



A Normative Review of The Position of Creditors in Syndication Credit Agreements without A Facility Agent

Retno Catur Kusuma Dewi¹; Khoirul Anwar²

¹ Faculty of Law, Merdeka University, Madiun, Indonesia

² Faculty of Law, Pawyatan Daha University, Kediri, Indonesia

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Abstract

The specificity of syndicated credit compared to ordinary credit is that there are several banks acting as creditors (syndication participants), there is an agent role, and there is only one debtor, and all parties are bound by one main document, namely the syndicated credit agreement. One of the characteristics of syndicated credit is the involvement of a facility agent in the syndicated credit agreement, based, among other things, on the agreement to be the only party who can collect payments and distribute creditor payments. Probematics arise when facility agents do not carry out their obligations and responsibilities properly. The aim of this research is to analyze the legal position and legal remedies of creditors participating in syndicated credit against debtors who are in default. This research was conducted descriptively and analytically using a normative-legal approach. The importance of regulating syndicated credit agreements will have a positive impact on increasing legal certainty and investor confidence in investing in national strategic projects. The agent is also the creditor in the syndicated credit; if the debtor defaults, then the agent is also responsible. The responsibility of the syndicated credit agent outside the syndicated credit participant is only as a liaison between creditors and debtors. The agent's role is limited in accordance with what is written in the agreed-upon agreement document.

Keywords: *Default; Facility Agent; Syndicated Credit*

Introduction

Receivables in syndicated credit are generally transferable (transferable loan facility), as regulated in the syndicated credit agreement. The transfer of receivables in Indonesia is carried out using the cessie method, which determines that the transfer of receivables from old creditors (cessus) to new creditors (cessionaries) is legal if it is done through an authentic or private deed, and only becomes binding on the debtor after being notified to him. (Chandra, 2020). People who use syndicated credit are provided by more than one bank, and syndicated credit involves several banks in the process until the syndicated credit is agreed upon. In syndicated credit, there are several steps that require special attention. Moreover, this concerns relationships with prospective banks participating in the syndication.

Relationships between banks are reached on a common ground that satisfies all banks so as not to cause inconvenience to all potential syndicated credit participants.

Syndicated credit is carried out in an effort to get around the provisions regarding MLL (maximum lending limit). When a project requires very large funds, such as the construction of a toll road or other megaproject, it is impossible for only one bank to provide the funding. Syndicated credit is a way for projects with large funding requirements to run, and on the other hand, banks do not violate applicable MLL provisions (Kharis Umardani, 2017). In syndicated credit, all administrative matters will be handled by the arranger, so the customer only needs to provide the data needed for syndication purposes. After the role of the arranger or management group led by the lead manager ends, when the syndicated credit agreement is signed, the role is handed over to the agent. This agent can be another independent bank, namely a bank that is not a member of the syndicate or a credit provider, or also one of the banks that is part of the syndicated credit participants. Agents on syndicated loans are responsible for syndicated administration issues during the loan period. The agent's role begins when the loan documents are signed (Kusumaningtuti et al., 2008). Syndication participants consider the agent's role to be important.

In a syndicated credit agreement, there is one special characteristic that is different from other agreements, namely the involvement of a third party other than the debtor and creditor themselves, namely the agent. The existence of an agent arises and is regulated when the syndicated credit agreement is signed, especially after the credit is disbursed. The definition of an agent in this case can be equated with that of a facility agent and/or collateral agent whose position and role are similar. The existence or position of the agent is not explained in the rules above but is only mentioned, for example, in the Financial Services Authority Circular Letter Number 27/SEOJK.03/2016 concerning Commercial Bank Business Activities Based on Core Capital, which states the provision of credit by a group of banks to one (one) debtors whose credit amounts are too large to be provided by just one (one) bank. In a syndicated credit agreement, the bank can act, among other things, as an arranger, underwriter, agent, or participant.

The agents that will be discussed next have important positions, roles, and responsibilities. One of his roles is to act as a proxy or representative for creditors to carry out legal actions or relationships with debtors, such as administrative processes, signing documents, liaising, and providing input to loan and credit providers. Another important responsibility is carrying out actions to fulfill the debtor's achievements, such as collecting loan principal and interest, disbursing installments and interest, charging fees, transferring receivables, managing the burden and execution of debtor guarantees, supervising the debtor's project or business, and distributing information and documents to related parties (Djaman, 2016).

With a high level of trust from the banks participating in the syndication, it will be a problem in itself if the credit has been approved, signed, and handed over to the debtor, but along the way the debtor defaults or the credit is not repaid. Legal problems arise when facility agents do not carry out their obligations, functions, and responsibilities properly. The creditor's interests, in this case, receiving installments and interest, are harmed. The execution of credit guarantees as a form of credit security is also hampered because the authority can only be exercised by the facility agent. The creditor's legal efforts to take action to fulfill the debtor's obligations, such as filing a lawsuit for default or bankruptcy against the debtor, will be hampered considering the creditor's limited authority, and these authorities have been delegated to agents, such as filing bills, executing guarantees, and/or filing lawsuits (Angraeni & Nasution, 2019). Based on these problems, syndicated creditors are in a difficult position. First, by default, the debtor has harmed the creditor because the loan given was not a small nominal amount (returning to the purpose of providing syndicated credit). Second, efforts to fulfill achievements (execution of guarantees or lawsuits) cannot be carried out if the facility agent does not carry out his functions and obligations properly.

Research Metode

This research is normative juridical research. Normative legal research is a scientific research procedure to discover the truth based on scientific logic from the normative side (Marzuki, 2008). Norms are not only defined as positive law, namely rules made by politicians in a higher position (Efendi & Ibrahim, 2018). The normative side here is not limited to statutory regulations only. Legal research is normative research, but it does not only research positivist law. Based on this opinion, legal research seeks to find the suitability of legal rules in accordance with legal norms, which contain sanctions and obligations under legal principles, and whether a person's actions are in accordance with legal norms or legal principles. The research approach used is normative juridical with a statutory approach and a conceptual approach, namely, a problem approach seen from a legal aspect, which is then used to explore information and legal materials to analyze the research objectives.

Result and Discussion

The syndication was formed because it was managed by institutions, which are generally banks, called arrangers. These banks usually become members or participants of the syndication after the syndication is formed. In the process of establishing syndicated credit, the central function lies with the lead manager. The agent is the proxy of the bank of the syndicate participants. Agent who will transfer all funds from creditors to debtors on the basis of a syndicated credit agreement. The duties of the arrangers or bidding group end after the syndicated credit agreement and binding agreement are signed. The bank agent (agent bank) will play a role later, after the agreement is completed. The role of arrangers is completely taken over by bank agents. If the lead manager is a commercial bank, or if there are several lead managers, then one of the lead managers who is a commercial bank is also appointed as an agent. Sometimes the agent is another independent bank or a bank that is not a member of the syndicate or a creditor.

The role of agent is usually given as a form of appreciation to the largest credit provider or arranger in the syndicated credit process. The agent's role is to coordinate every payment, billing, negotiation, and other administration of the loan. The agent acts as a representative of the parties participating in the syndication or as an attorney for the parties (banks). The difference between an arranger and a bank agent is that the arranger's duties last until before the signing of the syndicated credit agreement (forming the syndication), while the agent's duties operate and manage the administration of the use of syndicated credit after signing the agreement. The main function of a facility agent is to administer loans and pay both loan interest and other costs. The facility agent must also ensure that all the conditions in the condition precedent clause have been fulfilled by the debtor. In the loan agreement, the duties of the facility agent must be described in detail. Facility agents are also tasked with monitoring the debtor's financial condition (Astuty et al., 2010).

Indonesia itself has not regulated agent institutions in detail, such as the rights and obligations of agents. The closest is the concept of power of attorney, so that agents in Indonesia, based on a power of attorney, carry out creditor rights. Because it is based on the power of attorney, the agreement must clearly regulate the role, rights, and obligations of the agent, including the termination or change of agent. J. Satrio also has the same opinion that agent institutions are not recognized in Indonesian law, whereas in Anglo-Saxon countries, agent institutions themselves are regulated regarding their rights, obligations, and responsibilities, so that the agent's authority depends on the agreement made between the syndicate participants and the agent (Harmain, 2015).

The agent does not represent the debtor but represents the parties in the syndicated credit (participants and banks) and is responsible for carrying out the administration of credit use during the agreed period. One thing that helps a lot if the agent is a bank is also the bank's documentation, because in the next role, using that documentation, they are tasked with managing the administration of the loan. The

role of the agent is considered important for syndication participants. Debtors in syndicated loans only have direct contact with agents, where agents are representatives of the syndicated participating banks. Syndicate-participating banks have the same interests. Based on these interests, they formed a syndication. In this syndication, there is only one vote; it can also be said that one syndication is one vote. Paying attention to the important role of the facility agent, negligence on the part of the facility agent will worsen the losses of the creditors of the syndicate participants. Creditors themselves cannot collect directly from debtors because the authority to collect lies with the facility agent, as stipulated in the agreement. Each creditor does not have and is not permitted to enter into legal relations or be able to take direct legal action. Debtors themselves are prohibited from making direct payments to creditors (Susilowati & Mulyani, 2022).

Because these provisions are regulated in the syndicated credit agreement, the creditor's first legal remedy is a preventive measure by regulating the authority and rights of the facility agent in the syndicated credit agreement, further regarding the process of dismissing the facility agent when the agent is not functioning properly. The clauses in the Syndicated Credit Agreement can be regulated as follows (Sriwati & Setiawan, 2023):

1. (Name of Facility Agent) has the right to resign as Facility Agent by sending a notification letter to each Lender at least 30 (thirty) days prior to the date of such resignation, provided that such resignation must be carried out in good faith;
2. The majority of lenders also have the right to dismiss (name of facility agent) as a facility agent with written notification at least 30 (thirty) days prior to the date of such dismissal;
3. The provisions contained in this agreement will continue to apply to actions that have been taken or not taken by the facility agent (who has resigned) or been dismissed;
4. The facility agent who resigns is obliged to submit to the facility agent the original replacement documents kept by the facility agent in connection with the implementation of his or her duties under this credit agreement;
5. The replacement facility agent is bound by all obligations and has the rights, powers, and authority possessed by the facility agent based on the credit agreement, and all terms and positions of the facility agent in the credit agreement are hereinafter defined as the replacement facility agent as the replacement facility agent is a party to the credit agreement.

Sutan Remy Sjahdeini explained that this clause is called the removal clause. This clause needs to be regulated strictly so that the aim is to give creditors or syndicated participants the authority to withdraw power of attorney and dismiss the agent without the agent's approval, either for certain reasons such as not carrying out obligations or committing acts prohibited by the agreement to the detriment of the creditors. The reason for dismissal of a facility agent does not need to be regulated because, basically, the authority of the facility agent is based on the power given by the creditors to the facility agent so that it can be revoked at any time if the facility agent does not carry out its obligations and responsibilities. The contents of the agreement further strictly regulate the circumstances or conditions that must be discussed and agreed to by all creditors or actions that can be decided by a majority of creditors. There are two types of majority decisions, namely an ordinary majority (<50%) or an absolute majority (66% or 2/3). Through this mechanism, facility agents who do not carry out their functions properly can be immediately dismissed in the interests of the creditors participating in the syndicated credit. This clause has problems when the majority of members do not agree to the termination, causing harm to minority creditors.

Legal protection can be classified into two categories: preventive (preventing losses) and repressive (dealing with disputes if a dispute occurs). Preventive legal protection can be provided through agreement clauses that contain prohibitions on action or tough conditions, for example, the requirement to obtain the approval of agents and other syndicate participants in the transfer of receivables.

Apart from preventive efforts by means of regulations in the syndicated credit agreement above, another effort that can be taken is through a lawsuit for dismissal of the facility agent as well as a lawsuit for default against the debtor based on Articles 1266 and 1267 of the Civil Code. The Supreme Court, through its decision (MA Decision Number 1116K/Pdt/2015 in conjunction with MA Decision Number 145 PK/Pdt/2017 and Supreme Court Decision Number 1300 K/Pdt/2013), has several times granted the dismissal of the facility agent so that creditors can sue and collect without going through the agent. Facility. One of the considerations in the Supreme Court Decision Number 1116K/Pdt/2015 in conjunction with the Supreme Court Decision Number 145 PK/Pdt/2017 is that Defendant IV (as Facility Agent and Guarantee Agent) did not carry out his obligations based on the agreement, so that his appointment as Facility Agent and Guarantee Agent was cancelled. By canceling the appointment, the plaintiff and other creditors can make claims against the debtor without going through Defendant IV.

This decision has the impact of paying off one of the creditors, so on the other hand, it also raises legal issues, especially regarding the pro rata sharing clause. The Syndicated Credit Agreement is basically still valid for the syndicated participants. The Syndicated Credit Agreement always explains the most basic principle of syndicated credit, namely equal status for syndicated members so that no one gets repayment first. This principle can be regulated through an agreement clause called the Sharing Clause (A.A. Sagung Wira Chantieka & Ibrahim R, 2018). Based on this clause, repayment from the debtor to one of the creditors through a lawsuit basically still has to be divided equally among the creditors participating in the syndicate. However, this is another issue because at least the problem regarding syndicated credit participating creditors' efforts to fulfill debtors who are in default without going through a facility agent has been resolved.

Conclusion

In the credit agreement, it is clearly stipulated that in what matters, the agent is permitted to make decisions or carry out actions without consulting or obtaining approval from the syndicate members, and in what matters, the agent must first obtain instructions or approval from the majority of the syndicate participants. The agent has no responsibility for the completion of credit documentation because each party must ensure for themselves that the completion of the credit documentation is as desired. The agent's responsibilities in syndicated credit are divided into two categories: agents who are also syndicated participants as creditors and agents outside of syndicated credit participants. The agent is also part of the credit provider (creditor) in syndicated credit; if the debtor defaults, then the agent is also responsible. The responsibility of syndicated credit agents outside of syndicated credit participants, who do not participate in providing credit (not as creditors), is only as a liaison between creditors and debtors. The agent's role is limited as written in the agreement document and agreed upon by all parties involved in the syndicated credit. Legal certainty is directly proportional to increasing investor confidence in investment efforts, especially in providing loans or credit for national strategic projects that require large financing. Therefore, it is necessary to establish Bank Indonesia regulations to regulate guidelines regarding the form and content of the parties' syndication agreement, which clearly regulates the obligations, rights, authority, and roles of the agents.

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