



## THE EXISTENCE OF BUYBACK GUARANTEE IN INDONESIAN SECURITY LAW RELATED TO HOUSE PURCHASE FROM DEVELOPER WITH KPR FACILITY

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### ABSTRACT

Buyback Guarantee is generally used in banking practice, but its regulation in Indonesian positive law is still limited. Buyback Guarantee is basically a guarantee given by the developer to the buyer or bank, which ensures the repurchase of the property in the event of inability or failure in the sale and purchase process. In the context of guarantee law, Buyback Guarantee reflects the application of the principle of freedom of contract and the principle of prudence (prudential banking), which aims to provide protection and legal certainty for banks and consumers. However, the Buyback Guarantee agreement is not explicitly regulated in the Civil Code (KUHPerdata), so its existence in Indonesian guarantee law still poses challenges in terms of its application and regulation.

**Keywords: Buyback Guarantee, Guarantee Law, KPR**

### INTRODUCTION

The high interest of the community in owning decent and affordable housing, thus fostering the People's Housing Credit (KPR) business. The rapid growth of KPR-based housing (People's Housing Credit) is due to subsidies from the government so that the community has minimal convenience in terms of price. So the public's interest in this housing is very large. The availability of various types is also a special attraction for the community. Another attraction is the availability of various installment tenors from 5 years to 15 years which helps make it easier for the community to make payments.

KPR or Home Ownership Credit is one type of credit service provided by the Bank to customers who apply for special credit to meet the needs of building a house or repairing a house. The developer works together with the bank to make it easier for the community to get a house, namely with a home ownership credit (KPR). Banks have a very important role in upholding the people's economy, because through the bank, units that have excess capital can be distributed to the community through credit loans. Here there is a mutual symbiosis between creditors and debtors. KPR is a credit used to buy or for other consumptive needs with collateral in the form of a house. Although the use is the same, KPR is different from construction and renovation credit. The collateral required for KPR is the house to be purchased itself for KPR Purchase. While KPR Multipurpose or KPR Refinancing which becomes the Collateral is the House that is already owned.

The Indonesian government has established regulations that provide convenience for the Indonesian people, especially for low-income people in owning a house through the Housing Financing Liquidity program regulated in Article 1 Number 10 of the Regulation of the Minister of Public Works and Public Housing Number 21/Prt/M/2016 concerning

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Convenience and/or Assistance in Acquiring a House for Low-Income People. KPR is one of the facilities that can help facilitate the Indonesian people in buying a house with the assistance of funds from banks.

In addition to government regulations regarding assistance in acquiring a house for the community in the form of credit, regulations regarding KPR are also found in banking financial institutions that are shown to debtor customers or through developer intermediaries. KPR for developers has a very important meaning in helping to ease the cost of buying a house for developer consumers. The existence of this mortgage is based on a mortgage agreement between the bank and the debtor customer made through a developer intermediary.

One of the risk mitigation instruments that are often used by banks in providing mortgage facilities is the Guarantee Agreement. The Guarantee Agreement referred to here is an agreement that requires the guarantor (individual or legal entity) to buy back the object/object of collateral that has previously been agreed upon in the guarantee binding agreement between the debtor and creditor, if in the future the debtor defaults on the promise to make installment payments or debt repayment at the specified time, then the guarantor is required to buy back the collateral from the creditor, without any conditions whatsoever. This agreement is commonly known as the Buy Back Guarantee Agreement or Guarantee Agreement to buy back. This agreement is not only contained in the Cooperation Agreement clause between the bank and the developer, but ideally also stated in a deed in the form of a Buy Back Guarantee Agreement or a guarantee deed to buy back the object/object of collateral by the guarantor/underwriter. The guarantor/developer in this case is not as the guarantor of the debtor's debt, but as the guarantor to buy back the debtor's collateral in the event of default. The Buy Back Guarantee agreement by the developer in the KPR facility is usually valid until the Deed of Sale and Purchase (AJB) is signed and/or the Mortgage Certificate (SHT) is issued.

Based on the explanation above, the author is interested in discussing the Existence of Buyback Guarantee in Indonesian Guarantee Law Related to the Purchase of a House from a Developer with a KPR Facility.

**Problem Formulation**

1. How is the existence and regulation of the Buyback Guarantee in the purchase of a house from a Developer with a KPR facility?
2. How is the legal certainty of the Buyback Guarantee in Indonesian guarantee law related to the purchase of a house with a KPR facility?

Existence and regulation of the Buyback Guarantee in the purchase of a house from a Developer with a KPR facility. Almost all cooperation agreements for the provision of home ownership credit facilities between developers and banks always regulate or promise a buyback guarantee. Buy back guarantee is held to regulate if:

1. The debtor is unable to continue paying the home ownership credit installments until the debtor experiences a bad credit based on the credit agreement or debt



acknowledgement that has been signed by the debtor with the bank/creditor, associated with the fact that the bank has not received the house certificate in the name of the consumer from the developer and the certificate has not/cannot be attached with a mortgage.

2. The developer is unable to hand over or is late in handing over the house (in this case the developer has defaulted) to the consumer or does something that is not in accordance with what has been agreed in the house sale and purchase agreement.

Provisions regarding buy back guarantees specifically have not been regulated in laws and regulations in Indonesia. In contrast to guarantees such as mortgage rights, fiduciary, pawn, which are regulated by law so that in their implementation they are carried out with authentic deeds, either before a Notary or a Land Deed Making Officer (PPAT), such as in the granting of mortgage rights which must be based on a Deed of Granting of Mortgage Rights (APHT) made by a PPAT, or a fiduciary deed which must be made by a notary, so that these guarantee deeds have a firm basis and executorial legal force and provide legal consequences for banking institutions if there is a default because there are clear statutory regulations.

Meanwhile, the buy back guarantee is carried out between the bank and the developer in the condition of the land/house not yet certified and the Deed of Sale and Purchase (AJB) and Deed of Granting of Mortgage Rights (APHT) and Mortgage Rights certificate have not been carried out, so the buy back guarantee is made on the basis of an agreement. The Law of Agreement is one of the legal instruments in the Civil Code (KUHPerdara) which is used in carrying out business activities. Sudikno Mertokusumo explained that an agreement is a legal relationship between two or more parties based on an agreement from the parties so that it gives rise to legal consequences.

In the buy back guarantee agreement there is an element of legal obligation that not only protects the interests of the seller and buyer but also the interests of the creditor, so that this buy back guarantee agreement has legal consequences for all parties, namely between the third party and the creditor and for the debtor. Therefore, the buy back guarantee is classified into a guarantee agreement, namely a guarantee that is individual in nature and gives rise to a direct relationship with a certain person and can only be maintained against a certain debtor.

Buy back guarantee is currently widely used in providing Home Ownership Credit (KPR) facilities, none other than because of the many housing development projects financed by banks but still in the process of being built by developers. For example, in the case of a condition where a house certificate has not been registered in the name of the developer, which means it is still in the process of being processed at the land office, so that the signing of the sale and purchase deed in the name of the buyer cannot be carried out, even though the house or house building will be pledged to the bank. So in a situation like this, the bank can still accept the guarantee even though the nature of the guarantee binding cannot be carried out perfectly, namely by charging the collateral object using a mortgage. Thus, the buy back guarantee here is needed as an effort to protect the interests of creditors/banks and is a form of bond between the bank and the developer.

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The buyback guarantee agreement in the buyback guarantee is not regulated in the Civil Code, but is only a common practice between banks and developers. In the Contract Law discussed in the Civil Code, every business actor can make an agreement freely and based on their needs as long as it does not conflict with the provisions of the law. The freedom to make the agreement is stated in Article 1338 paragraph (1) of the Civil Code which states that "all valid agreements apply as laws for those who make them". Based on the provisions of the article above, it can be interpreted that the parties can make an agreement freely and it applies and binds as a law for the parties.

Legal certainty of Buyback Guarantee in Indonesian guarantee law related to the purchase of a house with KPR facilities

In the Civil Code (KUHPperdata), there are no rules that explicitly regulate the buyback guarantee. The emergence of this guarantee is influenced by the open nature of the law of obligations regulated in Book III of the Civil Code. In the context of the practice of guarantee law in banking institutions, the buyback guarantee is a consequence of the principle of freedom of contract and the principle of prudential banking. The application of prudent banking principles in all banking activities is one way to keep banks healthy, by applying the principles of guarantee law. Legally, several forms of guarantees have been made that are strengthened by Notaries / PPAT, which provide certainty and executorial legal force if the debtor violates the contract. Therefore, this guarantee is classified as a new concept in the practice of guarantee law. This causes a lack of literature references that specifically review buyback guarantees, so that defining it in depth causes difficulties. In the Civil Code (KUHPperdata), there are no provisions that specifically regulate buyback guarantees. The existence of this guarantee is influenced by the open nature of the contract law and is regulated in Book III of the Civil Code. In the practice of guarantee law in the banking sector, buyback guarantees arise as a result of the application of the principle of freedom of contract and the principle of prudence in banking (prudential banking). This prudential principle is applied in all banking activities as a step to maintain bank health, including by applying the principles of guarantee law. Legally, several forms of guarantees have been prepared and strengthened by a Notary deed or PPAT, which provides certainty and executorial legal force if the debtor violates the contract. Thus, this guarantee can be considered a new concept in the practice of guarantee law, which causes a lack of literature references that discuss the buy back guarantee in detail, thus providing challenges in providing a deeper definition.

The legality of the buy back guarantee agreement between the bank and the developer is based on the principle of freedom of contract and consensualism, which gives the parties the freedom to agree on the contents and objects of the agreement according to their needs and mutual agreements, as long as it does not conflict with applicable laws and regulations. The agreement created from the agreement between the bank and the developer has valid legal force, providing protection and legal certainty for both parties in exercising their rights and obligations in accordance with what has been agreed.



When viewed from the perspective of guarantee law, there are two main types, namely material guarantees and personal guarantees. This personal guarantee in practice is often referred to as collateral. Buy back guarantee is an agreement. The definition of an agreement as stated in Article 1313 of the Civil Code is "an act by which one or more persons bind themselves to one or more persons". In banking practice, it begins with the signing of a credit agreement between the debtor and the creditor, followed by a buy back guarantee agreement between the creditor and a third party. Based on the definition of an agreement stipulated in Article 1313 of the Civil Code, the developer or dealer company binds itself to the Bank to buy back the debtor's goods purchased from the developer if the debtor defaults on the creditor, so that a legal relationship arises between the third party and the agreement made between the debtor and the creditor. The ultimate goal of the buy back guarantee is that the debtor can pay off his debt to the creditor.

The object of the agreement in a buy back guarantee is different from the object of a guarantee agreement in general, both in the form of a personal guarantee and a corporate guarantee. In a buy back guarantee agreement, the object of the agreement is the object that is guaranteed in the principal agreement between the debtor and the creditor. The developer as one of the parties in the buy back guarantee agreement is bound to buy back the object whose source of purchase funds comes from the credit agreement and at the same time becomes the collateral object in the credit agreement.

This is certainly different from the guarantee agreement in a personal guarantee and corporate guarantee where the object of the agreement is the achievement in the form of a guarantee of the debtor's debt by a third party, while in a buy back guarantee the achievement is the obligation for the third party to buy back the goods that are collateral in the principal credit agreement of the debtor.

## **Conclusion**

1. The provisions regarding the buyback guarantee are explicitly regulated in the Civil Code (KUHPerdata), but the concept of this buyback guarantee has grown and developed as part of freedom of contract and the principle of prudence in banking.

2. Buyback Guarantee can provide legal certainty to buyers and banks in the event of a risk of the developer's inability to fulfill their obligations, as well as provide a sense of security to consumers in the process of purchasing a house, but there are no specific regulations in Indonesian legislation governing the buyback guarantee.

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**Legislation**

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