



Legal Consequences of Unregistered Fiduciary Guarantee Deed

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ABSTRACT

Discussion regarding legal arrangements for fiduciary guarantee deeds that are not registered for research studies at FIFGROUP Batam Branch is regulated in Law Number 42 of 1999 concerning Fiduciary Guarantees, which is regulated regarding fiduciary guarantees contained in Article 1 paragraph (1) and (2) and what are the procedures for implementing the fiduciary guarantee in Article 11. The obstacle to the fiduciary guarantee deed not being registered is the need to complete documents such as identity cards, family cards (KK), and the applicant's address. From the results of this study, it was concluded that the legal arrangements are contained in Law Number 42 of 1999 concerning Fiduciary Guarantees. As well as the factor that becomes the obstacle is the incompleteness of the documents. So that the government conducts socialization related to the fiduciary registration process considering that the legal regulations already exist, finance companies must pay attention to drawing up a fiduciary guarantee deed and register it through a notary.

Keywords: Deed Law, Fiducian Guarantee, Not Registered

INTRODUCTION

The development of law in Indonesia is inseparable from the history that has been going on for quite a long time. If you look at this long history, the existing laws in Indonesia originate from the Netherlands, which once colonized Indonesia. It is undeniable that Indonesia has adopted the law originating from the Netherlands. Considering that Indonesia is a Dutch colonial country, whether we want it or not, Indonesia must also apply the legal system that existed in the Netherlands.

The need for credit will always follow economic and trade developments, and the provision of credit facilities will always require guarantees, in this case, for the security of the provision of credit in the sense that receivables from the lender or debtor will be guaranteed by collateral. The rights that provide guarantees are specifically regulated in the Civil Code.

According to Sri Soedewi Masjchun Sofwan, collateral is vital for securing returning funds given to creditors and for legal certainty. The Civil Code in Article 1131 determines that available guarantees granted by law have the nature of concurrency. All the assets of a debtor, both movable and immovable, both those that already exist and those that will exist in the future, serve as collateral for all his engagements. Collateral the types of collateral can be divided into 2 (two) types, namely material/material guarantees (in the form of material rights such as collateral for movable and immovable objects which can be charged by a pledge, mortgages on ships and aircraft, mortgage rights, and fiduciary guarantees), and immaterial/individual guarantees. Regarding the issue of guarantees, the bank will implement a policy that provides value for efficiency, security, cost, profit, and, of course, its relation to the development of other product markets. The policy still pays attention to legal aspects and profitability aspects.

It is necessary to have a guarantee institution related to the existence of guarantees with credit transactions between creditors and debtors. One of the collateral institutions used is a fiduciary institution. Fiduciary guarantees have been used in Indonesia since the Dutch colonial era as a form of guarantee born from jurisprudence. This form of collateral is widely used in lending and borrowing transactions because the charging process is considered simple, easy, and fast. In some cases, it has lacked significant development, for example, regarding the parties' position.

Fiduciary itself is an old term that is well-known in Indonesian. According to Law Number 42 of 1999 concerning Fiduciary Guarantees, this is also referred to as the transfer of ownership rights in trust from the debtor to the creditor. The transfer of ownership rights in trust in this fiduciary is commonly called the surrender of the *Constitutum Possessorium* (submission by continuing to master it).¹ Fiduciary construction is the transfer of property rights over the debtor's goods to the creditor while the physical possession of the goods remains with the debtor (*Constitutum Possessorium*) with the condition that when the debtor pays off his debt, the creditor must return the ownership rights to the goods to the debtor.²

The form of a guarantee agreement regarding various types of guarantee institutions in banking practice in Indonesia is always indicated in written form, as seen in certain forms/models

¹ H. Martin Roestamy, "Hukum Jaminan Fidusia", Percetakan Penebar Swadaya, Jakarta, 2009, Hal.48

² Munir Fuady, "*Jaminan Fidusia Revisi Kedua*", Citra Aditya Bakti, Jakarta, 2003, Hal. 10

from the Bank or outlined in the form of a Notary deed. For large sums of money, it is customary to put it in a notarial deed for legal certainty.

By the provisions of Article 14 paragraph (3) of Law no. 42 of 1999 concerning Fiduciary Guarantees ("UUJF"), new fiduciary guarantees are born on the same date as the date when the Fiduciary guarantee is recorded in the Fiduciary Register Book. Creditors will receive a fiduciary guarantee certificate "For the sake of Justice Based on Belief in One Almighty God." By obtaining a fiduciary guarantee certificate, the fiduciary creditor/recipient immediately has the right of direct execution, as occurs in lending and borrowing in banking. The legal force of the certificate is the same as a court decision that already has permanent legal force.

RESEARCH METHODOLOGY

Empirical Legal Research examines legal aspects by looking at the facts that occur in the field and then compared to the applicable laws and regulations and the opinions of experts related to this research. The nature of this research is descriptive, which seeks to provide and collect data and information that has existed or occurred in the field and aims to reveal or describe existing and ongoing phenomena. Based on the explanation above, the type of this thesis research is quantitative legal research, which is supported by sociological (empirical) legal research: legal literature, legislation, interviews, and other materials. This normative-empirical approach is a combination of normative legal approaches with the addition of various empirical elements.

DISCUSSION

Fiduciary guarantee arrangements in Indonesia are regulated in Law Number 42 of 1999 concerning Fiduciary Guarantees. Article 1 paragraph (1) of Law Number 42 of 1999 concerning fiduciary guarantees defines that "Fiduciary is the transfer of ownership rights of an object based on trust with provisions that the object whose ownership right remains in the control of the owner of the object. Article 1 point 2 states that a fiduciary guarantee is a guarantee right over movable objects, tangible and intangible, and immovable objects, especially buildings that cannot be encumbered with mortgage rights as referred to in Law Number 4 of 1996 concerning Mortgage rights that remain in control. As collateral for the settlement of certain debts, a fiduciary giver gives the fiduciary recipient a priority position over other creditors.

a. Basic Fiduciary Law

At the beginning of its implementation, fiduciary guarantees were only based on jurisprudence, and it had not yet been regulated that there was an obligation to register fiduciary guarantees by both fiduciary recipients and fiduciary givers. The absence of this obligation causes the fiduciary guarantee to be considered as not fulfilling legal certainty because the fiduciary recipient cannot know whether the object used as a fiduciary guarantee is in a position that another party has guaranteed.

For the first time in 1985, the existence of a fiduciary institution was recognized through a law, namely Law Number 16 of 1985 concerning Flats. This law regulates the ownership rights to apartment units which can be used as collateral for debts that fiduciary institutions can burden, then Law Number 4 of 1992 concerning Housing and Settlements, which also provides the possibility for houses to be built on land owned by other parties burdened with fiduciary guarantees.³

Judging from jurisprudence and statutory regulations, the basis for fiduciary law is:

1. Arrest Hoge Raad 1929, regarding Bierbrouwerij Arrest (Netherlands)
2. Arrest Hoggerechtshof on BPM-Clynet Arrest (Indonesia)
3. Law Number 42 of 1999 concerning Fiduciary Guarantees.⁴

So to accommodate the needs of the wider community, guarantee legal certainty and provide legal protection for interested parties, clear and complete legal provisions regarding Fiduciary Guarantees and fiduciary institutions are regulated in an Act, namely, in Law Number 42 of 1999 regarding Fiduciary Guarantees, which came into effect on September 30, 1999. With the promulgation of this UUJF, it means that henceforth there will be no more opportunities for polemics regarding agreeing or disagreeing with the terms or conditions of fiduciary guarantees and fiduciary institutions, which are a form of material guarantee institution. Which stands alone outside and is, therefore, different from the pawn.⁵

According to Article 1 of PMK Number 130/PMK.010/2012, Finance Companies that carry out consumer financing for motorized vehicles with a fiduciary guarantee are required to register the said fiduciary guarantee at the Fiduciary Registration Office by the law governing

³ Rachmadi Usman, "*Hukum Kebendaan*", Sinar Grafika, Jakarta, 2013, Hal. 280

⁴ Salim Hs, "*Perkembangan Hukum Jaminan Di Indonesia*", Pt. Raja Grafindo Persada, Jakarta, 2004, Hal.

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⁵ Rachmadi Usman, *Op.Cit.*, Hal. 282

fiduciary guarantees (article 1). The obligation to register a fiduciary guarantee also applies to Financing Companies that carry out the following:

- a) Consumer financing for motorized vehicles based on Sharia principles;
- b) Consumer financing for motorized vehicles whose financing comes from channeling or joint financing
- c) financing).

With the issuance of this regulation, all finance companies must register fiduciaries for each financing transaction. Therefore article 2 of PMK Number 130/PMK.010/2012 states that finance companies must register fiduciary guarantees at the Fiduciary Registration office by 30 (thirty) calendar days from the date of the consumer financing agreement. Regarding the registration period for fiduciary guarantees, the Batam Branch of FIFGROUP has never registered beyond the specified limit and has registered the fiduciary guarantee under the stipulation date. According to Article 4 PMK Number 130/PMK.010/2012, if a multi-finance company violates, it will be subject to administrative sanctions in stages in the form of:

- a. Warning;
- b. Suspension of business; or
- c. Revocation of business license

Warning sanctions are given in writing a maximum of 3 (three) times in a row with a validity period of 60 (sixty) calendar days each. If the finance company has complied with the provisions before the warning sanction period expires, the Minister of Finance can revoke the warning sanction. Meanwhile, the validity period of the third warning ends, and the Financing Company still does not comply with the provisions. In that case, the Minister of Finance may impose sanctions on freezing business activities. Sanctions for freezing business activities are given in writing to Financing Companies. They are valid for 30 (thirty) calendar days from issuing the letter for sanctions for freezing business activities. Likewise, with the sanction for freezing the business of a Financing Company that has complied with the provisions, the Minister of Finance will revoke the sanction of freezing business activities, and if until the expiration of the period of freezing business activities as referred to in the Financing Company does not also comply with the

provisions, the Minister of Finance will revoke the operating license of the Financing Company in question.⁶

a) Legal Consequences of Unregistered Fiduciary Guarantees According to Law Number 42 of 1999

By not registering a fiduciary guarantee by the provisions of Law Number 42 of 1999 and its implementing regulations, the said fiduciary agreement deed is included in the category of private agreements, and the settlement method requires the judiciary's intervention. Therefore, the execution must be submitted to the court after the decision has permanent legal force. In the process of executing objects that are objects of fiduciary guarantees or objects that are objects outside of fiduciary guarantees, the parties must pay attention to the debtor's rights attached to the objects that are used as collateral for the intended loan because, in such cases, it is necessary to pay attention to the object of fiduciary guarantee financing in its journey not in full according to the value of the goods, because the debtor has made his achievements, namely having paid several installments which are his obligations. Therefore, the debtor partly owns objects of fiduciary guarantees, while the creditor owns others. If the execution is carried out by force, namely through the services of a debt collector or collector, this will violate the law. Such violation of the law can be categorized as an unlawful act as stipulated in Article 1365 of the Civil Code so that the debtor can file a lawsuit through the court to request compensation for the creditor's actions.

Besides that, according to the author, arbitrary actions carried out by creditors through debt collectors or debt collectors can also be categorized as violating criminal law. In practice, therefore, the act is categorized as an act that violates Article 368 of the Criminal Code, which reads, "Whoever, with the intent to benefit himself unlawfully or others, forces someone by force or threats of violence to give something, which wholly or partly belongs to that person or another person, or in order to make a debt or write off a debt, is threatened with extortion with a maximum imprisonment of nine years." This situation can occur if the creditor in execution is forced to take the goods unilaterally, even though it is known that the goods partly or wholly belong to someone else. Even though it is also known that some of these items belong to creditors who want to execute them but are not registered at the Fiduciary Security Office, the said actions are still unlawful acts

⁶ (<http://irmadevita.com/2012/harus-daftar-jaminan-fidusia-dulu-baru-tarik-kendaraan.html>).

and violate the law, as explained above. Regarding the action of a creditor who forcibly takes objects of fiduciary guarantees, but the fiduciary guarantee is not registered, the debtor can immediately report to the nearest Republic of Indonesia Police Office. Other legal consequences can also be that creditors transfer fiduciary objects that are carried out underhanded to other parties; in this case, the debtor cannot be charged with Law Number 42 of 1999 because the deed of private agreement is invalid according to the said Law. Therefore, in response to this, sometimes the creditor reports the debtor to the police on charges of embezzlement by the provisions of Article 372 of the Criminal Code, which reads: "Anyone who deliberately and or unlawfully owns something that another person wholly or partly owns, but what is in his power not because of a crime is threatened with embezzlement, with a maximum imprisonment of four years or a maximum fine of nine hundred rupiahs.

The registration of fiduciary guarantees at FIFGROUP Batam Branch overcame obstacles and obstacles. Based on the results of an interview with Mr. Saut Freddy Nababan at the Remedial Recovery Section at FIFGROUP Batam Branch, the author can conclude the constraints and obstacles to the fiduciary deed that are not registered at FIFGROUP Batam Branch. Usually, the obstacle is the lack of completeness of the applicant's documents, such as identity cards, family cards (KK), and the applicant's address, due to frequent changing addresses (boarding houses/contracts) or because many immigrants are an obstacle due to fiduciary registration. They are required to use an identity domiciled in the city of Batam.

CONCLUSION

Based on the results of the research and discussion that the authors have described in the discussion chapter, the authors conclude the following:

1. Legal arrangements in the fiduciary deed that are not registered at FIFGROUP Batam Branch are guided by the Fiduciary Law Number 42 of 1999 Concerning Fiduciary Guarantees (State Gazette of the Republic of Indonesia of 1999 Number 168), which is regulated in this Act regarding the fiduciary guarantees contained in Article 1 paragraph (1) and (2) UUJF and how the procedures for implementing fiduciary guarantees in Article 11 UUJF.
2. Factors that become obstacles and obstacles to the legal consequences of an unregistered fiduciary deed are, in general, namely, the lack of completeness of the applicant's documents such as identity cards, family cards (KK), and the applicant's address, due to frequent changing

addresses (boarding house/contract) or because of the large number of migrants who are an obstacle because during fiduciary registration they are required to use an identity that is domiciled in the city of Batam.

REFERENCE

- Sri Soedewi Masjchun Sofwan, *“Beberapa Masalah Pelaksanaan Lembaga Jaminan Khususnya Fiducia Di Dalam Praktek Dan Pelaksanaannya Di Indonesia”*, Ugm Press, Jakarta, 1997.
- Salim H.S., *“Perkembangan Hukum Jaminan Di Indonesia”*, Pt. RajaGrafindo Persada, Jakarta, 2004.
- Salim H.S., *“Pengantar Hukum Perdata Tertulis (Bw)”*, Sinar Grafika, Jakarta, 2001.
- Ridzki Djunaidi, *“Beberapa Permasalahan Hukum Dan Jaminan”*, Bppn, Jakarta, 2000.
- H. Martin Roestamy, *“Hukum Jaminan Fidusia”*, Percetakan Penebar Swadaya, Jakarta, 2009.
- Munir Fuady, *“Jaminan Fidusia Revisi Kedua”*, Citra Aditya Bakti, Jakarta, 2003.
- Jalaluddin Rakhmat, *“Metode Penelitian Komunikasi”*, Rosdakarya, Bandung, 2004.
- Onong Uchjana Effendy, *“Ilmu Komunikasi Teori Dan Praktek”*, Pt. Remaja Rosdakarya, Bandung, 2004.
- Satjipto Rahardjo, *“Ilmu Hukum”*, PT. Citra Aditya Bakti, Bandung, 2000.
- Idham, *“Konsolidasi Tanah Perkotaan Dalam Perspektif Otonomi Daerah Guna Meneguhkan Kedaulatan Rakyat dan Negara Berkesejahteraan”*, PT. Alumni, Bandung, 2014.
- Projodikoro Wirjono, *“Azas-Azas Hukum Perjanjian”*, Alumni, Bandung, 1997.
- Gunawan Widjaja Dan Ahmad Yani, *“Jaminan Fidusia”*, Pt. Raja Grafindo Persada, Jakarta, 2000.
- Rachmadi Usman, *“Hukum Kebendaan”*, Raja Grafindo Persada, Jakarta, 2011.
- John M. Echols Dan Hassan Shadily, *“Kamus Inggris Indonesia”*, PT. Gramedia, Jakarta, 2005.
- Marjane Termorshuizen, *“Kamus Hukum Belanda Indonesia”*, Djambatan, Jakarta, 2002.
- Surayin, *“Kamus Umum Bahasa Indonesia, Analisis”*, Ytama Widya, Bandung, 2001.
- R. Subekti, *“Hukum Perjanjian”*, Pt. Intermasa, Jakarta, 1994.

Sudikno Mertokusumo, "*Penemuan Hukum Sebuah Pengantar*", Liberty, Yogyakarta, 1979.

A.Hamzah Dan Senjun Manullang, "*Lembaga Fidusia Dan Penerapannya Di Indonesia*", Indhill Co., Jakarta, 1987.

Rachmadi Usman, "*Hukum Kebendaan*", Sinar Grafika, Jakarta, 2013.

Salim Hs, "*Perkembangan Hukum Jaminan Di Indonesia*", Pt. Raja Grafindo Persada, Jakarta, 2004.