

## Parent Company's Corporate Guarantees For Subsidiaries' Cross-Border Loans

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### ABSTRACT

**Keywords:**  
Corporate  
Guarantee;  
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Venture; Cross  
Border Loan

*Loans with collateral have become one of the options for newly created businesses looking for more accessible and less expensive funding. Financial institutions, particularly banks, are hesitant to lend to companies that have been in operation for less than two years. Furthermore, obtaining guarantees from other businesses is one technique to improve a company's credit score. Companies can acquire more competitive funding with a better credit rating. One way is to get a guarantee from the parent firm as a shareholder. This research looks at how different legal systems handle guarantees from the parent firm to subsidiaries. This study employs normative legal research techniques. According to the findings, offering assurances is a typical business practice. Companies that are new or have been in business for less than two years are given priority to provide guarantees. Unless a shareholder offers assurances to the subsidiary in the case of a default, the parent company or shareholders have no liability to the subsidiary. A joint venture agreement will govern the issuance of guarantees by the parent firm based in another country with other shareholders. The parties must agree on the choice of law to be used. If there is a dispute, then the choice of law is important. Choice of law also determines the choice of forum in resolving disputes.*

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### 1. INTRODUCTION

The Indonesian government provides guarantees to bank creditors in the form of guarantees for payment of obligations by State-Owned Enterprises (BUMN)/Regional Owned Enterprises (BUMD) in the context of providing infrastructure. This guarantee aims to provide certainty of the security of funds invested in supporting the acceleration of infrastructure development in Indonesia.<sup>1</sup> Guarantee in the form of repayment capacity.

This research aims to discuss loan guarantees by parent companies to subsidiaries from a cross-border legal perspective. This research has a novel discussion of cross-country law that is rarely found in other research. Apart from that, research also provides knowledge regarding the legal status of guarantees.

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<sup>1</sup> Dwi Resti Pratiwi Et Al., "Kajian Terhadap Peraturan Menteri Keuangan Nomor 89 Tahun 2023," 2023.

The government also issued Minister of Finance Regulation (PMK) Number 98/PMK.08/2020 concerning procedures for government guarantees for Corporate Business Actors through Guaranteed Business Entities appointed in the national economic recovery program framework due to the Covid-19 pandemic. The government guarantees or provides working capital credit support to companies with a loan amount of around Rp. 10 billion to Rp. 1 Trillion. Banks need guarantees in extending credit to the infrastructure development industry. This guarantee covers all obligations, including the agreed principal and interest. This guarantee will provide a lower risk to financial institutions.<sup>2</sup>

Several international cooperation bodies also provide loans and loan guarantees. One such agency is the Japan Bank for International Cooperation (JBIC). JBIC has a role in building the international economy and society, particularly in the financial sector. JBIC focuses on the private sector. JBIC, in addition to providing direct loans, also provides loan guarantees. This guarantee is given to loans from financial institutions, bonds issued by developing countries, or Japanese companies operating outside Japan, including swap transactions. JBIC also issues export guarantees.<sup>3</sup> The JBIC guarantee provides a better rating than the guarantee from the parent company. Investors will be more likely to choose JBIC guarantees.

This guarantee will provide guarantees for creditors. This guarantee has caused some problems, as in China. Chinese companies are experiencing the contagion effect. The default effect has a systemic impact, where one company is in default which can result in other companies being in default.<sup>4</sup>

Discussions on guarantees by private companies with different choices of law are still rarely carried out. This study discusses the guarantee (guarantee), especially the parent company's guarantee in a corporate guarantee against subsidiaries in other countries. This study comprehensively discusses joint venture agreements regarding the obligations of each investor, shareholder agreements regarding counter guarantees, and how the execution of guarantees with the choice of law differs between holding companies and subsidiaries.

In the context of investment, foreign companies need local companies that dominate the market and the characteristics of Indonesia. Foreign companies will provide

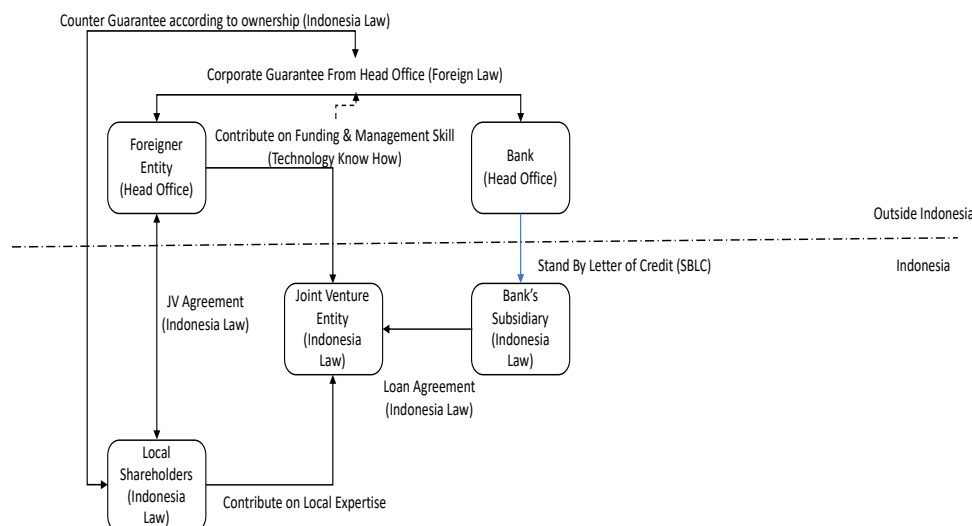
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<sup>2</sup> Franklin Allen et al., "Moral Hazard and Government Guarantees in the Banking Industry," *Journal of Financial Regulation* 1, no. 2 (2015): 30–50, <https://doi.org/10.1093/jfr/fju003>.

<sup>3</sup> Jian-Ye Wang and Márcio Valério Ronci, "The JBIC Financing Facility for Indonesia," in *Access to Trade Finance in Times of Crisis* (International Monetary Fund, n.d.), <https://doi.org/https://doi.org/10.5089/9781589064041.072>.

<sup>4</sup> Manisha Mundhra, "Short-Comings and Pitfalls of Registering Corporate Guarantee as Charge," *Internatiobal Journal of Law Management & Humanities* 4, no. 4 (2021): 2463.

funding. Funding is vital for the development of the company.<sup>5</sup> The two companies will work on a joint venture agreement (JVA). This JVA explains the obligations and rights that both parties must fulfill. In general, foreign parties contribute funds and technology, while local partners contribute local knowledge.



**Figure 1.** Corporate Guarantee Process

Source: Research Results

A subsidiary of a bank in Indonesia that will provide credit to new companies in Indonesia. Foreign companies that provide funding can channel funds directly or through foreign bank partners with relationships with these investors. The investor will guarantee the credit provided by the foreign bank or foreign bank's subsidiary to the new company. The head office of a foreign bank will provide a guarantee in the form of a Stand By Letter of Credit (SBLC). New companies will have difficulty obtaining funding from banks because they are just starting to operate. An overview of this process is described in **Figure 1**.

Companies with bank loans in the United States are as much as one-third guaranteed by other companies. The other company is a holding or third-party company that functions as a guarantor. Third-party guarantees harm interest rates and loan risk.<sup>6</sup>

Personal guarantees or company guarantees are additional guarantees for credit provided by financial institutions to creditors. The guarantee is an undertaking given on behalf of the defaulter that, in case a default occurs, the guarantor will fulfill the

<sup>5</sup> Suwinto Johan and Ariawan Ariawan, "Juridicial Overview Of The Syndication Financing Agreement Between Customers And Financial Institutions," *Kanun Jurnal Ilmu Hukum* 23, no. 3 (2021): 445–58, <https://doi.org/10.24815/kanun.v23i3.21920>.

<sup>6</sup> Mehdi Beyhaghi, "Third-Party Credit Guarantees and the Cost of Debt: Evidence from Corporate Loans," *Review of Finance* 26, no. 2 (2022): 287–317, <https://doi.org/10.1093/rof/rfab012>.

obligation.<sup>7</sup> This guarantee is not the main guarantee in lending.<sup>8</sup> This guarantee will affect the parent company if the subsidiary is in default.<sup>9</sup> However, the government is expected to be able to provide guarantees when the company is in default until debt restructuring.<sup>10</sup>

The parent company's directors represent the parent company's guarantor against the subsidiary. If the board of directors provides a guarantee without the board of commissioners' approval, then this guarantee is null and void and becomes the personal responsibility of the board of directors who signed it.<sup>11</sup> The guarantee provided by the company must be in the form of a limited liability company. Commanditaire Vennootschap (CV) cannot provide company guarantees or guarantees. CV is not a form of a legal entity, so the guarantee by CV will be considered null and void per Article 1820 and Article 1320 of the Civil Code (KUH).<sup>12</sup>

The filing of bankruptcy against a subsidiary does not directly affect the parent company. The bankruptcy filing can also be filed against the parent company if the parent company provides guarantees for the subsidiary's obligations.<sup>13</sup> In some cases, the parent company guarantee is only an oral obligation. This guarantee is challenging to execute when the subsidiary is in default.<sup>14</sup> In addition to debt guarantees, the parent company also has obligations regarding implementing environmental protection and human rights. The parent company must ensure that overseas subsidiaries protect the environment and human rights. This is regulated by legislation in France and England.<sup>15</sup>

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<sup>7</sup> Ms Ashmika Agrawal and Kalrav Krishna Tripathi, "CIRP against Guarantor to Corporate Person under Insolvency and Bankruptcy "," *Galgotias Journal of Legal Studies* 4, no. 1 (2019): 1–8.

<sup>8</sup> Vincent Leonardo Tantowie et al., "Legal Position Agreement with Personal Guarantee at Bank Medan Branch," in *International Conference on Culture Heritage, Education, Sustainable Tourism and Innovatoin Technologies*, 2020, 408–16, <https://doi.org/10.5220/0010312804080416>.

<sup>9</sup> Siti Malikhatun Badriyah, Siti Mahmudah, and Mochammad Djais, "Legal Impacts from the Bankruptcy of Subsidiary Company to Holding Company as the Corporate Guarantor," in *IOP Conference Series: Earth and Environmental Science*, vol. 175, 2018, <https://doi.org/10.1088/1755-1315/175/1/012214>.

<sup>10</sup> Jonathan C Gordon, "Government Guaranties for Corporate Bankruptcies," *Vermont Law Review* 43 (2018): 251–304.

<sup>11</sup> Mira Widyawati, Nyulistiowati Suryanti, and Kilkoda Agus Saleh, "Tindakan Direksi Yang Memberikan Corporate Guarantee Terhadap Anak Perusahaan Tanpa Persetujuan Dewan Komisaris Ditinjau Dair Hukum Perseroan," *Jurnal Bina Mulia Hukum* 3, no. 1 (2018): 127–38, <https://doi.org/10.23920/jbmh.v3n1.10>.

<sup>12</sup> Ida Bagus Abhimantara, "Kedudukan Persekutuan Komanditer (Commanditaire Venootschap) Sebagai Corporate Guarantee," *Notaire* 2, no. 3 (2019): 359–71, <https://doi.org/10.20473/ntr.v2i3.16227>.

<sup>13</sup> I Nyoman Sulastra, "Kedudukan Dan Tanggungjawab Personal Guarantee Atau Coorporate Guarantee Yang Timbul Dalam Kepailitan," *Jurnal Hukum Agama Hindu* 3, no. 2 (2020): 61–70.

<sup>14</sup> Nevina Yuliani, Busyra Azheri, and Wetria Fauzi, "Implementation of Corporate Guarantee for the Debt of Debtor at PT Bank Danamon Indonesia Tbk , Padang Branch," *International Journal of Multicultural and Multireligious Understanding* 6, no. 6 (2019): 609–18.

<sup>15</sup> Dalia Palombo, "The Duty of Care of the Parent Company: A Comparison between French Law, UK Precedents and the Swiss Proposals," *Business and Human Rights Journal* 4, no. 2 (2019): 265–86, <https://doi.org/10.1017/bhj.2019.15>.

Investors are more attracted to debt types such as secured bonds with a higher credit rating than unsecured ones. This guarantee will attract investors to buy bonds. However, debt guarantees give rise to information asymmetry. The risks that investors should be aware of are not visible in the prospectus.<sup>16</sup>

In Indonesia, this loan guarantee is regulated in Law Number 10 of 1998 concerning Banking.<sup>17</sup> Article 1831 of the Civil Code (KUH) explains that a guarantor or borgtocht is not required to participate and pay to creditors if the primary debtor is lax and the assets have paid off enough. The creditor can apply to the court to file the guarantor if the guarantor does not show good faith to fulfill his obligations.<sup>18</sup> The bankruptcy or default cannot be transferred or held accountable to the parent company as the shareholder. However, this must follow the agreement's contents between the creditor and the debtor.<sup>19</sup> In reality, the success or failure of a company is highly dependent on its shareholders.<sup>20</sup>

In addition to guarantees (guarantees), credit agreements also recognize Letters of Undertaking (LoU). LoU is a unique guarantee to guarantee credit or financing. Based on Article 1134 of the Civil Code, banks with LoUs are creditors with a higher position than other creditors.<sup>21</sup> In some agreements, the guarantor provides guarantees with other terms such as Letter of Indemnity (LoI) or Stand By Letter of Credit (SBLC). The bank is the issuer of SBLC in export and import transactions.<sup>22</sup>

The research questions are: How is the guarantee by a company with a different choice of law between the giver and the guaranteed? How is the execution of collateral by creditors with a different choice of law between a holding company and a subsidiary

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<sup>16</sup> Xueying Zhang, Shansheng Gao, and Jian Jiao, "Moral Hazard Effects of Corporate Bond Guarantee Purchases: Empirical Evidence from China," *Journal of Economics and Behavioral Studies* 10, no. 5 (2018): 100–115.

<sup>17</sup> Erna Sari, Andari Yurikosari, and Ani Wijayati, "Pengaruh Perlindungan Hukum Bagi Corporate Guarantee Sebagai Akibat Wanprestasi Debitor Dalam Pembiayaan Bank," *To-Ra* 7, no. 2 (2021): 14–32.

<sup>18</sup> Issac Davids Panjaitan, Asnati, and Fahmi, "Pertanggungjawaban Penjamin / Guarantor ( Personal / Corporate Guarante ) Dalam Perkara Kepailitan," *Jurnal Hukum Positum* 5, no. 2 (2020): 52–65.

<sup>19</sup> Ketut Gde Dannu Mertha Wiguna and I Gede Artha, "Tanggungjawab Induk Perusahaan Sebagai Penanggung (Corporate Guarantee) Anak Perusahaan Dalam Perjanjian Kredit Jika Terjadi Wanprestasi," *Kertha Semaya*, 2018, 1–14.

<sup>20</sup> T Philippova, O Shavandina, and E Kovalenko, "An Analysis of the Capital Concentration of a Corporate Organization as a Guarantee of Successful Business Development," *Advances in Social Science, Education and Humanities Research* 364 (2019): 64–68, <https://doi.org/10.2991/icsdcbr-19.2019.14>.

<sup>21</sup> Rio Christiawan, "Kekuatan Eksekusi Jaminan Letter of Undertaking Pada Pembiayaan Perbankan," *Refleksi Hukum: Jurnal Ilmu Hukum* 6, no. 1 (2021): 37–52, <https://doi.org/10.24246/jrh.2021.v6.i1.p37-52>.

<sup>22</sup> Jae-Sung Lee, "A Study on Documentary Letter of Credit Transaction Based on Import & Export Procedure," *East Asian Journal of Business Economics* 9, no. 3 (2021): 15–28, <https://doi.org/10.16980/jitc.17.3.202106.207>.

company? What is the form of a joint venture agreement between shareholders who provide guarantees and those who do not provide guarantees?

## 2. RESEARCH METHOD

This research uses the normative legal method. This research examines primary research materials, secondary research materials, and others. This research focuses on legal norms and principles related to consumer privacy protection. The research also examines the synchronization of existing laws and regulations vertically and horizontally. The research examines corporate laws and regulations related to corporate business law and banking law. The research looks at investing and gambling from a legal and financial perspective. Normative research examines primary research materials, secondary research materials, and other supporting materials.<sup>23</sup> The primary research material is the 1945 Constitution. The secondary research material consists of scientific research articles, books, results of proceedings, or research seminars. At the same time, other research materials are information in various communication media.<sup>24</sup>

## 3. RESULTS AND DISCUSSION

### 3.1. Corporate Guarantee by The Parent Company

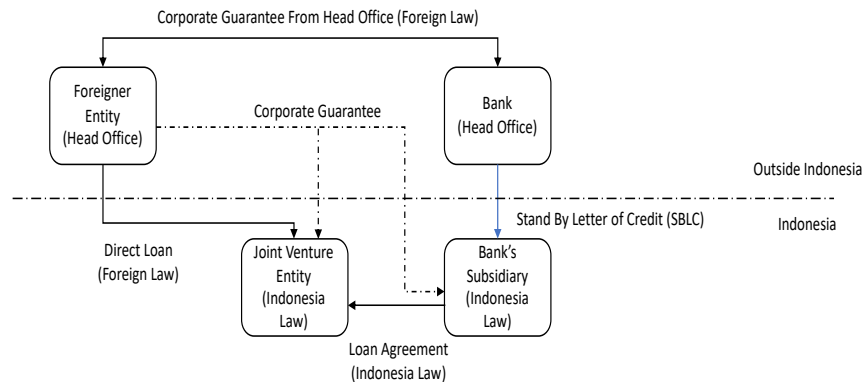
Foreign companies as joint venture partners must contribute funding to joint venture companies. Funding can be done with several alternatives: foreign holding companies can provide loans directly, provide guarantees to banks in Indonesia for loans or provide guarantees to the head office at a bank with good relations with the guarantor. The bank has a subsidiary in Indonesia. This is explained in **Figure 2**.

The first alternative, this direct loan grant, can use the same choice of law as the recipient of the guaranteed company and can also be different. Direct loans are agreements between foreign shareholders and subsidiaries in Indonesia. The parent company can choose the choice of law where the company is located.

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<sup>23</sup> Mahmud Marzuki, *Penelitian Hukum: Edisi Revisi - Prof, Revisi* (Jakarta: Kencana Prenada Media Grup, 2017).

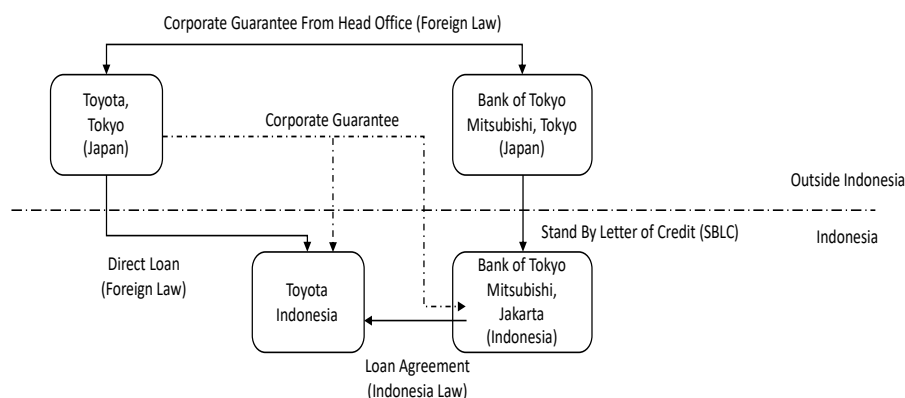
<sup>24</sup> Suwinto Johan and Ariawan Ariawan, "Keterbukaan Informasi UU Pasar Modal Menciptakan Asymmetric Information Dan Semi Strong Form," *Masalah-Masalah Hukum* 50, no. 1 (2021): 106–18, <https://doi.org/10.14710/mmh.50.1.2021.106-118>.



**Figure 2.** Financing Structure

Source: Research Results

The second alternative is to provide indirect loans by providing guarantees to the parent bank by following the choice of law between the parent company and the parent bank. As an illustration, both companies are companies domiciled in Japan, so the choice of law is law in Japan. Toyota Japan founded Toyota Indonesia. Toyota Japan provides guarantees to Bank of Tokyo Mitsubishi (BoTM), Japan. Then BoTM gave SBLC to BoTM, Jakarta, for the loan given to Toyota Indonesia. The provision of guarantees by the parent to subsidiaries in Indonesia will use the form of a Stand By Letter of Credit (SBLC). This agreement is an integral part of Indonesia's financing agreement between an Indonesian company and a bank subsidiary. After the SBLC, BoTM, Jakarta, provided a loan to Toyota Indonesia. This Choice of Law can use the law in Indonesia or the legal standing of a chosen independent country. For example, the choice of law is Singapore Law with a choice of forum dispute resolution through the Singapore Arbitration International Center (SIAC).



**Figure 3.** Illustration of Corporate Guarantee

Source: Research Results

The third alternative, the parent company, directly guarantees banks from the country of origin to provide loans to companies in Indonesia. This guarantee is also an integral part of the main agreement and the guarantee agreement. For this agreement, the party can choose the laws of Indonesia or the laws of other countries. Choice of law is an

agreement between the parties. As an illustration, Toyota, Japan provides guarantees to BoTM, Jakarta Indonesia, for lending to Toyota Indonesia. This transaction does not go through the head office of BoTM, Japan.

### **3.2. The form of A Joint Venture Agreement Between Shareholders Who Provide Guarantees and Those Who Do Not Provide Guarantees**

A joint venture agreement is an agreement between two shareholders who agree to establish a business. This business is in the form of a company. Each shareholder should support the success of this business. This venture will be called a subsidiary of both shareholders. One shareholder who has an ownership portion of more than 50% will be the main shareholder. Meanwhile, shareholders who own shares of more than 20% to 50% are referred to as affiliated companies.

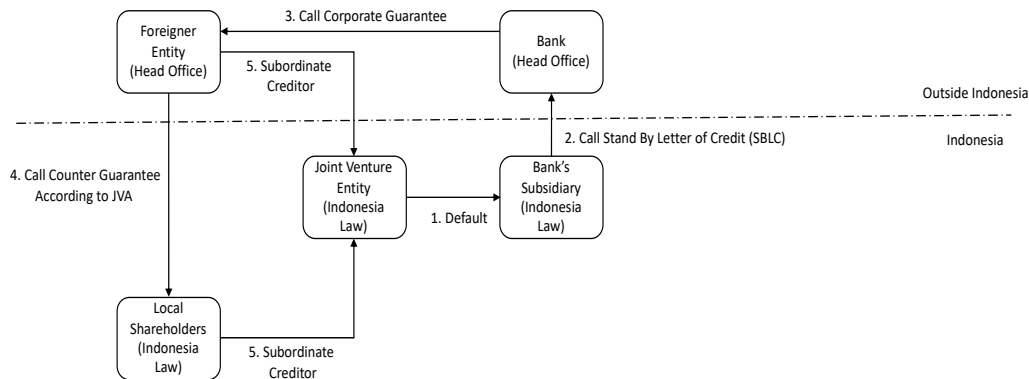
Each shareholder will provide their respective advantages to ensure the subsidiary's success. Foreign companies will have an obligation to provide funding for the company's running. This foreign company will provide financing to the subsidiary. Foreign companies will ask for guarantees from local shareholders per the proportion of shares of each party. As an illustration, foreign shareholders guarantee a loan of Rp. 500 billion to subsidiaries in Indonesia. Foreign shareholders own 60% of the shares, while Indonesian shareholders own 40%. Foreign shareholders will ask for a counter-guarantee from Indonesian shareholders of 40% on a guarantee of Rp. 500 billion. So Indonesian shareholders will provide guarantees to shareholders of 40%. This obligation will be stated in the joint venture agreement.

This counter-guarantee aims to cover losses from foreign shareholders and investment companies experiencing default. Foreign shareholders also want to ensure that Indonesian shareholders monitor investment company's run well. This guarantee is in a statement and is a moral obligation for the parties who signed it.

### **3.3. Execution of corporate guarantees by creditors**

The process of executing a corporate guarantee depends on the subject being guaranteed. The corporate guarantee will be claimed if the guaranteed subject is in default. This claim will change the status of the guarantor to a creditor if the creditor has taken over the obligations of the guaranteed company. The guarantor will replace the position of the bank creditor. This is explained in **Figure 4**.





**Figure 4.** Guarantee Call Process

Source: Research Results

Choice of the law becomes a challenge if one party refuses to fulfill the obligations claimed by the other party. This refusal will cause a dispute and must be resolved through existing legal channels. This choice of law will serve as a dispute resolution if the mediation route fails to reach. Choice of law will follow the agreement made by the parties. The choice of the law becomes crucial for the parties when negotiating credit agreements and derivative agreements.

#### 4. CONCLUSION

Funding is one of the crucial factors for the growth of a newly established company. Financial institutions, especially banks, are only willing to provide financing to companies running for two years. A newly established company needs support from shareholders as the parent company. The parent company will provide company guarantees against financing provided by financial institutions to subsidiaries. The guarantee may have the same or different choice of law as the subsidiary's position. The holding company that provides guarantees can make claims against other shareholders per the percentage of ownership. This research is qualitative research. This research focuses on transaction structure. This research has shortcomings regarding the execution process that occurs and the knowledge of business actors about company guarantees. Other research can be developed by conducting interviews with business actors in the financial industry.

#### AUTHOR DECLARATION

**Author contributions and responsibilities** - The authors made substantial contributions to the conception and design of the study. The authors took responsibility for data analysis, interpretation, and discussion of results. The authors read and approved the final manuscript.

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