CHAPTER TWO
LITERATURE REVIEW

A. The Overview of Contract

1. Definition of Contract

Legal scholars define a contract differently. According to Subekti, the term contract used in the Civil Code derived from the dutch "*overeenkomst"*.[9] Meanwhile, Sri Soedewi Masjchoen Sofwan translates the term *overeenkomst* as the understanding of the consensus.[10] According to Setiawan, *overeenkomst* derived from the word *overeenkomen* which means consensus or consent, because of that translation the term contract used to translate as *overeenkomst*.[11] Soedikno Mertokusumo translates *overeenkomst* as the term "contract" is because it describes the valid requirement of *overeenkomst* is *toestaming*. Toestaming may be defined as a consensus, consent, dealt, as agreement, conformity of will. Therefore, if the term *overeenkomst* is translated as consensus it will cause irregularities, so in terms of operations he prefers to use the term contract.[12]

Based on Article 1313 of the Civil Code, the definition of a contract is an act in which one or more people bind themselves to one another. According to scholars, the definition of a contract in the civil code has many weaknesses, namely:

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[9] Subekti, 1989, *Hukum Perjanjian*, Bandung, Citra Aditya Bakti, p. 1.

[10] Sri Soedewi Masjchoen Sofwan, 1989, *Hukum Perutangan*, Bandung, Sumur Bandung, p. 1.

[11] Setiawan, 1994, *Pokok-Pokok Hukum Perjanjian*, Bandung, Bina Cipta, p. 2.

[12] Soedikno Mertokusumo, 1989, *Mengenal Hukum Suatu Pengantar*, Yogyakarta, Liberty, p. 96.

a. One-sided Only

The one-sided only may be seen from the formulas, which stated that “a party might bind himself”. The word "bind" is only one-sided, so it is necessary to formulate "the two parties are binds to one another” so that the reciprocal consensus between the parties may occur.

b. Excluding The Consensus

The verb "includes" is automatically excluding the consensus. The definition of "deeds" includes an act which not agreed and may against the law. The solution is to use the word "approval".

c. The Broad Definition of Contract

This is due to the promise of marriage which regulated in family law, while the regulated matter is the relationship between the debtor and the creditor in the field of property. Moreover, the definition of the contract is too broad because of the term “deed” may also include acts against the law and voluntary guardianship, even though what is intended is an act against the law.[13]

[13] R. Setiawan, 1979, *Pokok-Pokok Hukum Perikatan*, Bandung, Bina Cipta, p. 49.

d. Purposeless

The formulation of Article 1313 of the Civil Code does not mention the purpose of the contract so that the parties which bind themselves are not clear for what purpose.[14]

The Experts who agreed that the meaning of a contract as mentioned in Article 1313 of the civil code contains many weaknesses, provides a formula for the meaning of the contract. A contract is an event where someone promises to another person or where two people promise each other to do something.[15] A contract is a legal relationship between two parties or more based on a consensus is a legal consequence. The contract may not in accordance with the existing customary of law, depends on the suitability of the will of all parties which cause the emergence of legal consequences of the interests of one party at the expense of another party or for the mutual benefit of each party.[16]

The Article 1338 of civil code provides freedom of contract for parties who intended to enter into a contract. The civil code stated that personal will of the party may include in the contract, this is one of the kinds of the given freedom. The contract legally made by the parties and carried out in good faith served as laws that bind both parties. Although the civil code provides freedom in making a contract, the freedom is limited by three things,

[14] Abdul Kadir Muhamad, 1992, *Hukum Perikatan*, Bandung, Citra Aditya, p. 78.
[15] Subekti, 1987, *Hukum Perjanjian*, Jakarta, PT Intermasa, p. 1.
[16] Purwahid Patrik, 1988, *Hukum Perdata II Jilid I*, Semarang, Mandar Maju, p. 1-3.

namely: (1) not prohibited by law; (2) does not conflict with ethics; (3) and does not conflict with public order as stipulated in Article 1339 of the Civil Code.

2. The Requirements of Valid Contract

The requirements of the valid contract are stated in Article 1320 of the Civil Code, namely:

a. Consent

Consent means that before a contract made, usually the parties hold negotiations so that consensus is reached between the two parties

b. Capable (competence)

Competent is the capability of the person in carrying out the consent in the contract. The capability is regarding sanity and age. The age of the people who considered to be capable of carrying out legal actions if they are 18 years old or have married even though they are not yet 18 years old and are not under a guardianship based on the Law number 17 of 2016 on the Determination of Government Regulations of the Second Amendment to Law number 23 of 2002 on Child's Protection.

c. A certain Subject Matter

The contract must consist of a certain subject as a matter of it. The contract that does not fulfill these conditions will not be recognized by law, even though it is acknowledged by the parties

who made it. In making a contract, what is agreed upon (the object of the contract) must be clear. At least the types of goods must be present.

d. Halal Causa

The halal causa may be defined as a content of the contract that is not forbidden by the law. The law does not pay attention to the reason why parties make a contract, but to the contents of the contract that describes the objectives to be achieved by the parties, whether or not the law is prohibited, contrary to public order and decency or not.[17]

The content of Article 1320 of the Civil Code is developed in the doctrine of law and classified into two Classification, namely:

a. The Subjective Element

The Subjective element is the consent of the parties who make the contract and the skill of making the contract. This element must be fulfilled, while the parties still have the freedom of contract. If the contract does not meet the Subjective element, then the consequences are the contract might be canceled (*vernietig*).

[17] Subekti and Tjitrosudibio, 2008, *Kitab Undang-Undang Hukum Perdata*, Jakarta, PT Pradnya Paramita, p. 339.

b. The Objective Element

The Objective elements are the things that arise with the object of a contract that has been made by the legal subject. The objective element includes the object of the contract and the halal causa of it. Due to the consequences of a contract that do not meet the objective element, the contract shall be considered null and void (*nietig*).[18]

3. The Principle of The Contract

In making a contract, there are several principles that shall be understood and carry out. These principles are as follows:

a. Principle of Consensual

The consensual regulated in the book III of Civil Code. The consensual may be defined as the contract may bind the parties if there is a consent of both parties on the making of the contract.[19] The contract is considered to be binding if the parties have agreed on the points of the contract.[20] For example, the sale and purchase contract, rent and also exchange. These examples are a form of consensual contract. In order to make this crystal clear, the Article 1320 of the Civil Code which contains the valid requirement of the contract such as, consent, capability, certain things and halal

[18] Kartini Muljadi, Gunawan Widjaja, 2008, *Perikatan yang Lahir dari Perjanjian*, Jakarta, PT Raja Grafindo Persada, p. 98.
[19] *Ibid.*
[20] Subekti and Tjitrosudibio, *Op. Cit.,* p. 15.

causes as explained in the previous discussion. Not only the Article 1320 but also the Article 1458 of the Civil Code where buying and selling are considered binding if you have agreed between goods and prices even though the goods have not been delivered and also the price has not been paid by both parties in the contract.[21]

b. The Principle of Freedom of Contract

This is a principle that frees each subject of the contract to make a contract. In the sense that what is promised by the subjects of the contract is binding, as like as the Law. The Article 1338 Paragraph (1) of the Civil Code stated that all contracts that are made legally, binding as a law for the parties who make them. In this case, we can highlight the word "all" in the Article, which means that all contract has been arranged in the law or contract that has not been regulated in the law. In this Principle it is liberated for all subjects of the contract to determine who will enter into the contract, the contents, the validity, the terms of the contract determine what will be the object of a contract (according to the lawful cause).[22]

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[21] Akhmad Budi Cahyono and Surini Ahlan Sjarif, 2008, *Mengenal Hukum Perdata*, Jakarta, CV Gitama Jaya, p. 133.

[22] Purwahid Patrik, 1994 *Dasar-Dasar Hukum Perikatan (Perikatan yang Lahir dari Perjanjian dan dari Undang-Undang*), Bandung, Mandar Maju, p. 66.

c. The Principle of *Pacta Sunt Servanda*

The Principle of *Pacta Sunt Servanda* may be defined as a contract that is made legally, applies as a law for the parties who make it. In the sense that it must obey what has been agreed as if we obey a regulation or law. In a contract that has been made by the two parties who are the subject of the law, it can be ascertained after it has been approved that what will be called the rights and obligations of the parties making the contract will arise.

If any legal subjects who do not obey, do not implement or even miss out on what has become their obligation and the other party feels disadvantaged, then the party who feels disadvantaged can sue the adverse party in order to immediately fulfill the promised achievements at the outset, or even claim compensation, depending on what was promised at the outset.[23]

d. The Principle of Good Faith

The principle of good faith here mainly lies in the implementation of rights and obligations in a legal relationship. This applies at the time of execution of the contract.[24] Every person who wants or will implement a contract must fulfill what is called good faith. This principle is regulated in Article 1338

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[23] Munir Fuady, 2005, *Pengantar Hukum Bisnis,* Bandung, PT Citra Aditya Bakti, p. 13.

[24] Dewi Nurul Musjtari and Fadia Fitriyanti, 2008, *HukumPerbankan Syariah dan Takaful (Dalam Teori dan Praktik),* Yogyakarta, LabHukum Fakultas Hukum UMY, p. 41.

Paragraph (3) of the Civil Code which contains "contract must be carried out in good faith".[25]

e. Personality Principle

This principle of personality is a principle that explains why a contract will only bind anyone who makes it. This is in accordance with the sound of Article 1315 of the Civil Code which stated that, in general, no one can bind himself in his own name or ask for the stipulation of a promise rather than for himself.

The things to be understood is that in a contract only places the rights and obligations of the parties as a maker. The third parties have no connection and are not bound by the contract.[26] Speaking of acquisition in this principle, the exception is where someone makes a Guarantee contract or warranty contract. It can be shown that A made a contract with B so that C could fulfill the achievement to B. This must be the opposite of what was stated in Article 1315 above. The warranty itself can be found in Article 1316 of the Civil Code. We will also find exceptions when we open Article 1318 of the Civil Code, where a contract also includes the heirs of the party who entered into the contract.[27]

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[25] Innaka, Rusdiana, Sularto, 2012, "Penerapan Asas Itikad Baik Tahap Prakontraktual pada Perjanjian Jual Beli Perumahan", *Mimbar Hukum,* Vol. 24 No 3, p. 377-569.

[26] Akhmad Budi Cahyono and Surini Ahlan Sjarif, *Op. Cit.,* p. 137.

[27] Subekti, *Op. Cit.,* p. 3.

B. The Overview of Credit Contract

Etymologically the word credit comes from Greek[28] and Roman[29], namely *credere*, which in Indonesian means trust. The trust is the trust given to someone who received the credit which in the credit contract of the bank is the debtor.[30] The definition of credit contract regulated in Chapter V up to Chapter XVIII of the Civil Code on Special Contract which does not contain provisions on bank credit contract, even in Law Number 10 of 1998 on Banking does not specifically regulate the term loan contract. Credit contract refers to the rules in the Civil Code, as one of the forms of contract that is grouped in a loan. Loan contract as stipulated in Article 1754 of the Civil Code so that the legal basis as a basis for making credit contract is in Book III of the Civil Code. The provisions of Article 1754 of the Civil Code according to Wirjono Projodikoro, are interpreted as a real contract. This is understandable because Article 1754 of the Civil Code does not mention that the parties to the first tie themselves to give a certain amount of goods that are used up, but that the first party gives a certain amount of goods which are used up.[31]

According to Mariam Darus Badrulzaman a bank credit contract is a preliminary contract *(vooroverenkomst)* from the submission of money this preliminary contract is the result of a contract between the giver and the

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[28] Thomas Suyatno, et al, 1993, *Dasar-Dasar Perkreditan*, Jakarta, Gramedia, p. 12.

[29] Muhammad Djumhana, 1996, *Hukum Perbankan di Indonesia*, Bandung, PT Citra Aditya Bakti, p. 229.

[30] Mgs. Edy Putra, 1989, *Credit Perbankan Suatu Tinjauan Yuridis*, Yogyakarta, Liberty, p. 1.

[31] Wirjono Prodjodikoro, 1991, *Pokok-Pokok Hukum Perdata Tentang Persetujuan-Persetujuan Tertentu*, Bandung, Sumur bandung, p. 137.

recipient of the loan regarding the relations both of two.[32] Provisions in the Civil Code do not regulate credit contract, in banking practices to secure credit or financing, generally, the credit contract is made in the written form and in the form of a standard contract. The requirement of standard contract that categorizes in the name contract are namely contract or a special contract is a contract that has been arranged with special provisions in the Civil Code of the Third Book of Chapter V through Chapter XVIII. For example, the sale and purchase contract, rent, grant, and others. While the requirement of standard unnamed contract is not a contract that specifically regulated in law. For example leasing contract, agency contract and distributors, credit contract.

C. The Overview of Guarantees

1. Definition of Guarantees

The term Guarantee Law, was derived from *Zakerheidesstelli* or security of law. In the Seminar on the National Law Guidance Board, it was stated that the Law of Guarantee includes both material guarantees and individual guarantees. Definition of Guarantee Law is referred to the type of guarantee, not to the legal notion of guarantee.[33] In addition, the Guarantee Law is to regulate the juridical construction that allows the provision of credit facilities, by pledging the items he bought as collateral.

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[32] Mariam Darus Badrulzaman, 1998, *Perjanjian Kredit Bank*, Bandung, PT Citra Aditya Bakti, p. 32.

[33] H. Salim HS, 2004, *Perkembangan Hukum Jaminan di Indonesia*, Jakarta, PT Raja Grafido Persada, p. 5.

Such regulations must be sufficiently convincing and provide legal certainty for credit institutions, both domestically and abroad. The existence of guarantee institutions and such institutions should be accompanied by the existence of a large number of credit institutions, with long periods of time and relatively low-interest rates.[34]

Furthermore, Guarantee Law is defined as a legal regulation that regulates collateral for creditor's debts to debtors.[35] This definition is focused only on regulating the rights of creditors and does not pay attention to the rights of the debtor. Even though the subject of Guarantee Law is not only about creditors but also debtors, while the object as collateral. From the various definitions above, each of them has weaknesses. Therefore, it needs to be completed and refined as follows, that the Guarantee Law is the whole of the legal rules governing the legal relationship between the giver and the recipient of the guarantee in relation to the imposition of collateral to obtain a credit facility.[36]

In the Guarantee Law, the classification of movable and immovable objects has an important meaning. The different classification will also determine which type of guarantee institution can be charged for the collateral provided to guarantee repayment. The nature of the guarantee

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[34] Sri Soedewi Masjchoen Sofyan, 1990, *Kumpulan Kuliah Asas-Asas Hukum Perdata (Perutangan)*, Yogyakarta, Yayasan Penerbit Gadjah Mada, p. 5.
[35] J. Satrio, 1996, *Hukum Jaminan Hak-Hak Kebendaan*, Bandung, PT Citra Aditya Bakti, p. 3.
[36] H. Salim HS, *Op. Cit.*, p. 6.

contract is *accessoir,*[37] which depends on the principal contract. The nature of the guarantee contract is accessibility, which depends on the main or additional contract. An *Accesoir* contract is an additional contract that follows the main contract, for example, a contract to impose mortgage or fiduciary rights. The existence of a guaranteed contract cannot be separated from the existence of a principal contract. The principal contract that precedes the birth of a guaranteed contract is generally in the form of a credit contract, a loan lending contract or a debt contract.[38] The granting of guarantees from the Debtor to the creditor raises 2 (two) types of guarantee rights that are generally known, namely:

a. General

   Guaranteed rights that are general in nature, are the guarantees provided by the debtor to the creditor, without giving the right to overtake each other (concurrent) between one creditor and another creditor.

b. Special

   Special guarantee rights are the guarantee given by the debtor to the creditor, by giving precedence rights from other creditors, so that he is domiciled as a privilege (preferent) creditor.

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[37] Badriyah and Siti Malikhatun, 2015, "Perlindungan Hukum bagi Creditor dalam Penggunaan Base Transceifer Station (BTS) Sebagai Objek Jaminan Fidusia dalam Perjanjian Credit*". Jurnal Media Hukum*, Vol. 22 No. 2, p. 205-217.

[38] Handri Raharjo, 2009, *Hukum Perjanjian di Indonesia*, Jakarta, Pustaka Yustisia, p. 68.

2. Guaranteed Legal Object

Refers to the description above, the object of the Guarantee Law can be divided into 2 (two), namely:[39]

a. Material Object

The material object is the object which is targeted in its investigation, in this case, is human.

b. Formiil Objects

Formiil objects, which are certain points of view of their material objects. So the formal object of guarantee law is how legal subjects can impose collateral on banking institutions or nonbank financial institutions. Assurance is a process, which involves the procedure and conditions in the guarantee.

D. The Overview of Mortgages

A mortgage may be defined as a legal contract by which a bank or other creditor lends money at interest in exchange for taking the title of the debtor's property, with the condition that the conveyance of title becomes void upon the payment of the debt.[40] A mortgage is one of the institutions guaranteed land rights, born by the contract.[41] Law of Mortgage stated that, stated that:

> The Mortgage to land and things related to it, hereinafter referred to as mortgage rights, is the guarantee rights as referred to Basic Agrarian Law,

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[39] H. Salim HS, *Op. Cit*., p. 8.

[40] Henry Campbell, 1979, *Black's Law Dictionary,* Minnesota, West Publishing, p. 569.

[41] Denico Doly, 1999, "Aspek Hukum Hak Tanggungan, Asas-Asas, Ketentuan pokok dan Masalah yang di Hadapi oleh Perbankan (Suatu Kajan Mengenai Undang-Undang Hak Tanggungan)*"*, *Negara Hukum Membangun Hukum untuk Keadilan dan Kesejahteraan*, Vol. 2 No. 1, p. 15.

> the following or not, objects which constitute a unit with that land, for repayment of certain debts, which provide a position that is preferred to certain creditors against other creditors.[42]

According to H. Salim HS, from the definition of mortgages described in Article 1 Paragraph (1) of the Law on the mortgage, it can be concluded that there are elements as follows:

1. Guarantee Rights that are charged with land rights.
2. The following or not rights to land and other objects which constitute a unit with that land. Basically, the liability can be imposed on land rights solely, but it can also be the right to the land along with the objects on it.
3. For certain debt repayments. The purpose of repaying certain debts is that the mortgage rights can be settled and the debtor's debts are settled on the creditor.

E. The Overview of *Roya*

After the mortgage is removed, it is necessary to do a *Roya* (write-off). In order to hold the *Roya,* there is a burden on the mortgage in the land title and the certificate. If this is not the case, then the public will not know the position of *Roya*, so that there will be difficulties to divert or burden the land again.[43] The write-off of records or *Roya* Mortgage Rights is done for the sake of

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[42] Agus Susila, 2017, "Formulasi Hukum, Langkah Mengatasi Problematika Eksekusi Hak Tanggungan dalam Penyelesaian Credit Macet", *Masalah-Masalah Hukum,* Vol. 46 No. 1 p. 41-47.
[43] Kashadi, *Loc. Cit*.

administrative order.[44] *Roya* or write off is an activity carried out by the Land Office to cross out records of Mortgage in the land book of land rights and certificates. After the Mortgage is removed, then the record is written off or the liability of the rights is carried out. The write-off of the records or the liability of these mortgages is carried out for the sake of administrative order and has no legal effect on the liability of the concerned person who has been removed. In connection with that at the same time in law of mortgages a procedure and a clear schedule regarding the implementation of deletion are stipulated and the Land Office is given 7 (seven) working days after receipt of the application to carry out the write-off of the mortgage rights.[45]

Based on Article 22 of Mortgage Law, after the liability is removed, the Land Office will write off the records of the mortgagee rights in the land title book and the certificate. Whereas the certificate of liability in question is withdrawn and together the book of land for mortgages is declared no longer valid by the Land Office. If the certificate referred to above is due to something that is not returned to the Land Office, it is recorded in the land book of the mortgage.[46]

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[44] Adrian Sutedi, 2012, *Hukum Hak Tanggungan Cetakan Kedua*, Jakarta, sinar grafika, p. 84.

[45] Rachmadi Usman, 1999, *Pasal-Pasal Tentang Hak Tanggungan Atas Tanah*, Jakarta, Djambatan, p. 127-128.

[46] Sutan Remy Sjahdeini, 1996, *Hak Tanggungan: Asas-Asas, Ketentuan-Ketentuan Pokok dan Masalah-Masalah yang Dihadapi oleh Perbankan*, Surabaya, Universitas Airlangga Press, p. 103.