



Juridical Study of Indemnity Letter Position in Resolving the Risk of Loss on the Surety Bond Agreement

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Abstract

Surety Bond is a letter of guarantee issued by the insurance company and the guarantee company, in accordance with regulation of the President of the Republic of Indonesia number 16 of 2018 concerning the procurement of goods/services government. The alliance in the surety bond is the bearing on which the surety will pay the value of the loss to the obligee when there has been a loss and for that there has been claims. On the other hand, the principal with the indemnity letter will pay back to the surety a certain amount of loss that has been paid. Although Law No. 40 of 2014 on insurance and Law No. 1 of 2016 on guarantee to be the basis of surety bond law as a guarantee of procurement of goods/services, but in the two laws are not stipulated further on the implementation of Surety bond and settlement of claims in the surety bond itself. This research aims, first, to analyze the position of indemnity letter in overcoming the risk of loss on the surety and analyzing the role of notary in the creation of indemnity letter agreements. The method used is a normative legal research method using legislation approaches, conceptual approaches and analytical approaches. The result of this research is, the position of indemnity letter to overcome the risk of loss on the surety has an important role that is as a guarantee for the surety to get the compensation payment from principal together with Indemnitor. Secondly, the role of notary in the making of indemnity letter as an authentic deed with the aim that indemnity letter that has an important meaning for surety to get certainty of indemnity from principal, has binding legal force and provides legal protection for the parties to ensure the implementation of surety bond agreement in particular can protect the risks that may be experienced by the surety.

Keywords: *Indemnity Letter; Surety Bond; Risk Loss; Notary*

Introduction

Indonesia as one of the developing countries, is currently conduct the development of its country's infrastructure, either development in the economic field or development of facilities and infrastructure for the smooth governance system for the community.

The Government requires that the contracting company have been elected in the method of voting to submit a written guarantee letter. The provisions of the letter of guarantee are explained in the regulation of the President of the Republic of Indonesia No. 16 of 2018 concerning government procurement of goods/services, which reads¹:

"A guarantee letter hereinafter referred to as guarantee is a written guarantee issued by a commercial bank/insurance Company/insurer/special financial institution that conducts the business in the field of financing, guarantee, and insurance."

A written guarantee letter that can be used in the procurement of government goods and services issued by the insurance company and the guarantee company is surety bond. The definition of Surety bond is explained in the letter of attachment of the Indonesian General Insurance Association, which reads:²

"Surety bond or guarantee is written proof issued guarantee/Surety to guarantee a guaranteed/principal will carry out obligations on an achievement or interest to the recipient of the guarantee/Obligee according to the contract of assurance/principal and the recipient of the guarantee/obligee. In case of tort then guarantor/surety responsible for making the payment of disbursement guarantee to the recipient of guarantee/obligee and further guarantor/surety shall be entitled to claim the payment of guarantee disbursement to the guaranteed/principal."

Based on the article above is known that the surety bond is an agreement consisting of 3 (*three*) parties that are guarantors/surety, assured/principal and recipient of the guarantee/obligee. The surety bond is used as a protection against the guarantee as the owner of the project so as not to suffer losses caused by the negligence is made by the assured in carrying out its work.

The implementation of Surety bond guarantee will always follow the provisions of the implementation in the Procurement Agreement of goods/services as the agreement. The alliance in the Surety bond is a range or liability for the Guarantor (*hereinafter referred to as surety*) will pay a loss with cash to the obligee when it is clear that there is a loss and claim. On the other hand, the principal with the approval of indemnity to surety (*hereinafter called Indemnity Letter*) will pay back to surety i.e. the amount of loss paid by surety to Obligee.

The Indemnity Letter Agreement constitutes an additional agreement in the Surety bond agreement, which is made by a indemnitor along with the principal stating that it is willing to reimburse the value of the surety issued warranty after the claim raised by the obligee. Indemnity letter is used in hopes of minimizing the possibility of risk of loss that will be experienced by surety after surety make payments to claims submitted by obligee because of the presence of tort by the principal.

Although Law No. 40 of 2014 on insurance and Law No. 1 of 2016 concerning guarantee to be the legal basis in the implementation of surety bond as the guarantee of procurement of goods/services, but in these two laws are not stipulated further on the position of indemnity letter in the surety bond and the role of notary in the indemnity letter agreement in the bond agreement itself. This gives rise to the legal blurring in the arrangement and implementation of the surety bond guarantees as one of the products of the insurance company as well as the product of the guarantee institution.

¹ Indonesia, presidential regulation on the procurement of goods/Government services, Perpres No. 16 year 2018, article 1 number 19.

² Indonesia, appendix of Indonesian General Insurance Association letter, Letter of Decree No. 33/SK. AAUI/2016 Article 1 number (1).

Methodology

This method of research uses normative (doctrinal) legal research methods which are legal research using secondary data sources or data obtained through library materials.³ The approach used in this research is the of approach, conceptual approach (Conceptual approach), and analytical approach. The technique of collecting primary legal materials, secondary legal materials, and tertiary legal materials, i.e. using documentary studies. After all required legal materials have been collected it will be identified and classified according to the problems researched based on the relevant theories so that it can be withdrawn a conclusion by using deductive reasoning is the method of withdrawal of conclusions after describe common legal materials to specific legal materials with the aim of being able to obtain answers to existing legal issues about the Indemnity Letter's juridical state study in resolving the risk of loss on the Surety Bond agreement.

Discussion

Indemnity Letter's Position in Overcoming Surety Loss Risk After Making A Proposed Claim Payment

Presidential Regulation No. 4 of 2015 on the Fourth Amendment to regulation Number 54 of 2010 concerning the procurement of goods/services government, which oblige for the service provider who has been elected in the method of selection that has been held to submit a written guarantee letter issued by the Bank's financial institutions, non-bank financial institutions or guarantee agencies. In article 6 clause (2) Regulation of the Minister of Finance of the Republic of Indonesia No. 145/PMK. 05/2017 on the procedures of payment on the income and expenditure budget expense before goods/services accepted explained that:

The letter of guarantee as intended in article 5 letter A shall fulfill the following requirements:

- a. Using Bahasa Indonesia;
- b. Issued by guarantor who is domiciled or has an operational representative in Indonesia;
- c. The validity of the shortest letter of guarantee until the expiry of the work in accordance with the provisions of the contract;
- d. The period of submission of the claim by the recipient of the guarantee or its representative is at least 30 (*thirty*) calendar days after the expiration of the guarantee letter as referred to in paragraph C;
- e. The period of payment from the guarantor to the guarantee recipient (*the Obligee*) is at least 14 (*fourteen*) unconditionally working days after receipt of the claim from the recipient or its power;
- f. The value of the guarantee letter is least equal to the payment value to the provider of goods and services;
- g. The contents of the least collateral letter must contain:
 - 1) name and address of the guarantee receiver (Obligee);
 - 2) provider of designated services
 - 3) Guarantor rights;
 - 4) name of contract of employment package;
 - 5) The value of the letter of guarantee in numbers and letters;
 - 6) Obligations of the guarantor to disburse the letter promptly to the guarantee recipient (Obligee);
 - 7) Validity of the letter of guarantee;
 - 8) in the payment of the claim refers to article 1832 of the Civil Code of law with the exclusion of article 1831 of the Civil Code; Dan
 - 9) signature of guarantor;

³ Mukti Fajar dan Yulianto Achmad, *Dualisme Penelitian Hukum Normatif & Empiris*, Cet.2, Pustaka Pelajar, Yogyakarta, 2013, p. 154.

h. Contains easily thawed and unconditional clause (unconditional).

Further governed in article 30 of presidential Regulation number 16 year 2018 concerning the procurement of goods/Government services explained that:

1. The guarantee of procurement of goods/services consist of:
 - a. Guarantee of offer;
 - b. The guarantee of Sanggah Banding;
 - c. Performance assurance;
 - d. Advance payment guarantee;
 - e. Maintenance assurance;
2. Guarantee of offer as mentioned in clause (1) Letter A and guarantee of Sanggah Banding as intended in paragraph (1) B only for the procurement of construction work.
3. Warranties as intended in paragraph (1) may be bank guarantee or surety bond.
4. The form of guarantee as intended in paragraph (3) shall be:
 - a. Unconditional;
 - b. Easy to dilute; and
 - c. Must be disbursed by the guarantee issuer at least 14 (fourteen) working days after the disbursement letter from the election Pokja/PPK/party authorized by the elections/PPK is accepted.

The guarantee of the procurement issued by the insurance company and the guarantee company is a guarantee of procurement in the form of surety bond. In its implementation, the Government established a grant of permit to non-bank financial institutions to issue a guarantee in the form of surety bond as an alternative to the bank guarantee issued by the bank.⁴ The principles of guarantee in the surety bond have actually been known in the Civil Code. The Surety bond is an agreement between the principal and the Surety party, in this case the Surety party is a third party that is committed to guarantee payment in the event of a loss caused by a tort by the principal. This is in accordance with the understanding of the Civil Code that said⁵:

“The bearing is a covenant by which the third party, for the benefit of the receivable, cleave to meet the debt of the owe while the person itself does not fulfill it.”

Decree of the Minister of Finance Indonesia number KEP-362/KM. 10/2012 to be the legal basis of the insurance company's authority to issue surety bond as one of its business products. At the beginning, Presidential decree No. 14A of 1980 on the implementation of the State budget of income and expenditure only gave the authority to *PT Persero Asuransi Jasa Raharja* to issue an surety bond as one of its business products. However, in its development, the issuance license through the decree of the Minister of Finance (KMK RI) No: 761/KMK.. 013/1992 expanded to 20 insurance companies. Then based on letter of insurance director No. S. 2272/DK/2001 dated 16 May 2001 which is addressed to Pertamina, there are 22 insurance companies entitled to issue a surety bond.

The enactment of law number 1 of 2016 on guarantee to be the basis of surety bond implementation as one of product of guarantee company. Article 4 paragraph (2) of Law of 1 of 2016 of Guarantee stated that:

⁴ Samsul Ramli, “*Bacaan Wajib Mengatasi Aneka Masalah Teknis Pengadaan Barang/Jasa Pemerintah*”, First printed, Transmedia Pustaka, South Jakarta, 2014, p. 9.

⁵ Indonesia, the Civil Code of Law, article 1820.

"In addition to the business guarantee as intended in paragraph (1) the guarantee company can do:

- a. Guarantee on the Treasury;
- b. Guarantee of purchase of goods in installments;
- c. Trade transaction guarantee;
- d. Guarantee procurement of goods and/or services (surety bond);
- e. Guarantee bank guarantees (counter bank guarantees);
- f. Guarantee of credit letter in domestic documents;
- g. Guarantee letter of credit;
- h. Customs guarantee (custom bond);
- i. Tax guarantee;
- j. Provision of management consulting services related to the business guarantee activities; Dan
- k. Other business activities after receiving approval from the Financial Services Authority."

Surety bond is a guarantee used as guarantee that can be suffered by obligee in the implementation of the Procurement Agreement of goods and services. Surety bond guarantees are used to minimize the likelihood of legal liability risk. Mistakes are made by a principal either intentionally or unintentionally create a default in the procurement agreements of goods and services that are carried out between principal and Obligee, where the tort raises the loss for the obligee that will give birth to the obligation for the surety to disbursements the value of the guarantee. Therefore, surety bond is used to make the payment back to the obligee for the losses incurred by the default.

Compensation in the implementation of insurance is a destination. A compensation agreement in the surety bond is known as Indemnity letter. The agreement of indemnification or indemnity letter to surety is an agreement that contains that the partner/principal is able to repay the entire payment that has been issued by the surety relating to the claim of indemnity or claim of obligee against a loss resulting from failure or negligence or a principal tort in carrying out its obligations that have been secured by the surety bond.

The agreement of indemnification to the surety constitutes an agreement that contains that the principal is able to re-pay the entire payment that has been issued by the surety in connection with the claim for indemnity of Obligee. The agreement to compensate the surety required is also an additional guarantor called the Indemnitor (Reguarantor). Indemnitor is a party that bind themselves together with the principal to compensate the surety.

Payment of damages is made by the principal to the surety should have a balance with the cost of claims that have been disbursed by surety for Obligee. It aims to prevent the surety party from taking an excess advantage in submitting the value of compensation to the principal. In addition, the indemnification agreement is done by surety and principal with the aim to provide protection and legal certainty for the surety party to avoid loss after the disbursement of guarantee filed by Obligee.

In addition to the implementation of bank guarantees (*guarantees of procurement of goods and services issued by the banking institutions*) that require the principal to deliver the collateral to the bank, which will be used by the bank as a guarantee if the principal does not perform its obligations in the payment of damages to the bank for the disbursement of claims bank guarantee that is made by the bank. In the Surety bond agreement, principal has no obligation to deliver the collateral. Therefore surety parties need a Indemnity letter that will provide a sense of security to the surety that the principal will continue to pay the compensation if the surety has diluted the value of the Surety bond guarantee.

The use of Indemnity letter in the surety bond is not set in either the OJK (*Financial Service Authority*) Regulation, the Guarantee law, as well as in the attachment of the Indonesian General Insurance Association Decision Letter as the basis for the surety bond implementation. Nevertheless, the

indemnity letter is an acknowledged agreement and has an important role for the surety to be able to enforce the principle of subrogation. The implementation of indemnity letter in surety Bond refers to the indemnity principle that is done in the insurance agreement with the provisions do not contradict the rules underlying the implementation of the surety bond as a product of guarantee and as a product of insurance, as well as the procurement agreements of goods and services as the principal agreement of the surety bond agreement. In addition indemnity letter as a treaty must also not contradict the rules governing the agreement.

The indemnity letter position as a guarantee for the surety to avoid loss should be formulated precisely and clearly for all parties that have been in it, to prevent misunderstanding or misinterpretation related to the contents of the agreement contained in the indemnity letter. Indemnity Letter is a binding agreements to the surety and principal parties together with *Indemnitor* must be made and planned for certainty as it relates directly to the risks that can occur in the surety bond agreement. Regarding the guarantee or accountability of the principal party or the way of harm to the principal party together with *Indemnitor* should be explained clearly in the indemnity letter.

The Role of Notary in the Making of Indemnity Letter on Surety Bond Guarantee

Notary as a position that executes some of the duties of the State in the field of civil law with the authority to make authentic deeds that are requested by the parties to notary. Notary compulsory to be professional (*professional in mind and action*) in carrying out the duties of the tenure, in accordance with the standard of Office stipulated in the Notary Tenure Law (*hereinafter referred to as UUJN*), namely to provide the best service to the community.

*"Notary is a general official authorized to make an authentic deed and have other powers as provided for in this law or under other laws."*⁶

The notary is constructed as general officers. General officers are the ones who do the work or duty to serve the interests of the community as a whole. Philosophy from the appointment of notary as a general officer, namely to provide protection and assurance to achieve legal certainty. Legal protection is an effort to provide a sense of security to a notary public so that they can perform its competence properly and the deed which is made can be used by the parties.⁷

The general officer referred to above can mean that the notary public is not a civil servant according to the laws or regulations of the government personnel. Although the notary public is lifted and dismissed by the government, the notary does not accept government salaries or government pension money. In response to his notary work entitled to receive honorarium from his clients.

In article 1868 the Civil Criminal Code is explained that:

"An authentic deed is a deed made in the form prescribed by the law made by or before the general officers in power for it, where the deed was created."

It is further explained that⁸:

"It can be said that the deed when signed, must be made intentionally and must be used by the person for whom the letter was made."

⁶ Indonesia, Law number 2 of 2014 on changes in law No. 30 of 2004 on notary Department, UUJN article 1 paragraph (1).

⁷ Salim HS., "*Peraturan Jabatan Notaris*", First printed, Sinar Grafika, Jakarta Timur, 2018, p.16.

⁸ Indonesia, Book of Civil Law, Civil Criminal Code article 1868.

The authentic deed is a deed made by or before the notary. However, even if the notary has authority in the making of the deed, in implementing its authority, the notary has the exception of:

“Notary is not authorized to make notarial deed for family, children, wives and others who are outside the area of authority.”

The insurance agreement aims to compensate the losses suffered by the insured, caused by certain things as specified in the policy. In the making of insurance policy in general does not involve a notary, but in the surety bond agreement that the position of surety has a greater responsibility in fulfilling the claim will usually involve a notary in the making of the agreement. The Surety bond agreement which does not require the principal to submit the existence of collateral is an important consideration for surety to bind the principal in a notarial deed.

As explained earlier that notary is one of the officials who have authority in the making of authentic deed. The Indemnity letter is made by the surety is a treaty that is registered or known by a notary-appointed principal in the principal and surety jurisdiction. Thus, after the treaty indemnification to the surety has been signed by the surety, principal, and Indemnitor above stamp then legalized by notary.⁹

Indemnity letter is made by notarial deed in order to avoid disputes. Because one of the disputes in the Surety bond agreement usually arises in the implementation of the Indemnity agreement. In this agreement the principal party together with Indemnitor bind themselves to reimburse all who are paid by the company surety to Obligee and keep the surety not facing losses because it guarantees the principal¹⁰. In the sense that the indemnity agreement is intended to ensure that the surety party can continue to enforce the principle of subrogation on the principal of a disbursement of collateral value.

The strength of binding Indemnity letter which is made by notary will close the possibility for the indemnitors and principals to avoid its obligations in making compensation to the surety, so that it will give more assurance and legal certainty for the surety party will not suffer losses after payment of claims, considering that the Surety bond agreement is made without any collateral submitted to the surety principal. Indemnity letter also becomes the basis for the surety in resolving the dispute that may arise later in the day relating to the subrogation conducted by the surety, both the settlement of disputes through court lines and the settlement of disputes outside the courts.

In general, surety Bond is made without the requirement of submission of collateral by the principal. However, in the implementation, for the value of guarantee that is considered large and for the principal who first participated in the goods or services procurement project or the first time made the surety bond agreement will be required to submit a guarantee. This is because there is a sense of lack of trust that the surety parties to the ability of the principal party to compensate if the claim from the obligee party.

If there is any collateral submitted by the principal to the surety, the provisions of the goods shall remain in the indemnity letter. It must be definitely explained the position of the collateral submitted by the principal, whether to be used to cover all costs of damages to the surety. Whether with such collateral, the principal will no longer require the presence of indemnitor parties to jointly responsible for compensation to the surety. And if it turns out that the value of collateral goods is less to pay the cost of the indemnity fee, then decide the action what will be done by the principal and the surety party. All of

⁹ Djumaldji, *“Hukum Bangunan Dasar-dasar Hukum Dalam Proyek dan Sumber Daya Manusia”*, first printed, PT Rineka Cipta, Jakarta, 1996, p. 154.

¹⁰ Emmy Pangaribuan Simanjuntak, *“Seri Hukum Dagang : Bentuk Jaminan (Surety-Bond, Fidelity-Bond) dan Pertanggungjawaban Kejahatan (Crime Insurance)”*, first printed, Liberty, Yogyakarta, 1986, p. 29.

these things should be clearly and distinctly stated in the indemnity letter to avoid any problems later on. This is where a notarized role is needed to create an indemnity letter to ensure that all matters are made in the indemnity letter and all parties attached therein can be requested in response to what it is desired in the agreement, and can be proved legally.

Conclusion

The position of Indemnity letter in overcoming the risk of loss on the payment of claims is conducted by the surety on the application of the obligee as a guarantee for the surety to obtain an indemnity payment by principal. Surety Bond as an agreement that does not require the principal to submit an item of assurance in the making of the Surety Bond agreement, relies heavily on the existence of indemnity letter in order to avoid losses that can occur in the payment of claims. The implementation of indemnity letter is based on the principle of indemnity in the insurance agreement, which means there must be a balance between the damages paid by the insurer to the losses suffered by the insured. The agreement to compensate the surety required is also an additional guarantor called the Indemnitor (Reguarantor). Indemnitor is a party that bind themselves together with the principal to compensate the surety. The agreement of indemnification or indemnity letter to surety is an agreement that contains that the partner/principal and Indemnitor jointly re-paid the entire payment that has been issued by the surety in relation to the claim for damages or claims of obligee against a loss resulting from failure or negligence or a principal tort in carrying out its obligations that have been secured by surety bond.

The role of notary in the making of the Surety Bond Agreement is in the making of indemnity letter as an authentic deed with the aim that indemnity letter has significance for the surety to get certainty of indemnity from the principal, have binding legal force and provide legal protection for the parties to ensure the implementation of the Surety bond agreement in particular can protect the risks In accordance with article 1 paragraph (1) of Law No. 2 of 2014 on changes in law number 30 of 2004 concerning notary department, notary is a general officer authorized by the law to make an authentic deed can provide assurance to the parties that what is written in the notarial deed is true and based on the requests of the parties themselves. The deed is made by or before the notary shall be in accordance with the stipulated form and the procedure in accordance with the law to be valid as an authentic deed. Indemnity letter made in the form of authentic deed will have the perfect force of proof of law, so that the Indemnity letter can be used by the surety as the basis of dispute resolution that can arise in the day relating to the process of principal Indemnity to surety, both the settlement of disputes through court and out of court, and for Indemnity letter to have the legal force binding on the parties to fulfill the contents of the agreement so as to guarantee the implementation of the Surety bond agreement which can provide legal protection for the parties involved in the agreement and in particular can protect the risks that the surety can suffer.

Suggestion

The government needs to make a special rule about surety bond. Surety bond as a guarantee agreement that relies on indemnity letter agreements as a protection for Surety to be able to avoid risk of loss that can be sustained after the payment of claims submitted by Obligee, has no rules that specifically govern the implementation of Surety Bond as a guarantee agreement and regulate the implementation of indemnity letter in the Surety bond.

The government needs to strictly regulate the creation of indemnity letters in notaries as a general official authorized in the creation of authentic deeds, to provide assurance and legal protection to the surety to be able to continue recovering from the principal of the payment of claims made by the surety.

References

- Djumialdji, F.X. (1996). "Hukum Bangunan Dasar-dasar Hukum Dalam Proyek dan Sumber Daya Manusia", Cetakan Pertama, PT Rineka Cipta, Jakarta.
- Emmy Pangaribuan Simanjuntak. (1986). "Seri Hukum Dagang : Bentuk Jaminan (Surety-Bond, Fidelity-Bond) dan Pertanggungjawaban Kejahatan (Crime Insurance)," Cetakan Pertama, Liberty, Yogyakarta.
- Mukti Fajar dan Yulianto Achmad. (2013). "Dualisme Penelitian Hukum Nomatif dan Empiris", Cet ke 2, Pustaka Pelajar, Yogyakarta.
- Munir Fuady. (2002). "Hukum Bisnis Dalam Teori Dan Praktek: Buku keempat", Cetakan Kedua, PT. Citra Aditya Bakti, Bandung.
- Salim H.S. (2018). "Peraturan Jabatan Notaris", Cetakan Pertama, Sinar Grafika, Jakarta Timur.
- Samsul Ramli. (2014). "Bacaan Wajib Mengatasi Aneka Masalah Teknis Pengadaan Barang/Jasa Pemerintah", Cetakan Pertama, Transmedia Pustaka, Jakarta Selatan..
- Indonesia, The book of Civil Code.
- Indonesia, Law No. 2 of 2014 on the change of law number 30 year 2004 on the Department of notary. State Gazette of the Republic of Indonesia Number 3 year 2014. Additional State Gazette of the Republic of Indonesia number 5491.
- Indonesia, Law No. 40 f2014 on insurance. State Gazette of the Republic of Indonesia number 337 year 2014. Additional State Gazette of the Republic of Indonesia number 5618.
- Indonesia, Law number 1 year 2016 on guarantee. State Gazette of the Republic of Indonesia number 9 year 2016. Additional State Gazette of the Republic of Indonesia number 5835.
- Indonesia, Presidential Regulation No. 16 of 2018 concerning the procurement of goods/services of government. State Gazette of the Republic of Indonesia number 33 year 2018.
- Appendix of Indonesian General Insurance Association letter, Letter of Decree No. 33/SK. AAUI/2016 on standard Surety Bond Indonesia terms and conditions for the procurement of construction goods and services.

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