

LEGAL ANALYSIS OF THE USE OF BUYBACK GUARANTEES TO SUPPORT DEVELOPER BUSINESS CAPITALIZATION AND MARKETING

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Abstract

Developer capital and marketing of their houses greatly affect the Indonesian economy, many developers need capital injections from banks, in addition to capital injections, developers can also obtain convenience in marketing completed houses through mortgages from banks that provide working capital loans. To facilitate mortgage approval for consumers, developers include a repurchase clause or better known as a Buyback Guarantee, a Buyback guarantee is a repurchase guarantee contained in a working capital cooperation agreement between banks and developers born from the principle of freedom of contract and the principle of Prudent in banking. This study aims to find out and explore how this credit agreement can be implemented and how this Buyback Guarantee clause is included in a banking credit agreement so that it can support capital and marketing of the developer's business. This study uses a Descriptive Juridical-Normative approach method. The formulation of the problem in this paper is How are the regulations and legality of the Buy Back Guarantee agreement clause as a form of repurchase guarantee between banks and developers and How the Buyback Guarantee Clause can support the Capital and Sales of the Developer's business. The results of this study demonstrate that the legality of credit agreements incorporating a buyback guarantee clause between banks and developers is based on the principles of freedom of contract and prudential banking principles.

Keywords: Buyback Guarantee, Developer, Freedom of Contract Agreement.

INTRODUCTION

Indonesia's economy is currently experiencing significant growth, accompanied by a wide variety of existing business activities. In the development of business sectors, strong capital is essential, and such capital is highly dependent on the banking sector in Indonesia. Capital can be increased through working capital loans from banks, which is also in line with Indonesia's economic development plan that emphasizes the provision of capital to well-performing real sector businesses. The real sector refers to businesses that actively operate and engage in trading transactions. Within the government's economic plan, banks are expected to provide maximum credit to real sector businesses, not only focusing on investment loans such as Home Ownership Loans (Kredit Pemilikan Rumah/KPR) and Vehicle Ownership Loans, but also prioritizing credit for companies and small businesses that drive economic activity and create monetary circulation in Indonesia.

In business development, companies sometimes require additional funding to support their working capital. The author focuses on one business sector that has recently attracted significant interest among entrepreneurs, namely the housing sector. The housing business sector observed by the author is currently experiencing increasing demand. Entrepreneurs operating in the housing sector are commonly referred to as developers, and hereinafter the author will use the term "developer." At present, developers must consider effective strategies for marketing the houses they build so that they can be purchased by consumers. The working capital owned by developers often requires additional funding, particularly due to the increase in building material prices over the past three years.

Developers currently require substantial capital injections from banks. In channeling funds in the form of working capital loans to developers, banks naturally expect that the houses sold by developers will be successfully sold, ensuring that loan repayment proceeds smoothly without payment defaults by the developers. In relation to the housing sector, banks provide Home Ownership Loan (KPR) facilities. This creates an advantage for banks, as they are able to provide two financing facilities simultaneously to a single financed company. Banks provide working capital loans to developers and also provide Home Ownership Loans (KPR) to consumers who purchase houses from the developers.

What is of particular interest to the author is the form of agreement that can facilitate both financing schemes in such a way that a mutually beneficial agreement is achieved for both banks and developers. Through such agreements, developers can receive working capital financing from banks, and house sales through bank-provided KPR facilities can proceed securely. Following preliminary research, the author identifies several key factors that can serve as a foundation for establishing cooperation between banks and developers so that such cooperation can be mutually beneficial.

Banks, of course, must exercise caution in disbursing credit to both developers and consumers who will be facilitated through KPR. This is consistent with the Prudential Principle, commonly known as the Prudential Banking Principle, which is a fundamental banking principle requiring banks to act carefully and prudently in conducting all business activities. A developer is a housing development company which, based on Article 5 paragraph (1) of the Regulation of the Minister of Home Affairs Number 5 of 1974, can be defined as a company engaged in housing development of various types in large quantities on a designated land area, complete with infrastructure required by the resident community, hereinafter referred to as a developer. As a housing developer, the housing development company may establish cooperation with banks in fulfilling the Prudential Banking Principle. An agreement containing a buyback guarantee clause can provide security for banks in anticipating potential non-performing loans or defaults by KPR debtors who are approved to purchase houses developed by the developer using bank-provided KPR facilities.

In relation to the prudential banking principle, banks are also required to strictly regulate prudential measures as the basis for conducting their business. This regulation is contained in Article 8 paragraph (1) of Law Number 10 of 1998 concerning Amendments to Law Number 7 of 1992 on Banking (hereinafter referred to as the Banking Law), which emphasizes that collateral is an important factor in preventing risks in credit distribution, including KPR for developers. Furthermore, Article 11 of Law Number 10 of 1998 concerning Amendments to Law Number 7 of 1992 on Banking regulates credit guarantees by Bank Indonesia, and its explanatory section states that collateral in credit distribution, including KPR for developers, is one of the efforts to maintain bank soundness and enhance bank resilience¹.

In practice, specific agreements regulating buyback guarantees have not been explicitly governed. In buyback guarantee agreements, there are legal obligations that not only protect the interests of sellers and buyers but also the interests of creditors. Consequently, buyback guarantee agreements give rise to legal consequences for all parties involved, including third parties, creditors, and debtors². In this regard, the author observes that existing buyback guarantees particularly those identified through research are implemented as buyback guarantee clauses incorporated into credit agreements between developers and banks. Thus, it can be concluded that a buyback guarantee is not an independent agreement, but rather a clause mutually agreed upon by the developer and the bank.

The buyback guarantee within a working capital credit agreement for developers constitutes an additional (accessory) agreement that regulates the guarantee of the debtor's (KPR borrower's) obligations to the bank by the developer⁴. The existence of a buyback guarantee is expected to provide legal protection for all parties involved. Previous studies have extensively discussed the legal relationship of buyback guarantee arrangements within housing unit sale and purchase transactions using KPR facilities. However, the direct implementation of buyback guarantees between the parties themselves has not been thoroughly examined. Therefore, the author has decided to initiate a study entitled "**Juridical Analysis of the Use of Buyback Guarantees in Supporting Capitalization and Marketing of Developer Businesses.**"

LITERATURE REVIEW

Before proceeding to the subsequent discussion, the author will first elaborate on several theories related to the Buyback Guarantee Agreement. These theories include the following:

2.1 Theory Related to Agreements

The author refers to one theory that constitutes a fundamental principle in entering into an agreement, namely the Principle of Freedom of Contract. This principle is derived from Article 1338 of the Indonesian Civil Code, which states: "*All legally executed agreements shall be valid and binding as law for those who enter into them.*"

This theory establishes several principles that grant individuals the freedom to:

1. Enter into an agreement or refrain from entering into any agreement at all;
2. Determine with whom they wish to enter into an agreement; and
3. Determine the contents, terms, and form of the agreement, whether oral or written.

In this context, the inclusion of a buyback clause within a working capital agreement represents an exercise of the freedom of the parties to determine the contents of their agreement.

2.2 Theory Related to Banking

With regard to banking, the author refers to a primary theory governing banking activities, namely the Prudential Banking Principle. This theory constitutes one of the core principles implemented in banking operations. The prudential banking principle requires banks to act carefully and prudently in carrying out all of their business activities. This theory was first introduced by Adam Smith.

2.3 Theory Related to Law in General

In relation to law in general, the author refers to a theory introduced by Aristotle, namely the Principle of Justice. This principle explains the concept of proportional justice, whereby each individual receives what is rightfully theirs according to their ability and merit. This principle has a significant influence on all agreements, including the application of buyback guarantees in agreements between banks and developers.

METHOD

This research is conducted using a normative juridical approach, namely a legal research method carried out by examining library materials or secondary data³. Several approaches may be used to obtain information in order to address the legal issues under study, including the case approach, the statutory approach, and the conceptual approach. This research adopts a descriptive-analytical research specification, which aims to provide a comprehensive and in-depth description of the conditions or phenomena being examined. The type of data used in this research is secondary data, namely data obtained from written materials. Based on this secondary data, the sources of data consist of primary legal materials, secondary legal materials, and tertiary legal materials. The data collection method employed in this research is library research. The data analysis method is carried out by systematically examining laws and regulations as well as literature related to the research object, supported by interview techniques and secondary data observation⁴.

Several approaches may be used to obtain information to address the legal issues under study, including the case approach, the statutory approach, and the conceptual approach. This research adopts a descriptive-analytical research specification, with the objective of providing a comprehensive and in-depth overview of the conditions or phenomena being examined. The type of data used by the author in this research is secondary data, namely data obtained from written sources⁵. From this secondary data, the sources consist of primary legal materials, secondary legal materials, and tertiary legal materials. The data collection method employed is library research. The data analysis method involves systematically reviewing laws and regulations as well as literature related to the research object, supported by interviews and observation techniques.

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RESULTS AND DISCUSSION

4.1 Regulation and Legal Validity of the Buyback Guarantee Clause as a Form of Security in Home Ownership Credit Between Banks and Developers

A house is a basic necessity that is neither inexpensive nor affordable for most members of society. Therefore, to fulfill the need for home ownership, many people rely on housing credit facilities known as Home Ownership Credit (Kredit Pemilikan Rumah/KPR). KPR facilities are particularly important for people with low to middle income levels⁸. Home Ownership Credit (KPR) is a type of credit service provided by banks to customers who require loans specifically to finance the construction or renovation of a house. The emergence of KPR is driven by the increasing demand for housing, which is not matched by the purchasing power of the general public⁹. Developers require fresh funds with a high cash flow turnover to accelerate the construction of planned housing units. Such development is carried out within specific construction timelines, either determined by the developer's internal targets or promised to consumers regarding the handover of housing units. In the implementation of housing development projects, many developers choose to cooperate with banks for working capital financing. Such financing is always based on a credit agreement. This study discusses a particular type of credit agreement that serves

as a strategic solution for developers while also supporting public access to home ownership in Indonesia. For confidentiality reasons, the identities of the parties and banking institutions involved are anonymized. In addition to regulating loan amounts and capital financing, this working capital credit agreement contains a specific and uncommon clause, namely the Buyback Guarantee clause. The clause provides, among others, that:

3.1.5.

In the event that, upon the expiration of the extension period as stipulated in Article 3.1.4 of this Agreement, the DEVELOPER remains unable to submit the required documents to the BANK, and/or the establishment of the mortgage right cannot be carried out due to the negligence and/or fault of the DEVELOPER, and/or if within the period as stipulated in Article 3.1.2 the DEVELOPER fails to complete the construction of the Building, then after the BANK has issued three (3) written warning letters to the DEVELOPER, no later than seven (7) calendar days after the issuance of the third warning letter, the DEVELOPER shall be obliged to immediately and in full repay the entire Customer Financing facility, including margins and all costs incurred, to the BANK, in one lump sum, upon the first demand of the BANK.

3.1.6.

As long as the Certificate of Ownership (SHM) in the name of the Customer, the Mortgage Certificate, the Building Permit (IMB), and the Building Handover Report (BAST) have not yet been submitted to the BANK, and the Building has not been completed, if the Customer commits a default under the Financing Agreement, including failure to pay installment obligations for the repayment of the Financing facility for three (3) consecutive months, then after the BANK has issued three (3) written warning letters to the Customer, with copies thereof to the DEVELOPER, and if up to no later than seven (7) calendar days from the date of the third notice such default has not been remedied by the Customer, the DEVELOPER shall be obliged to fully repay the Customer's Financing facility, including outstanding margins, late payment penalties, and all costs incurred, or, where deemed necessary in the interest of the BANK, the DEVELOPER shall be obliged to repurchase the Land and Building.

3.1.7.

Any delay in the timely fulfillment of the payment obligations as stipulated in Articles 3.1.5 and 3.1.6 of this Agreement shall constitute a breach of obligation and shall be subject to the consequences as determined under the prevailing laws and regulations and the provisions of this Agreement.

3.1.8.

The obligations of the DEVELOPER as stipulated in Articles 3.1.5 and 3.1.6 of this Agreement shall be followed by the execution of a Deed of Subrogation with the BANK no later than seven (7) calendar days after the DEVELOPER has settled the Financing facility. Through such subrogation, the DEVELOPER shall assume all rights and authorities of the BANK as the financing provider under the Financing Agreement and shall guarantee to release and indemnify the BANK from any legal claims that may arise from the Customer in the future in connection with such subrogation.

If the developer fails to complete construction, submit required documents, or if the KPR debtor defaults on installment payments for three consecutive months, the bank may require the developer to either fully repay the debtor's outstanding financing obligations including principal, margin, penalties, and costs or repurchase the land and building. The developer must subsequently execute a subrogation deed to assume the bank's rights and obligations. From the agreement, it can be seen that in the event of payment default, the developer is obliged to fully settle the outstanding KPR of the debtor. This clause is particularly important for banks in managing Non-Performing Loans (NPLs). The buyback guarantee clause significantly supports developers' capital structures, as construction financing can be disbursed based on development progress while also accelerating housing sales through KPR facilities.

Prior to the inclusion of buyback guarantee clauses, banks tended to be highly selective in approving KPR applications, especially for housing units under construction. The presence of such clauses allows banks to simplify approval procedures without compromising the prudential banking principle, thereby increasing confidence in financing housing projects developed by the debtor. The legal validity of buyback guarantee agreements between banks and developers is based on the principle of freedom of contract and consensualism, allowing parties to freely determine the content and object of agreements provided they do not violate prevailing laws. Consequently, such

agreements possess binding legal force and provide legal certainty and protection for both parties. The Indonesian Civil Code (KUHPerdata) does not explicitly regulate buyback guarantees. Their existence arises from the open nature of contract law under Book III of the Civil Code. In banking practice, buyback guarantees are a manifestation of freedom of contract and prudential banking principles. Legally, such guarantees are often reinforced through notarial or PPAT deeds, granting executorial force in the event of default¹¹. As such, buyback guarantees are considered a relatively new concept within Indonesian security law.

According to Sri Soedewi Masjchoen Sofwan, guarantees are divided into material guarantees and personal guarantees (*borgtocht*)¹². Based on Article 1820 of the Civil Code, a buyback guarantee may be classified as a personal guarantee, wherein the developer, as a third party, assumes responsibility for the debtor's obligations to the bank by repurchasing the housing unit if the debtor defaults. However, buyback guarantees differ from conventional personal guarantees. While both are accessory agreements, buyback guarantees specifically ensure the repurchase of the housing unit rather than direct repayment of debt. Moreover, the third party (developer) does not replace the creditor's position; the bank remains entitled to claim repayment from the debtor¹³.

In practice, the implementation of buyback guarantee clauses often excludes the debtor's awareness, leading to legal concerns regarding consumer protection. This issue highlights the need for clearer regulatory frameworks to ensure fairness and transparency, particularly for KPR debtors.

4.2 The Role of Buyback Guarantee Clauses in Supporting Developer Capital and Business Activities

4.2.1 Supporting Capital Financing

Housing development companies are highly dependent on capital turnover. Housing development financing generally consists of three types of capital:

1. Equity capital
2. Financial institution capital
3. Alternative capital

This study focuses on financing from financial institutions, particularly construction working capital loans, which are provided to developers to finance housing construction projects intended for sale to the public¹⁴.

4.2.2 Supporting Sales Performance

In KPR transactions, the user (debtor) borrows funds from the bank to purchase housing units developed by the developer. If the debtor defaults, the developer assumes responsibility by repurchasing the housing unit or settling the outstanding debt. This legal relationship positions the bank as the primary creditor, the developer as guarantor, and the user as debtor. The inclusion of buyback guarantee clauses enhances banks' confidence in approving KPR applications, thereby accelerating housing sales. Developer obligations toward consumers are governed by Law No. 8 of 1999 on Consumer Protection, which mandates accountability for losses suffered by consumers¹⁵. This obligation aligns with Articles 1236 and 1239 of the Civil Code, which regulate compensation for breach of contractual obligations¹⁶.

While buyback guarantees primarily protect banks, they also carry significant implications for consumers. Although consumer protection regulations do not explicitly regulate buyback guarantees, such clauses indirectly ensure that developers bear responsibility when consumers face financial difficulties. Ultimately, buyback guarantees serve not only as financial protection for banks but also as a mechanism that promotes confidence, legal certainty, and consumer welfare. Their implementation underscores the developer's responsibility to uphold consumer protection principles while strengthening cooperation with banking institutions. Furthermore, the accountability of developers in Home Ownership Credit (*Kredit Pemilikan Rumah/KPR*) agreements with banks is implemented through obligations stipulated in **Law Number 10 of 1998 concerning Amendments to Law Number 7 of 1992 on Banking**, which regulates several obligations borne by developers toward banks in the context of agreements involving the provision of Home Ownership Credit. These obligations are intended to protect the interests of banks, homebuyers, and the banking system as a whole. By ensuring that such obligations are properly fulfilled, developers can strengthen cooperative relationships with banks and maintain trust in the KPR financing process conducted by banks.

Based on the Sale and Purchase Binding Agreement (*Perjanjian Pengikatan Jual Beli/PPJB*) between the developer and the user, the developer bears responsibility for providing complete documents and facilities as previously agreed, particularly in relation to the delivery of the Land and Building. In the event that the developer commits a breach of contract (*wanprestasi*) toward the user due to delays in the handover of the Land and Building, it is first necessary to examine whether the principle of good faith was observed in the formation of the Sale and Purchase Binding Agreement (*PPJB*). Furthermore, it must also be assessed whether the agreement complies with

the Guidelines for Sale and Purchase Binding Agreements as stipulated in the Decree of the Minister of Public Housing (Kepmenpera) No. 9/KPTS/1995. Additionally, in the resolution of such disputes, it should be evaluated whether the developer demonstrates good faith in fulfilling its obligations and assuming responsibility for the performance owed under the agreement. If these elements are present, periodic mediation may be pursued as an initial dispute resolution mechanism. When purchasing a house, users are required to pay close attention to the existence of a Sale and Purchase Binding Agreement (PPJB), as such agreement provides legal grounds for the user to file a civil lawsuit before the court should mediation fail to provide a satisfactory resolution. The PPJB generally also contains provisions governing sanctions in the event of delays in the completion of the construction of the Land and Building. An example of such an agreement can be found in the contract attached by the author in this paper.

CONCLUSION

Based on the discussion presented earlier in accordance with the problem formulation prepared by the author, the following conclusions may be drawn:

1. The regulation of buy back guarantee agreements is not explicitly and specifically regulated in the Indonesian Civil Code (KUHPerdata). However, based on the author's research, a buy back guarantee agreement may be established either as a standalone agreement explicitly titled a *Buy Back Guarantee Agreement* or through the inclusion of a buy back clause within a working capital credit agreement between a developer and a banking institution. This type of guarantee arises due to the open-ended nature of the law of obligations as regulated in Book III of the Indonesian Civil Code.

The buy back guarantee or the inclusion of a buy back clause in working capital credit agreements for housing development, within banking guarantee practices, constitutes a consequence of the principle of freedom of contract and the prudential banking principle. The legality of the buy back guarantee agreement as a form of security in home ownership credit between banks and developers is grounded in the principles of freedom of contract, *pacta sunt servanda*, prudence (Prudential Banking Principle), and consensualism, whereby the parties are free to agree upon the contents and objects of the agreement according to their mutual needs and consent, provided that such agreement does not conflict with prevailing laws and regulations.

Accordingly, such agreements do not only benefit banks and developers but also provide legal certainty and protection for users who obtain Home Ownership Credit (Kredit Pemilikan Rumah/KPR). Essentially, a buy back guarantee constitutes the repurchase of an object or collateral that has been pledged in a guarantee agreement between the debtor and the creditor. In the event that the debtor defaults on its obligation to repay the agreed debt or installments, the guarantor is obliged to repurchase the collateral from the creditor unconditionally.

2. The Buy Back Guarantee Agreement or the inclusion of a Buy Back Guarantee clause in a Working Capital Credit Agreement for housing development significantly assists both corporate entities and individuals engaged in the housing development sector in obtaining capital financing. The developer's capital structure becomes more sound, as financing and sales processes can proceed effectively. This is due to the fact that, with the inclusion of such clauses, prospective buyers who intend to utilize Home Ownership Credit (KPR) facilities can be accommodated by the bank, thereby facilitating the approval process for KPR financing for prospective buyers of housing units developed by the developer.

RECOMMENDATIONS

Based on the results of the research and the conclusions presented above, the author proposes the following recommendations:

1. The Buy Back Guarantee Agreement should be considered as an alternative mechanism to facilitate the approval process of Home Ownership Credit (Kredit Pemilikan Rumah/KPR). This mechanism also serves as an instrument to protect banking institutions, as creditors, from an increase in Non-Performing Loans (NPL) resulting from credit defaults. Therefore, the author recommends that Bank Indonesia establish clear and comprehensive regulations governing Buy Back Guarantee agreements, allowing them to function as independent agreements that strengthen the legal relationship between developers and banking institutions. In addition, within working capital credit agreements between developers and creditors, there is often a lack of clarity regarding whether the buy back clause is disclosed to homebuyers, who in this context act as KPR debtors. This lack of transparency affects the settlement of non-performing loans, as such settlements may exclude the KPR debtor from the process. On the one hand, KPR debtors may be disadvantaged if the resolution of credit defaults is handled solely by the developer. Therefore, transparency is required in

situations where the house purchased by a KPR debtor is subject to a buy back arrangement by the developer. This transparency enables KPR debtors to fully understand the legal status of the property they purchase and encourages them to exercise greater diligence in fulfilling their obligations, particularly with respect to installment payments.

2. The use of Buy Back Guarantee agreements remains relatively unfamiliar among housing developers. Consequently, it is necessary to conduct broader dissemination and socialization efforts for all developers through the Indonesian Real Estate Association (Real Estat Indonesia/REI) regarding the application of Buy Back Guarantee agreements in working capital credit applications. Furthermore, banking institutions must also be provided with a clear understanding of the nature and function of Buy Back Guarantee agreements, as such mechanisms support the implementation of the prudential banking principle. Additionally, greater transparency between banks and KPR debtors—namely homebuyers within housing projects developed by developers—is essential, so that debtors are more attentive to their obligations in repaying installments or fulfilling their KPR commitments. In this manner, the principle of justice can be realized among developers, banking institutions, and KPR debtors involved in housing projects. Under these conditions, it is expected that sound capital management in housing development and the sale of housing units can be achieved, housing construction can proceed according to the planned schedule, banks can maintain security in extending KPR facilities to homebuyers and thereby facilitate credit approval processes, and homebuyers can clearly understand the risks associated with defaulting on their Home Ownership Credit obligations.

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