rights and obligations in the syndicated loan agreement. One thing that needs to be considered is in the practice of the banking industry in Indonesia the loan sales or sales of loan facility, in syndicated loans both between members of the loan syndication and third parties by making a sale and purchase agreement for sales of loan facility and *Cessie* agreement performed without approval from the debtor but only approved by the Agent Bank.

The sales of loan facility from old to new creditors in the syndicated loan, in practice is often not followed by the transfer of mortgage and fiduciary holders from old to new creditors through registration at National Land Agency and the Fiduciary Registration Office, as regulated in the Mortgage Rights Act. No 4 of 1996 Article 16 paragraph (2) and Fiduciary Act No. 42 of 1999 Article 11 paragraph (1), considering that the high cost because it is required to add an addendum to the Syndicated Loan Agreement and must involve all syndicated creditors and debtors. This will not cause a problem if the syndicated loan runs smoothly until the credit is paid off, but on the other hand, if the debtor cash flow is suddenly disrupted and results in a problematic syndicated loan, the new creditor will experience difficulties in executing the guarantee, because the mortgage holder is still on behalf of the old creditor. and other creditors.

2. Dark Practices of Sales of Loan Facility in Syndicated Credit Agreements

Banking is a source of funds especially in the form of loan for individuals and legal entities to meet their consumption and production needs. The funds used by the bank to finance the loan did not come solely from bank capital but mostly came from public funds. Bank capital is very limited, so to develop a business, banks must try hard to withdraw funds from the public which are then channeled back to the community. This is what banks call an intermediary function. Public funds that can

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[6] Chandera, Y., Utama, C. A., Husodo, Z. A., & Setia-Atmaja, L. (2018). The co-insurance effect hypothesis and the cost of bank loans: Evidence from Indonesian pyramidal business groups. *Global Finance Journal*, *37*, 100-122.

be withdrawn from the community include savings, current accounts, deposits, certificates of deposit, bonds and other debt securities.[7]

According to H.L Ajuha in his book Macroeconomics, Theory & Policy,[8] *Credit created when one party (a person, a firm or an institution) lends money to another party, borrower. Thus, credit is generally understood to mean the finance provided to others on a certain rate of interest. The act of lending and borrowing creates both credit and debit. Whereas debits meands the obligation to pay the finance borrowed, the credit means the claim to receive this money payments from the other party. Every credit involves debt, that is, obligation to pay money, and therefore creates claim."*

Banks in the form of loan originating from public funds have a high risk asset that is the loan does not return on time which is called a *Non-Performing Loan* (NPL). As a consequences, it can disrupt bank liquidity so that banks must be able to manage credit to be given to debtors with good loan management, uphold the principle of prudence, conduct in-depth analysis of all aspects, aiming to minimize the risk of problem loans to a minimum.

In modern banking practice, a legal relationship in loan is no longer solely in the form of loan agreement, but a mixture with other forms of agreement such as granting power of attorney and other agreements. In such a mixed form, there is always a link between the related agreements.[9] As main principle of an engagement or agreement, namely the principle of freedom of contract, the parties that will link themselves to the loan agreement can base it on the provisions of the Civil Code but can also base it on the prevailing laws and regulations as well as agreements joint agreement, meaning that in terms of compelling provisions, it must be in accordance with the provisions contained in the Civil Code and the applicable laws and regulations, while in the case of non-compelling provisions submitted to the parties so that the credit agreement is not only controlled by general principles. Agreement law is also governed by what is specifically agreed upon by both parties.[10]

In its development, the principle of freedom of contract has subsequently been influenced by economic regulations which contain coercive provisions aimed at balancing parties fairly in the context of implementing national development based on

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[7] Irani, R. M., & Meisenzahl, R. R. (2017). Loan sales and bank liquidity management: Evidence from a US credit register. *The Review of Financial Studies*, *30*(10), 3455-3501.

[8] H.L Ajuha. 1996. *Macroeconomics, Theory & Policy*, S. Chand & Company, Ltd. Ram Nagar, New Delhi – 110055, p. 201

[9] *Ibid*

[10] Ardes, R., & Nugraha, R. (2020). Assessing the Liability Convention and the Indonesian Space Act in Light of Active Debris Removal. *Hasanuddin Law Review,* 6(3), 199-212. doi:http://dx.doi.org/10.20956/halrev.v6i3.2600

the principle of equity. The impact is felt when there is a provision from the Government which states what things the parties cannot agree on or if there is a provision that states what must be agreed upon.[11]

Restrictions in the application of the principle of freedom of contract in relation to bank loan must pay attention to several principles, namely fiduciary relations, confidential relations, and prudential relations. The principle of trust is a principle which states that the business of bank is based on the employment relationship between the bank and its debtors. Banks make efforts from public funds that are stored based on trust, so that each bank needs to maintain the health of its bank while maintaining and maintaining public trust. The principle of confidentiality is a principle that requires or obliges a bank to keep everything related to finance confidential, which according to the customary world of banking must be kept confidential. This confidentiality is for the interests of the bank itself because banks need the trust of the public who saves their funds in the bank. The public will only entrust their money or use the services of a bank if the bank guarantees that there is no abuse of their deposits while the prudential relation is a principle which states that banks in carrying out their functions and business activities are obliged to apply the principle of prudence in order to protect funds. people entrusted to the bank.[12]

In banking practice, there is still a possibility for the applicant to withdraw his intention to take the loan, if the use of the money is no longer needed. According to Russchen,[13] this new accord of will took place in secret. Banks often take too long to make decisions about lending, whereas the loan is actually needed at certain times which the applicant considers the most favorable times. If at that time it is too late, the expected benefits will be lost, therefore the applicant may discourage his intention to take credit where between signing the credit agreement and submitting loan, of course there is a time lag. With the difference in phases, there is a period of time in which both parties can still consider whether the transfer of money or the receipt is continued or not. The signing of a credit agreement is not accompanied by the delivery of money (credit) to the credit applicant. The credit applicant will not be able to take money, if there is no statement from the bank that the applicant is allowed to take a loan.

3. Sales of Loan Facility: Risk Management of Syndicated Loan

[11] Hofman, B., Rodrick-Jones, E., & Thee, K. W. (2004). Indonesia: Rapid growth, weak institutions. In *World Bank Shanghai Conference, http://www. world bank. org/wbi/reducing poverty/case-Indone sia-PovertyReduction. html*.

[12] Johanners Ibrahim, *Pengimpasan Pinjaman (Kompensasi) Dan Asas Kebebasan Berkontrak Dalam Perjanjian Kredit Bank,* C.V Utamo, Bandung, 2003, pp. 103-105

[13] *Ibid*

A step towards a long vision of a bank requires progress in the quality of risk management in daily bank activities, especially the process and quality of risk measurement, because banks derive their income from accepting and managing debtor risk. A strong bank risk management governance structure will serve as the basis for evaluating the balance between risk and rate of return to generate sustainable income. The issuance of Bank Indonesia Regulation No. 5/8 / PBI / 2003 is a control support by Bank Indonesia as the Central Bank of Indonesia on bank activities to implement prudential principles in order to maintain and maintain the existence of banks in the dynamics of sustainable national development. As written in Article 2 of the PBI Risk Management, it is stated that Banks are required to implement Risk Management effectively.

In general, risk is defined as the forms of events that have an influence on the ability of a person or an institution to achieve its goals.[14] Then, according to the Big Indonesian Dictionary, risk is a result that is unpleasant, detrimental, dangerous, from an act. In an effort to provide a broader picture of the impact of risk on banking, another definition of Article 1 point 2 stipulates that risk is the potential for an event to occur which may cause bank losses in its role as a creditor. Eventually, it is uncertainty that lead to growing risk. In short, risk can be concluded as an opportunity for loss or destruction. More broadly, risk can be defined as the possibility of the desired outcome occurring. Risks can cause losses if they are not anticipated and are not managed properly, on the other hand, those that are properly managed will provide room for the creation of opportunities to obtain a greater profit.[15]

In banking practice, Bank loan is defined as receivables. During the credit period, other banks often take over credit receivables, particularly in syndicated loans. There are differences in the understanding of the sales of loan facility between the meaning of economic meaning and the juridical. In terms of a bank, it is known as a sales of loan or sales of loan facilities, but this term differs from one bank to another, therefore it returns to the term in legal terms, namely the sales of loan facility can be carried out with novation, subrogation and cessie institutions.

In practice, the sales of loan facility that occurs in this case is part of the credit receivables of PT. Bank A, as old creditor to PT. TMJ has been partially paid by PT. Bank D, as the new creditor who took over part of the credit receivables by making a credit and cessie sale and purchase agreement between the old creditor and new creditor without the approval of the debtor, but only approved by the Agent Bank. In

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[14] Robert Tampubolon, *Risk Management*; Qualitative Approach Apllied to Comercial Bank, PT. Elex Media Komputindo, Jakarta 2004, p.19.

[15] Ferry N Idrus, *Manajemen Risiko Perbankan*, Graha Ilmu, Yogyakarta, 2006, p.7

the practice of sales of loan facility in syndicated loans, whether between members of a syndicated loan or other financial institutions, in general, the old creditors who have taken over credit receivables will get a greater profit than maintaining the portion of their participation in syndicated credit, for various reasons and considerations such as mentioned above, only taking into account economic or business factors without taking into account the juridical factors properly.

Sometimes the amount of credit distributed is so large that the financing is not sufficiently financed by one bank but by several banks. If this happens, the form of loan is classified as syndicated loan, namely loan extended by two or more financial institutions with similar terms and conditions, using general documentation and administered by a bank agent, compiled by an "arranger" who is assigned and responsible starting from the customer loan application process up to the credit agreement signing process.

Basically, syndicated loans are held based on agreements made by banks that distribute loans between syndicated bank agents and syndicated bank members. Syndicated loans occur because of limited bank funds. In the loan application submitted by the debtor, often a bank is unable to provide funds as large as the loan application and there is a spread of risk (the risk that will arise is shared by the syndicated lender bank).[16] Laws and regulations limit the amount of loan to be extended by banks so that banks must pay attention to the Legal Lending Limit, which is known as the *Legal Lending Limit*, which ultimately affects the soundness of the bank, as well as the relationship between banks or participants, meaning the participating banks syndication has the opportunity to build mutually beneficial cooperative relationships, especially in healthy lending practices.

The syndicated loan that was disbursed was Rp. 4.697.960.000.000,- (four trillion six hundred ninety-seven billion nine hundred and sixty million rupiah) have been supported by requirements that guarantee safe loan repayments because implementing 5C principles and have conducted a feasibility study and there is a professional appraisal team regarding the feasibility of a business to be financed by the bank. The feasibility of a business that will be financed is whether the company has the capacity (ability) to borrow and return the loan, capital, that the borrower must also have funds to start his business, the bank only helps capital and the entrepreneur cannot borrow without provide its own capital. Collateral (guarantee) is meant by the bank is a guarantee or collateral, as a second way out of credit repayment.

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[16] Irjayanti, M., & Azis, A. M. (2012). Barrier factors and potential solutions for Indonesian SMEs. *Procedia economics and finance*, *4*, 3-12.

Loan given to PT. TMJ is relatively large, the bank must hold material guarantees and individual guarantees whose value must exceed the loan value so that if the loan recipient defaults on his loan agreement, the material and individual guarantees can easily be taken as repayment of his debt and most importantly the conditions of economy must be considered, how the prediction of the national economy at the time the loan will be disbursed and the prediction of future government policies must be read by the bank before extending such a large amount of loan because in the absence of considerations and predictions about future economic conditions, it is feared that this will result in the company being unable to repay debt that will eventually become problem loans.

In this case, a partial sale of loan participation (syndicated loan receivables) from PT. Bank A to PT. Bank D by making a sale and purchase agreement and a *Cessie*. If this is done according to applicable regulations, as a result of the sales of loan facility, all rights and obligations of PT. Bank A is the right and obligation of PT. Bank D. However, in practice what happens is in the sale and purchase agreement of loan receivables only made by PT. Bank A, PT. Bank D and bank agents, without involving other creditors, namely PT. Bank B and PT. Bank C and Debtors.

The agreement of sales of loan facility between PT. Bank A and PT. Bank D is inseparable from the provisions regulated by the Civil Code, where on the one hand the agreement is regulated by Book II concerning the transfer of accounts receivable on behalf of as well as guarantees. The sales of loan facility is regulated in Article 613 of the Civil Code. Receivables in terms of their form are divided into accounts receivable on behalf of, receivables from substitutes and receivables from carry-over. Receivables in the name are transferred through cessie, namely the transfer of receivables through an underhand deed or an authentic deed. Receivables from substitutes are transferred through endorsement while receivables from carry-over are transferred directly.

The legal consequences of sales of loan facility on behalf of PT. Bank A to PT. Bank D when viewed from Article 1338 Paragraph (1) of the Civil Code which contains the principle of binding strength, the debtor is only bound to the old creditor if there is no confirmation from the old creditor to the debtor and the debtor has the right to refuse payment of debt to the new creditor because legally the debtor has no legal relationship with the new creditor.

Concerning the transferring of tangible and intangible property rights, Indonesian's Civil Law itself adheres to a causal theory rather than an abstract theory. According to causal theory, the validity of a levering depends on whether or not the obligatory agreement is based on it. If the sale and purchase agreement is valid, then the delivery is also valid and vice versa. The adoption of the causal theory in the

Indonesian Civil Code is summarized from the provisions of Article 584 of the Civil Code which states that property rights are obtained by way of submission, for example by means of cessie, based on a civil event (*rechtstitle*) to transfer property rights, for example, a receivable sale and purchase agreement and is carried out by a person authorized to transfer ownership rights.

In order to protect the rights and obligations of new creditors, in this case PT. Bank D, preferably in the sales of loan facility between syndicated loan members which is done by making a credit receivable sale and purchase agreement (obligatory agreement) and the *Cessie* agreement, besides being approved by the Agent Bank, it should also be approved by the debtor party (PT. TMJ) and other creditors. (PT. Bank B and PT. Bank C), so that the implementation of the provisions of the Civil Code Article 613 paragraph (1) can be fulfilled and have legal consequences for the parties.

Specifically, legal protection means protection guaranteed or provided by law, or in other words, all efforts made based on applicable legal provisions in order to create legal certainty and order in order to provide protection to people in need.

4. Conclusion

The process of sales of loan facility from PT. Bank A to PT. Bank D can be canceled due to the *rechtstitle* (sale and purchase agreement) underlying the cessie agreement does not comply with the applicable legal provisions. Legal consequences for PT. Bank D (new creditor) for the takeover of credit receivables by making a sale and purchase agreement for loan and cessie agreements from PT. Bank A to PT. Bank D which is done only with the approval of the Agent Bank without the knowledge of the debtor and bad credit occurs, then PT. Bank D cannot execute the object of collateral, because PT. Bank D did not register with the Land Agency and Fiduciary Registration Office, so the Mortgage and Fiduciary Rights holders were still on behalf of PT. Bank A and other creditors.

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