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CORPORATE GUARANTEE AND THE LEGAL STANDING OF *COMMANDITAIRE VENOTSCHAP* (CV)

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Abstract

In this paper, the author presents a legal perspective in an individual guarantee agency or borgtocht. Commanditaire Vennootschap (CV) which is positioned as a business entity that is not a legal entity taking the position as a corporate guarantee in the additional agreement of the main agreement, it is necessary to examine the legality and authority of the business entity to take legal action as a guarantor of Debtor debt. Issues discussed in this paper regarding the position of the CV as a corporate guarantee in the guarantor agreement and the validity of the CV to be the guarantor in a coverage agreement. The legal issues raised in this paper conclude that a CV which is a non-legal entity business entity cannot be positioned as a corporate guarantee or borgtocht because in the individual guarantee provisions in Article 1820 Burgerlijk Wetboek (BW) that can be a guarantor are legal subjects both legal entities (recht persoon) nor individuals (naturlijk persoon) and CV as business entities do not have the authority to act (bevoegheid) and the said guarantor agreement can be canceled (vernietigbaar) because it does not meet the subjective elements in Article 1320 BW.

Keywords: Limited Partnership, Company Guarantee, Borgtocht

A. Introduction

The concept of a business entity formed within the community is accommodated by the law, which is commonly referred to as a company.[1] Company is a widely used economic concept in Commercial Law and regulations. Although the KUHD (Indonesian Civil Code) does not explicitly define the term "company,"[2] the Compulsory Company Registration Law provides a definition. According to this law, any business that

[1] Pipin Syarifin dan Jubaedah, Hukum Dagang di Indonesia, Bandung: CV. Pustaka Setia, 2012, hlm. 88. The term "business" refers to the activities that are authorized to achieve a certain purpose by utilizing the functions of the mind or body. The term "body" refers to a group of people or capital that is a single unit, regardless of whether they are conducting business or not. This includes PT, private companies, other companies, State-Owned Enterprises, Regional-Owned Enterprises in any name and form. When the term "entity" is associated with the term "business", it forms the phrase "business entity". A business entity can be a company or a form of business that is recognized as a legal entity, such as a PT or non-legal entity, which operates a certain type of business with the aim of continuously generating profits.

[2] Kurniawan, Hukum Perusahaan, Yogyakarta: Genta Publishing, 2014, hlm. 3. The term "company" (*bedrijf*) is an economic concept mentioned in Article 6 of the Trade Code. However, the Trade Code is so extensive that it doesn't provide a clear definition or interpretation of what a company really means from a legal perspective.

operates permanently within the territory of the Republic of Indonesia, generates profits, and has a registered domicile is considered a company.[3]

There are three types of business entities. The first type is an individual company, which is founded by a single person. This type is commonly known as a Trading Company or Trading Business. The second type is a partnership, which can take the form of a Civil Guild (*Maatschap*), a Firm Guild (Firm), or a *Commanditaire Vennootschap* (CV). The last type of business entity is a legal entity, namely in the form of a Limited Liability Company (PT), Cooperative, Public Company, and Regional Company. Most countries recognize three forms of corporate organization, namely sole proprietorship or sole trader, partnership company, and company or corporation.[4]

A *Commanditaire Vennootschap* (CV) is a business structure that does not have legal entity status. It is created when one or more individuals lend money, with some acting as responsible partners and others as financiers.[5] Within the context of the CV organization, there exist two types of allies: complementary allies and commanditer allies. Complementary allies possess the authority to act on behalf of all allies and are jointly responsible for any liability to third parties, up to the value of their personal property. On the other hand, the commanditer ally, also known as the passive ally, contributes capital in the form of money or objects to the company (*inbreng*) and is entitled to a share of its profits. However, in the event of liability to third parties, the commanditer ally is only responsible for the property they have contributed to the company.

The Communion of Communitors[6] is a recognized business entity in the public eye, particularly within the business community. While the Commercial Law Code doesn't specifically regulate CVs like it does firm partnerships and civil partnerships (*Maatschap*), some legal experts argue that CVs can be applied to articles regarding those types of partnerships. The KUHD contains provisions for CVs in articles 19, 20, 21, and 32[7]. Upon further examination of articles 19 to 21, it becomes clear that the CV is a unique type of Firm. Its distinctiveness lies in the presence of a commoditary ally, which is absent in a traditional Firm. A Firm only has an active ally called a *firmant*, while a CV has both active allies and commoditary allies (sleeping partners).[8]

[3] According to Article 1 Letter (b) and the Law of the Republic of Indonesia Number 3 of 1982, it is mandatory for companies to register themselves. This includes companies that are owned by social institutions such as foundations. You can find the full details of this law in the State Gazette of the Republic of Indonesia of 1982 Number: 7, which is also a supplement to the Government Gazette No. 3214.

[4] Robert W. Emerson, Business Law (4 th, Barron's Educational Series, Inc 2004).[296].

[5] According to Article 19 Paragraph (1) of the Commercial Law Code (KUHD), a CV is a private partnership established between one or more individuals who are responsible for all aspects of the partnership, and one or more individuals who provide funding to the partnership. This type of partnership is also known as a money release partnership. According to Article 1 Number 1 of Regulation 17/2018 by the Minister of Law and Human Rights, CV refers to a partnership that involves one or more complementary allies and is established for the purpose of conducting business on an ongoing basis.

[6] CV is a type of company that provides loans, formed by individuals or a group of people who are jointly responsible, along with one or more companies that act as money lenders. In some cases, the loans provided can be in forms other than money, such as objects or other assets. The structure of a CV typically involves two types of entities: active companies (complementary or joint responsibility companies) and passive companies (private or money lending companies). An active company refers to an individual with full responsibility for managing the company in the position of Director, while a passive company refers to an individual with limited responsibility for the capital invested in the company, as a Commuter Company.

[7] I. G. Rai Widjaya, Hukum Perusahaan (Undang Undang Dan Peraturan Pelaksana Undang Undang Di Bidang Usaha), Mega Poin, 2005, hlm. 1.

[8] Soekardono, Hukum Dagang Indonesia, Jilid 1 B, Rajawali Pers, 1991, hlm. 102.

There exist three distinct types of business forms for CV, namely:[9]

a. Silent Communion. This is a group of investors who have not publicly acknowledged themselves as such. While outside of the company, they present themselves as a partnership of businesses, but within the company, they operate as a group of investors.
b. Blatant communion, a communitarian fellowship that openly declares itself to be a communitarian fellowship to a third party.
c. Communitarian alliance with shares, an overt communitarian alliance whose capital consists of shares. This form of fellowship is in no way regulated in the KUHD.

One can analyze the financial resources of CV's business in two ways: internal and external. Internal sources arise from management's capital infusion, while external sources come in the form of loans from banking and non-banking institutions, often with specific guarantees.[10]

When running a business, it's common to seek ways of increasing working capital to help grow the business. One option is to apply for a loan from a bank, which typically requires a credit agreement as the main agreement, followed by an accessory agreement in the form of collateral such as an institution, fiduciary, mortgage, or lien. However, the bank may require additional guarantees, such as individual or corporate guarantees, to further secure the loan.

A corporate guarantee institution is a type of individual guarantee that functions as a debt guarantee agreement, as outlined in Articles 1820 through 1850 of Book III of the *Burgerlijk Wetboek*. According to Subekti, an individual guarantee is an agreement between a debtor (creditor) and a third party that ensures the debtor's obligations are fulfilled. This agreement can even be made without the debtor's knowledge.[11] The goal of this guarantee is to ensure that the debtor's obligations are fulfilled, either in full or up to a certain amount, by allowing the insurer's (guarantor's) property to be confiscated and auctioned off in accordance with court decision execution provisions.[12]

The aim and substance of this underwriting agreement is to ensure that the underwriting in the primary agreement, as outlined in Article 1821 BW, is fulfilled. It is crucial to note that underwriting cannot exist without a valid principal engagement.[13] This guarantee acts as a type of collateral that is accesoir and aligns with the definition of a corporate guarantee institution, which is a pledge or assurance provided by an insurer company to fulfill the debtor's obligations in the event of a default. The corporate guarantee institution involves three interconnected parties: creditors, debtors, and third-party companies acting as insurers (*borg*, guarantor).

There are two types of guarantees: personal guarantees made by individuals and corporate guarantees carried out by legal entities. Both types share the same principle, where the rights and obligations of the guarantor are identical, but the subject of the guarantee differs.[14]

Corporate Guarantee is a specific type of guarantee institution that exists due to legal and contractual obligations. Legal guarantees are those appointed by law without explicit agreement from the parties involved. For instance, statutory provisions

[9] H. M. N. Purwositjipto, Pengertian Pokok Hukum Dagang Indonesia 2: Bentuk-Bentuk Perusahaan, Djambatan, 2005, hlm. 76.

[10] Hexxy Nurbaiti Ariesi, "Tanggung Jawab Pengurus Persekutuan Komanditer Dalam Keadaan Pailit", Universitas Diponegoro, 2007, hlm. 6.

[11] R. Subekti, Jaminan-Jaminan Untuk Pemberian Kredit Menurut Hukum Indonesia, Citra Aditya Bakti, 1989, hlm. 15.

[12] Diah Handayani, "Kedudukan Corporate Guarantor Sebagai Pihak Penjamin Debitur Utama Dalam Proses Kepailitan", Jurnal Magister Kenotariatan Fakultas Hukum Universitas Sumatera Utara, 2016, hlm. 3.

[13] Article 1821 of the Burgerlijk Wetboek states that there is no liability without a statutory principal engagement. Article 1820 defines default as "if the debtor fails to fulfill his engagement".

[14] Adrian Sutedi, Hukum Kepailitan (Ghalia Indonesia 2009).[151].

may dictate that all of a debtor's assets - both movable and fixed - are considered collateral for the entire debt. As such, the creditor is entitled to exercise their rights against all of the debtor's assets, except for those that are explicitly excluded by law (as per Article 1131 BW).[15]

Commonly utilized guarantee institutions in the business world are typically rooted in personal guarantees, or *borgtocht* as regulated by Article 1820 BW. Therefore, it is important to examine how the status of a CV as a business entity differs from that of a legal entity acting as a corporate guarantee under current laws and regulations in Indonesia.

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Please explore in more words the background of your paper and your current research position among other research on related themes. You should discuss here as well your research's relations with those of other researchers; literature review, especially on most relevant, newly academic works published in high reputation journals, is a must.

To put it another way, please try to answer at least two questions: (1) why you believe that your research question is such an important to answer; and (2) how other scholars have or have not answered, or how you think your answer would be a contribution to the existing scholarship on the subject.

A detailed description of your methods in doing the research is not necessary to write down in this section, but if you think you have to do so, you may mention it slightly in one or two sentences.

A little bit of exploration on the flows of your discussion and the expected final results will be good points for closing this introduction section.

B. The Legal Status of A *Commanditaire Vennootschap* as A Corporate Guarantee

Financial institutions play a crucial role in the economy of a country by providing credit to the public. To facilitate business transactions between creditors and debtors, banks that distribute credit require additional protection. The legal norms of guarantee law provide banks with tools to disburse loan funds with confidence.

The Bank and the borrower customer will be legally bound by a credit agreement, which falls under the category of an anonymous agreement as per Article 1319 BW due to the absence of regulated provisions in the credit agreement. As per Article 1319 BW, this credit agreement qualifies as an *obligatoir* agreement, giving rise to collection rights that are either individual or personal in nature[16]. The birth of the credit agreement positions the Bank as a concurrent creditor, with the general guarantees specified in Article 1131 BW further reinforcing its legal standing. Typically, the Bank will supplement this with an accessory agreement, known as a guarantee agreement, which comprises two types of agreements: material guarantee agreements and individual guarantee agreements.

that are heavier than the principal A corporate guarantee can be defined as an individual guarantee, as stated in Article 1820 BW. An individual guarantee agreement involves a third party who agrees to act as the insurer (borg) for the debtor's debt. The creditor and the third party then come to an agreement known as an individual agreement.[17] Essentially, Article 1820 BW outlines that a guarantee is an agreement where a third party agrees to pay

[15] Sri Soedewi Masjchoen Sofwan, Hukum Jaminan Di Indonesia Pokok-Pokok Hukum Jaminan Dan Jaminan Perorangan (Badan Pembinaan Hukum Nasional Departemen Kehakiman 1980).[43].

[16] Moch. Isnaeni, Pijar Pendar Hukum Perdata (PT Revka Petra Media 2016).[36].

[17] Moch. Isnaeni, Pengantar Hukum Jaminan Kebendaan (PT Revka Petra Media 2016).[110].

off a debtor in default for the benefit of creditors. It's clear that the underwriting agreement is considered an accessory agreement, whose existence is dependent on the principal agreement. The purpose of obtaining an individual guarantee is to ensure that the debtor's obligations are fulfilled, either in whole or in part. If necessary, the insurer's (guarantor's) property can be confiscated and auctioned off according to court decision execution provisions.[18]

The provisions in BW outline the characteristics of borgtocht, which includes upholding individual rights and personal rights. This guarantees that the position of creditors is on par with concurrent creditors, and the amount of collateral does not exceed the conditions engagement as stated in Article 1822 BW.[19] Additionally, the guarantor is only responsible for paying the debt if the debtor is unable to do so, as a reserve. The law offers privileges to a guarantor, as outlined in Articles 1832, 1836, 1837, 1847, 1848, 1849, and 1850 BW.[20] In practice, the Bank requires the guarantor's privilege to be released, creating an opportunity for the Bank to directly sue the guarantor to pay off the debtor's debt without having to sell the debtor's property first.[21]

In practice, the safeguards provided by Articles 1831 and 1832 BW for the Corporate Guarantor are often perceived as problematic for creditors. These safeguards can impede the creditor's ability to exercise their rights, necessitating special agreements to override the privileges established for the guarantor in the BW, such as:

a. A promise for the insurer to relinquish their right to demand the sale of the debtor's property as a first resort;

In its role as Guarantor, the Corporate Guarantor enjoys the benefit of not being obligated to satisfy the debtor's debts to creditors until after the debtor's assets, as appointed by the guarantor, have been seized and sold, and the proceeds of the sale are insufficient to meet the debtor's outstanding liabilities. As such, the Corporate Guarantor will only be responsible for settling the remaining obligations of the debtor that remain outstanding after the sale of their assets.[22]

b. A Promise for the guarantor to waive his right to divide debts (*voorrechtvan schuldsplitsing*):

The responsibility of sharing a debt lies with a guarantor whose guarantee is greater than that of the other guarantors involved in the debt. This allows each guarantor to claim their share of the debtors and divide them accordingly. However, if the Corporate Guarantor waives their privileges, they become solely responsible for settling all debtor obligations. If the privilege to divide the debt is waived, the creditor is entitled to pursue the Guarantor's heirs for the fulfillment of all receivables, which cannot be divided among them.[23]

c. The Guarantor agrees to forfeit their right to request release from their role as guarantor in the event of a justifiable reason.

The sole legal basis for such a request would be the inability of the Guarantor to exercise their right of subrogation. This right arises once the Guarantor has paid off the debtor's debt, but cannot be exercised if the collateral securing the debt, such as mortgages, liens, or fiducies, has been cancelled or no longer exists. If the creditor allows the debtor to sell or eliminate the collateral, the Guarantor is left with no mortgage guarantees or liens, and is thus liable. Essentially, the creditor fails to secure the guarantees for the debtor's debt, which prevents the Guarantor from receiving mortgage guarantees, liens, or other

[18] R. Subekti, Jaminan-Jaminan Untuk Pemberian Kredit Termasuk Hak Tanggungan Menurut Hukum Indonesia (Citra Aditya Bakti 1996).[17].
[19] Article 1822 *Burgirlijk Wetboek.*
[20] Sutarno, Aspek-Aspek Hukum Perkreditan (Alfabeta 2004).[238-241].
[21] *Ibid.*
[22] *Ibid*
[23] *Ibid.*

guarantees as a replacement for the creditor's rights.[24]

d. The insurer's commitment remains intact regardless of the co-insurer's obligation. In essence, it is deemed "lawful" as Aristotle articulated, emphasizing the importance of upholding the law and adhering to the provisions outlined in the guarantee agreement, which must be enforced.[25]

The law mandates that the guarantor, or *borg*, must possess the legal capacity to bind themselves, demonstrate the capability to fulfill their obligations, and be domiciled within Indonesian territory.[26] Additionally, under Article 1 Number (1) of Permenkumham Number 17 of 2018, the Communion of Communitors defines a CV as a partnership formed by one or more commoditary allies and one or more complementary allies for the purpose of conducting business on an ongoing basis.[27]

The term "CV" often denotes a unique type of enterprise, wherein private companies are solely liable for the capital they have invested, while complementary investors bear responsibility for their personal assets. Besides this characteristic, what sets CV apart from limited liability companies is its legal entity status, which is distinct from the CV itself, even though both entities are classified as business organizations. This difference in legal status has significant implications, as CV is not recognized as a legal subject and cannot independently undertake legal actions, as it cannot be classified as a "*recht persoon*."

Based on the preceding conversation, it seems that a *Comanditaire Vennootschap*, being an unincorporated business entity, cannot be classified as a corporate guarantee or *borgtocht*. This is due to the provisions outlined in Article 1820 BW, which stipulates that the insurer must be a legal entity (*recht persoon*) or individual (*naturlijk person*).

C. The Validity of *Commanditaire Vennootschap* Which is The Corporate Guarantee in The Underwriting Agreement

Legal entities are defined by the separation of the owner's property from the assets of the entity. This separation allows a legal entity to participate in legal actions, similar to a natural person (*naturlijk persoon*). As a result, the owner of a legal entity is only responsible for the assets entered into the company. In Indonesia, legal entities include Limited Liability Companies, Foundations, and Cooperatives. However, a private partnership cannot be considered a subject of *recht persoon* law, which limits the authority of a CV to take legal action as a fully incorporated business entity.

If CV and the Bank have entered into a guarantee agreement and mutually agreed to be bound, then the agreement will be enforceable as per the principle of pacta sunt servanda, as stated in Article 1338 BW. Any agreement, including the guarantee agreement, must adhere to the terms of validity outlined in Article 1320 BW. This means that the agreement must fulfill all legal requirements to avoid being legally defective. Article 1320 BW specifies that the validity of an agreement is dependent on several factors, including:[28]

1. the agreement being made by those who can bind themselves;
2. The ability to make an engagement;
3. A certain thing; and
4. Having a permissible cause.

The obligations and abilities outlined in Article 1320 BW are intricately linked to the "legal subject" who enters into a contract, and as such, both elements within the realm of the agreement are considered "subjective."[29] If these subjective elements are not met by all parties involved, the resulting agreement may be considered

[24] *Ibid.*, hlm. 9.
[25] Sri Soedewi Masjchoen Sofwan, Hukum Jaminan Di Indonesia Pokok-Pokok Hukum Jaminan Dan Jaminan Perorangan (Liberti Offset 1980). [97-98].
[26] Article 1827 Burgirlijk Wetboek.
[27] Pasal 1 angka 1 Permenkumham Nomor 17 tahun 2018.
[28] Article 1320 *Burgerlijk Werboek*
[29] Moch. Isnaeni, Op.Cit. hlm. 131.

voidable (*vernietigbaar*) rather than null and void (*nietig*). There are also objective conditions and acceptable causes that, if not met, can lead to a null and void outcome[30]

Competence in Article 1320 BW includes legal authority, which is the power to support legal rights and obligations.[31] This power can only be exercised by legal subjects themselves, as it is separate from the ability to act (*bekwaamheid*). To ensure the validity of an agreement, the *Burgerlijk Wetboek* requires certain elements of competence to be fulfilled. This includes a minimum age of 21 years or being married to independently carry out legal actions (vide: 330 BW), or 18 years old according to Law Number 1 of 1974 concerning Marriage. In the context of public law, authority is related to power and is described as legal power (*rechtsmacht*).[32]

If a CV operates as a business entity without a legal entity status and assumes the role of a corporate guarantor, it could have significant consequences for the underwriting agreement. This is because CVs lack the legal authority to act, or "*bevoegdheid*," which means that the agreement may not meet the subjective elements outlined in Article 1320 BW and could be deemed "*vernietigbaar*," or voidable.

E. Concluding Remarks

An unincorporated business entity, such as a *Comanditaire Vennootschap*, cannot serve as a corporate guarantee or *borgtocht*. This is due to the fact that under Article 1820 BW, only legal entities (*recht persoon*) or individuals (*naturljik persoon*) can act as insurers.

If a CV were to act as a corporate guarantee, it could have implications for the underwriting agreement because a business entity lacks the necessary authority to act. Additionally, the agreement could be deemed cancelable if it does not meet the subjective elements outlined in Article 1320 BW.

[30] Ida Bagus Abhimantara, 'Karakteristik Perjanjian Transplantasi Organ Tubuh Manusia Di Indonesia' (Universitas Airlangga 2018).[7].

[31] Paton G. W. A., Texbook of Jurisprudence (2 th, ClarendonPress 1951).[314].

[32] Philipus M. Hadjon, 'Tentang Wewenang' [1997] Yuridika.

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