

Notary's Responsibility in Interbank Credit Take Over in Australia

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Abstract. *Credit Take Over is the provision of credit facilities by banks/non-banks with the aim of paying off the debtor's debt obligations at a particular bank accompanied by taking over the collateral to serve as collateral for the provision of credit facilities. In practice, loans that are guaranteed by collateral are often carried out by take over. This study aims to determine the regulation of the role of a Notary in interbank credit take over and to know and understand the implementation of the role of a Notary in interbank credit take over. The type of research used is to use empirical juridical methods with the nature of descriptive analysis research. The implementation of this method is to collect data from various literature and legal theory as well as about the role of a Notary in taking over interbank credit. The results of the study show that notaries in carrying out their duties and authorities must comply with the regulations in LAW or Government Regulations regarding Notaries, and must obey and adhere to what is the Notary's code of ethics. The role of a Notary in making authentic deeds, especially those related to authentic Deeds of taking over credit, is an effort to provide legal certainty to the parties. This is where the role of the Notary is in realizing the precautionary principle so that problems do not occur in the future which can harm the parties to the deed, as well as harm the Notary himself.*

Keywords: *Dispute; Notary; Problem; Responsibility.*

1. Introduction

Take Over Credit is the granting of a credit/loan facility by a financial institution (bank/non-bank) with the aim of paying off the debtor's debt obligations at a particular bank accompanied by taking over the collateral to serve as collateral for the provision of the credit facility¹.

¹ E. Herguido Sevillano, J.F. Lavado Contador, S. Schnabel, M. Pulido, J. Ibáñez, Using spatial models of temporal tree dynamics to evaluate the implementation of EU afforestation policies in

The Take Over event in the Civil Code is also known as "subrogation" in article 1400. For credit guarantees, a deed is needed, an official who is authorized to make authentic deeds, so here the Notary is also a LAND OFFICER. Because if the other LAND OFFICERS will require examination and research from the start regarding the debtor, creditor and the object of guaranteeing the land. This is less efficient and time consuming. This is in accordance with the duties, functions and powers of a notary as stipulated in Regulation of a Notary, based on Position of a Notary².

In the Take Over process that often occurs, where the debtor submits a loan application to a new creditor with the aim of being used to pay off the remaining debt to the old creditor and the remaining credit will be blocked until a certificate in the name of the debtor can be issued and will be handed over to the new creditor as collateral for the credit. When signing the Credit Agreement between the Debtor and the New Creditor, the Notary/LAND OFFICER only holds a photocopy of the certificate submitted as proof of collateral for the Debtor's Land Rights, because the debtor still has debt/credit to the old creditor so that the collateral cannot be issued by the old creditor .

In this case there are problems that can lead to legal consequences where the Notary signs the deed of the financing contract and the deed of binding the MORTGAGE LETTER guarantee before the roya letter is confirmed to be issued on the same day, supposedly to ensure legal certainty, the Notary signs the financing/credit contract and MORTGAGE LETTER, after issuance Roya letter and original guarantee certificate which will be charged with the new Mortgage by the original creditor bank. In the MORTGAGE LETTER deed and APHT deed, there are promises and if the Notary uses the MORTGAGE LETTER before the date of the Roya letter is confirmed to be issued on the same day, there will be a reimbursement of the Mortgage Right. Whereas in the Deed of Encumbrance of Mortgage there are promises and provisions in the previous credit agreement, it is forbidden to transfer the collateral object before the credit is paid off³.

This is where the role of a notary/LAND OFFICER is needed in the Take Over transaction process, namely playing a role in the guarantee binding process to guarantee legal protection for both parties and third parties. The Deed of Take Over Credit agreement was drawn up before a Notary/LAND OFFICER, so that the Deed is an authentic deed that has perfect evidentiary power. This is intended by the parties to provide more protection and legal certainty, because the

rangelands of SW Spain, *Journal of Public Transportation*, p. 166-175, <https://www.sciencedirect.com/journal/land-use-policy/vol/78/suppl/C>

² Springer, J. D. (1999). Corporate law and constituency statutes: Hollow hopes and false fears. *New York University Annual Survey American Law*, 122.

³ Hunter, Susan & Bulirwa, Elizabeth & Kisseka, Edward. (1993). AIDS and agricultural production. *Land use policy*. 10. 241-58. 10.1016/0264-8377(93)90018-6.

Notary/LAND OFFICER in making the deed is impartial and looks after the interests of the parties objectively. But in this case the Notary/LAND OFFICER must be careful because every notary deed can be used as a perfect means of proof, if there is a dispute between the parties, the dispute does not rule out involving a notary⁴.

2. Research Methods

This research uses approach method Sociological or empirical juridical descriptive analysis is an approach that aims to describe a phenomenon that is currently taking place and then studies of these facts are carried out with an analysis of applicable legal theories. The implementation of this method is to collect data from various literature and legal theory as well as interviews with Notaries in Australia about the role of Notaries in interbank credit take over.

3. Results and Discussion

3.1 Regulation of the Role of a Notary in Interbank Credit Take Over

Notaries as public officials, create a product called an authentic deed, which is related to the provisions of civil law, especially in the law of evidence. According to the LAW, a notary who has broader authority than a LAND OFFICER is a notary who has the authority to make authentic deeds regarding actions, agreements and provisions required by laws and regulations and/or what is desired by interested parties to be stated in an authentic deed, guaranteeing the certainty of the date drawing up the deed, keeping the deed, providing grosse, copies and excerpts of the deed, all of this as long as the making of the deed is not also assigned or excluded to other officials or other people determined by law. General Authority of a Notary confirms that one of the authorities of a Notary⁵.

The notary also has authority that will be determined later, authority that will appear and be determined based on statutory regulations. Notaries or LAND OFFICERS in carrying out their duties and authorities must be in accordance with the laws and regulations that govern them both in LAW or Government Regulations regarding LAND OFFICERS themselves, and must obey and adhere to what is the Notary's code of ethics both contained in regulations or ethical norms.⁶

⁴ Saxby, J., & Schacter, M. (2003). *Civil society and public governance. Getting a fix on legitimacy*. Ottawa: Conference Board of Canada.

⁵ Nadler, D. (2004). What's the board's role in strategy development? Engaging the board in corporate strategy. *Strategy and Leadership*, 32(5), 25–33.

⁶ Ibid.

To guarantee legal certainty, order and protection, written evidence is needed that is authentic regarding circumstances, events or legal actions carried out through certain positions, and that a Notary is a certain position that carries out a profession in providing legal services to the public. A notarial deed made before or by a notary has formal evidence as well as material evidence that can support the upholding of the prudential principle⁷ in an agreement, one example of an agreement that must uphold the precautionary principle is an agreement in bank lending such as the Deed of Take Over Agreement.

According to Gustav Radbruch there are two theories of legal certainty, namely certainty due to law and certainty in or from law. Laws that succeed in guaranteeing a lot of certainty in social relations are useful laws. Certainty because the law provides two other legal tasks, namely guaranteeing justice and the law must still be useful. law, based on a system that is logical and practical), the law is made based on, *rechtswerkelijkheid* (actual legal conditions) and in the law there are no terms that can be interpreted differently.

The role of a Notary/LAND OFFICER in making authentic deeds, especially those relating to the making of Credit Deeds for the implementation of authentic take over credit, is an effort to provide legal certainty to both parties in credit transactions. Authentic deed as evidence that has perfect evidentiary power before the court, must meet the formal requirements of the deed regarding the certainty of the time of making the deed⁸.

3.2 Implementation of the Role of a Notary in Interbank Credit Take Over

In the banking business world, take over is a term used in terms of a third party giving credit to the debtor with the aim of paying off the debtor's debt to the original creditor and providing new credit to the debtor so that the position of this third party replaces the position of the initial creditor. The take over event in the Civil Code is also known as "subrogation". In the Civil Code, regarding how subrogation occurs, namely it occurs because of approval (directly) and occurs because of a law (indirectly). Take over occurs because of the agreement⁹.

⁷ Ambe J. Njoh, Liora Bigon, Erick O. Ananga, Richard A. Ayuk-Etang, Institutional, economic and socio-cultural factors accounting for gender-based inequalities in land title procurement in Cameroon, *Journal of Public Transportation*, p. 116-125, <https://www.sciencedirect.com/journal/land-use-policy/vol/78/suppl/C>

⁸ Wood, David. (1993). Forests to fields. Restoring tropical lands to agriculture. *Land use policy*. 10. 91-107. 10.1016/0264-8377(93)90001-Q, https://www.researchgate.net/publication/11109790_Forests_to_fields_Restoring_tropical_land_s_to_agriculture/citation/download

⁹ Nash, J. (2008, March 28). CEO pay: Performance-based bonuses down, discretionary bonuses up in '07. *Financial Week*.

In general, the mechanism for transferring credit or taking over in banking is starting from a credit application by the debtor, then submitting all complete data and credit application requirements, followed by conducting a survey by the Credit Officer (BI checking, trade checking, debtor interview, guarantee checking).), if the requirements are met, then proceed with making a credit proposal that will be submitted to the credit committee. If the proposal is approved by the credit committee¹⁰, then it is followed by signing the credit agreement and binding collateral which must be attended by the bank, debtor and partner. After binding the collateral, the debtor accompanied by marketing goes to the initial creditor to make repayments with funds obtained from third parties. When payment has been made, then it is obligatory to ask for a slip of settlement sign as well as original proof of ownership of the collateral so that the Mortgage can be encumbered by first carrying out roya (deleting the right) on behalf of the initial creditor. At first glance, the credit take-over mechanism does not appear to be a problem. However, according to the author, "the principle of prudence" is really needed from a Notary in this take over process, because in fact in this take over process there are things that can be a source of problems where the authors observe these symptoms as three apprentices at one of the Notary's offices in Australia¹¹.

As a public official, a Notary must adhere to the principle of prudence, because the responsibility of a Notary for the deeds he makes is for life. In making an authentic deed, the notary must prioritize the precautionary principle, especially the deed regarding the agreement, because the deed regarding the agreement generally has legal consequences in the event of default (breaking the agreement) by the parties. Deed as a product made by a Notary is a perfect means of evidence in accordance with the principle of Presumptio Justea Causa where for the sake of legal certainty, deeds made by or before officials must be considered true and have binding legal force before being proven otherwise.¹²

The author sees the role of the Notary in the take over process, namely by signing the deed of the financing agreement and the deed of binding the MORTGAGE LETTER guarantee before the roya letter is confirmed to be issued on the same day, supposedly to ensure legal certainty, the Notary signs the financing / credit and MORTGAGE LETTER agreement, after the issuance of the

¹⁰ Laura Notess (WRI) , Peter Veit (WRI), Iliana Monterroso (WRI), Andiko (WRI), Emmanuel Sulle (WRI), Anne M. Larson (WRI), Anne-Sophie Gindroz (WRI), Julia Quaedvlieg (WRI) and Andrew Williams (WRI) - July 2018, The Scramble for Land Rights, Reducing Inequity between Communities and Companies, <https://wri-indonesia.org/en/publication/scramble-land-rights>

¹¹ Rose, N. & Wolfram, C. (2002). Regulating executive pay: Using the tax code to influence chief executive officer compensation. *Journal of Labor Economics*, 20(2), S138–S175.

¹² Redefining the role of the chairman of the board. (2002, December 18). *Knowledge@Wharton*.

roya letter and the original guarantee certificate¹³ that will be charged with the new Mortgage by the original creditor bank. In the MORTGAGE LETTER deed and APHT deed, there are promises and if the Notary uses the MORTGAGE LETTER before the date of the Roya letter is confirmed to be issued on the same day, there will be a reimbursement of the Mortgage Right. Whereas in the Deed of Encumbrance of Mortgage there are promises and provisions in the previous credit agreement, it is forbidden to transfer the collateral object before the credit is paid off. The Roya letter is proof of the payment of the debtor's debt to the creditor. If the Notary uses the MORTGAGE LETTER as a tool or means for take over without a Roya letter issued on the same day, it means that the owner of the certificate/guarantor re-authorizes the next bank that will take over the guarantee (to be called the Authorized Person). As a result, the deed made by a Notary may have legal defects.

At the time of making the MORTGAGE LETTER and Deed of Encumbrance of Mortgage, there must be confidence in the Notary or LAND OFFICER concerned that the Mortgage giver has the authority to take legal action against the Mortgage object imposed, although certainty regarding the possession of this authority is only required at the time of granting the Mortgage it's registered¹⁴.

In fact, the Mortgage giver does not have the authority to authorize the imposition of a new Mortgage Right, it is stated that in the Deed of Granting Mortgage there are promises, among others, promises that the Mortgage giver will not relinquish his rights to the Mortgage object without prior written approval from the Mortgage Holder (in this case the bank), in which the written evidence is in the form of proof of debt repayment and a roya letter. In terms of authority, as one of the requirements for the validity of the agreement according to the Civil Code, the mortgagee is not yet legal to authorize the imposition of a new mortgage without a letter of proof of settlement or a roya letter from the mortgage holder, so that the validity of the deed made by a notary may be questioned.

This is where the role of the Notary in realizing the precautionary principle for the protection and legal certainty of the parties involved in a deed is very important, so that problems do not occur in the future which can harm one or the parties in the deed, or harm the Notary himself. . Moreover, if one of the parties to the deed has bad intentions. This is actually a dilemma for the Notary, on the one hand as a Notary partner of the Bank, trust has been built between the Bank and the Notary, on the other hand there is a feeling of concern that the

¹³ Nadler, D., Behan, B., & Nadler, M. B. (2006). *Building better boards: A blueprint for effective governance*. San Francisco: Jossey-Bass.

¹⁴ Rérolle, J.-F., & Vermeire, T. (2005, April 29). M&A best practices for boards of directors. From Houlihan, Lokey, Howard, & Zukin, *Corporate Board Member Magazine*, M&A /Capital Markets.

Notary will lose his client. With this theory of authority according to Max Weber, Authority is a legal action that is regulated and given to a position based on the applicable laws and regulations governing the position in question. The role of the notary in carrying out interbank credit take over in making the deed is the authority given to the Notary/LAND OFFICER as mandated by the laws and regulations of Notary¹⁵.

4. Conclusion

The role of a Notary/Land Officer in making authentic deeds, especially those relating to the making of Credit Deeds for the implementation of authentic take over credit, is an effort to provide legal certainty to both parties in credit transactions. Authentic deed as evidence that has perfect evidentiary power before the court, must meet the formal requirements of the deed regarding the certainty of the time of making the deed. The role of the Notary in realizing the precautionary principle for the protection and legal certainty of the parties involved in a deed is very important, so that problems do not occur in the future which can harm one or the parties in the deed, or harm the Notary himself.

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