

Importance of Fiduciary Guarantee Registration for Parties Based on Law No. 42 of 1999 on Fiduciary Guarantee

Agnes Maria Janni Widyawati
Faculty of Law UNTAG Semarang
E-mail: agnesmariajw@gmail.com

ABSTRACT--*The emergence of fiduciary guarantees as they are known so far in the form of "Fiduciare Eigendom Overdracht" (surrender of ownership rights in trust) because the provisions of the law governing pawn contain many shortcomings, do not meet the needs of the community and do not follow the development of the community. Law No. 42 of 1999 is intended to accommodate the needs of the community regarding fiduciary security arrangements as a means to assist business activities and to provide legal certainty to the parties concerned. According to the fiduciary guarantee law there is an obligation to register objects burdened with fiduciary guarantees at the fiduciary registration office (regional office of the legal and human rights department). With the registration of fiduciary guarantees provide legal certainty and protection for the parties, namely fiduciary recipients, fiduciary givers and third parties.*

Keywords: registration, fiduciary guarantee

I. INTRODUCTION

The development of the world of investment and trade in Indonesia today causes the Guarantee law to occupy an increasingly important position. Investment and trade activities require financing and such financing can be obtained through credit. The need for credit and the provision of credit facilities require collateral.

A guarantee right is a right that causes a person who is in debt (creditor) to obtain a position of preference or to give preference to other creditors. A guarantee is called a material security if the creditor obtains a guarantee by prior repayment of other creditors.

The granting of fiduciary collateral as a material guarantee which is assessed from the existence of a loan agreement where the delivery of objects burdened with fiduciary collateral is done in *constitutum possessorium*, so that the fiduciary guarantor can still use the object even though the ownership rights have moved. The overdacht fiduciare eigendoms institution in the lending relationship is still justified by jurisprudence because the pawnshop is deemed to be insufficient to meet the needs in trading practice.

The importance of fiduciary collateral arrangements as a means of providing legal certainty to parties have an interest. The birth of Fiduciary Guarantee Law gave a new color in the field of guarantee rights, especially fiduciary guarantees. The change that occurred with the birth of the Act was a more comprehensive arrangement, no longer based on

Jurisprudence. The purpose of holding a Fiduciary Guarantee registration includes:

1. Provide legal certainty
2. Protection of Creditors and Debtors
3. Third party protection
4. Has executive power

However, in practice the imposition of Fiduciary Guarantees many do not carry out the registration of guarantees. Reasons for not registering Fiduciary Collateral are reasons for efficiency, low costs and competition between banks in the provision of credit, also no sanctions.[1] With the fiduciary registration legally having an executorial power, then the creditor (Bank) does have the legal power to execute objects if the debtor defaults. Based on the description above, the problems can be formulated as follows: What is the importance of registering fiduciary guarantees for the parties?

II. FINDINGS AND DISCUSSION

Fiduciary guarantee institutions allow the fiduciary giver to master the objects pledged to carry out business activities financed from loans using fiduciary guarantees.[2] In the beginning, objects that became fiduciary objects were limited to moving objects that were tangible in the form of equipment. However, in subsequent developments, objects that become fiduciary objects include objects that are intangible, as well as immovable objects.

Fiduciary definition according to Fiduciary guarantee law is:

"Transfer of ownership rights of an object on the basis of trust provided that the object whose ownership rights are transferred remains in the possession of the owner of the object."

Whereas the understanding of Fiduciary guarantees is regulated in Article 1 number 2 of Law No. 42 of 1999 concerning Fiduciary Guarantees:

Fiduciary guarantee is a guarantee right on movable objects both tangible and intangible and immovable objects, especially buildings that cannot be encumbered with the security rights as referred to in Law number 4 of 1996 concerning Mortgage rights which remain in the control of fiduciary givers, as

collateral for repayment of certain debts, which gives a preferred position to fiduciary recipients of other creditors.

Based on the above understanding, the elements of fiduciary guarantee are:

1. Fiduciary collateral is collateral for paying off debt;
2. Debts guaranteed for a certain amount;
3. Fiduciary security objects are tangible or intangible movable objects (and immovable objects, especially buildings not encumbered by mortgages). This relates to the imposition of collateral for flats;
4. Objects as collateral objects remain in the control of fiduciary givers based on trust, and
5. Give preferred position to creditors.

Fiduciary collateral has an *accessoir* nature of the existence of a loan agreement that gives preference to debt repayment. Credit agreement with the provision of fiduciary collateral that has been prepared by the bank in the form of a standard.

1) Imposition of fiduciary guarantees

The loading of objects with fiduciary guarantees is made with a notarial deed in Indonesian and is a fiduciary deed. The reason the law establishes with notary deed is:

- a. Notary Deed is an authentic deed so that it has perfect proofing power;
- b. Fiduciary security objects in general are movable objects;
- c. The law prohibits re-fiduciary.

In the fiduciary deed, aside from the day and date, the time (hours) to be made is also stated. The fiduciary guarantee certificate referred to at least contains:

- a. Identity of the fiduciary giver and receiver;
- b. Data on principal agreement guaranteed by fiduciary.
- c. The description of the object which is the object of fiduciary security The description of the object which is the object of fiduciary security, is sufficient to identify the object, and explained about the proof of ownership;
- d. Guarantee value;
- e. The value of the object used as the object of fiduciary security.

2) Registration of fiduciary guarantees

After the phases of loading are carried out based on the provisions of the Fiduciary Guarantee Act the fiduciary deed is obliged to be registered under the provisions of Article 11 paragraph (1) of the Fiduciary Guarantee Law, which states that objects burdened with fiduciary guarantees must be registered.

The procedure for fiduciary guarantee registration conducted by the fiduciary recipient in the Fiduciary Registration Office in connection with the application for fiduciary guarantee registration by the fiduciary recipient, is further regulated based on PP No.86 of 2000 concerning Procedures for Registration of Fiduciary Guarantees:

- a. Fiduciary registration application is carried out by the fiduciary recipient, proxy or representative by attaching a fiduciary guarantee registration statement that contains:
 - i. Identity of the fiduciary giver and recipient of the fiduciary, including his residence, place of residence, occupation;
 - ii. Date and number of guarantee deed, name and domicile of the notary who made fiduciary guarantee deed;
 - iii. Principal agreement data;
 - iv. The description of the object which is the object of fiduciary security;
 - v. Guarantee value and;
 - vi. The value of the object which is the object of fiduciary security.
- b. The Fiduciary Guarantee Registration Officer after receiving the application checks the completeness of the application requirements as follows:
 - i. Application letter for registration;
 - ii. Power of Attorney (if registration is authorized);
 - iii. Copy of Notarial Deed of Transfer of Fiduciary Guarantee;
 - iv. Photocopy of supporting evidence (if needed)
 - v. Receipt of payment of registration fee receipt

Because of the registration of fiduciary guarantees provide legal certainty and protection for the parties, namely fiduciary recipients, fiduciary givers and third parties, so that by not registering fiduciary guarantees for parties concerned gives juridical consequences, that is, it has no executorial power. With the juridical fiduciary registration having an executorial power. Giving fiduciary collateral must be made with a fiduciary deed made by a notary and then registered at the Fiduciary Registration Office, after fiduciary registration, the Fiduciary Registration Office issues a Fiduciary Guarantee Certificate containing the words commonly referred to as title, "For The Sake Of Justice Based On Belief In The One Almighty God", as stipulated in article 15 paragraph (1) and paragraph (2) which states that the Fiduciary Guarantee Certificate as referred to in paragraph (1) has the same executorial power as court decision which has obtained permanent legal force. Executorial power means that direct fiduciary recipients can carry out executions without going through a trial and are

final and binding on the parties to carry out the decision.

With the registration of fiduciary collateral objects in the Fiduciary Registration Office providing legal protection to various parties, namely:[2]

1. *Legal protection and the interests of creditors (fiduciary recipients).*

One way to protect the interests of creditors is to provide definite provisions for the rights of creditors. The complete data set that must be contained in the Fiduciary Deed (Article 6 Fiduciary Guarantee Law), indirectly provides a strong grip for the Creditor as the fiduciary recipient, specifically regarding which bills are guaranteed and the amount of the collateral that determines how much the bill of the preferred creditor.

Legal protection and the interests of creditors in the Fiduciary Guarantee Act can be seen in article 20 of the Fiduciary Guarantee Act:

"Fiduciary Collateral still follows Objects which become fiduciary collateral objects in the hands of those Objects, except for the transfer of inventory objects which are subject to Fiduciary Collateral".

That conditions confirm that fiduciary guarantees are material in nature and apply to them the *droit de suite* principle, except for the transfer of inventory objects which are subject to fiduciary security. The same protection can also be seen in the provisions of Article 23 paragraph (2): Fiduciary givers are prohibited from transferring, mortgaging, or renting out to other parties Objects that are objects of Fiduciary Collateral that are not inventories, except with prior written approval from the Fiduciary Recipient.

Sanctions against the above provisions are criminal as referred to in Article 36 Fiduciary Guarantee Law: Everyone intentionally falsifies, changes, removes or in any way gives misleading information, which if it is known by one of the parties does not give birth to a fiduciary guarantee agreement, is convicted with a maximum prison sentence of 1 (one) year and a maximum of 5 (five) year and a minimum fine of IDR 10,000,000 (ten million rupiah) and a maximum of IDR 100,000,000 (one hundred million rupiah).

For all acts and omissions of the fiduciary giver, the fiduciary recipient, based on the reasons that these partners are not responsible, as referred to in article 24 of the Fiduciary Guarantee Law: The fiduciary recipient does not assume any liability for the actions or negligence of the fiduciary giver arising from contractual relationships or arising from unlawful acts in connection with the use and transfer of objects which are subject to fiduciary security.

In essence, the purpose/objective of the fiduciary guarantee agreement in terms of legal protection for creditors is to give them privileges or privileges to pay off debtors' debts to them.

Further legal protection for the right to receivables comes first can be seen in the provisions of article 27 Fiduciary Guarantee Law:

- (1) Fiduciary recipients have the right to take precedence over other creditors.
- (2) Priority right as referred to in paragraph (1) is the right of the Fiduciary recipient to take the release of his receivables on the results of the execution of the object which is the object of fiduciary security.
- (3) Priority rights from Fiduciary Recipients are not nullified due to bankruptcy and / or liquidation of Fiduciary Givers.

Overall, several things that can indicate the existence of legal protection for creditors (Fiduciary Recipients) according to Fiduciary Guarantee Law include the following:

- a) The existence of a fiduciary guarantee registration agency is nothing but to guarantee the dismissal of the party receiving fiduciary.
- b) There is a prohibition on fiduciary providers to re-fiduciary object of fiduciary security (article 27)
- c) There is a provision that fiduciary givers are not allowed to transfer, pawn or lease (article 23 sub 2).
- d) The provision of the Fiduciary Giver must surrender the collateral object if the creditor wishes to execute the fiduciary collateral object.
- e) Criminal provisions in the Fiduciary Guarantee Law.

2. *Legal Protection and Interest of Debtor (Fiduciary Giver)*

For debtors through fiduciary guarantee agreements the legal protection given to them includes guarantees that fiduciary guarantee agreements make ownership rights to fiduciary guarantees, so that in the case of fiduciary defaults the terms of execution and auction of fiduciary objects are very strict with threats of null and void against execution actions outside applicable provisions, respectively can be seen in the articles below.[4] [5]

Several provisions in Fiduciary Guarantee Law that can show that this Law also provides legal protection for debtors as Fiduciary Givers, include:

- a. There is an affirmation (article 4) which states that the fiduciary agreement is a follow-up/accession, this can indirectly provide protection for the rights of the Fiduciary Giver (debtor) over the collateral object, because by that means, that by removing it, among other things through repayment of the main agreement, the fiduciary guarantee agreement automatically becomes nullified (article 25). That means that the right of ownership over fiduciary security objects automatically returns to the Debtor (Fiduciary Giver);
- b. The imposition of fiduciary acts through a notarial deed is also a form of attention to the formation of the Law on the interests of debtors (fiduciary givers). Through advice and reading of the fiduciary deed before the signing is one way to avoid providing rash guarantees;

- c. The existence of provisions regarding the execution of collateral items (article 29) constitutes an important protection of the rights of Fiduciary Givers, because with these provisions it becomes clear, that so far it is necessary to protect their interests as creditors only;
- d. The existence of the provisions of Article 29 sub c and article 31 of the Fiduciary Guarantee Law enlarges the opportunity to get a good price for collateral, which is certainly very beneficial to the Fiduciary Giver.

3. Legal Protection of Third Parties

With the registration of fiduciary guarantees will also provide legal protection for third parties. The provisions of article 18 UUJF indicate that the fiduciary guarantee applies the principle of publicity, this principle of publicity is necessary because of the *droit de suite* nature of the status of the guarantee rights.[6] [7]

The registration is intended so that the general public who has an interest (third party) can find out especially the burden of overlapping certain objects and therefore the list concerned is declared open to the public (article 18), and the provisions of this registration are held to have legal consequences on third parties.

The Fiduciary Guarantee Certificate has an executorial power, which means the Fiduciary Recipient can directly execute without going through a court of law. The Fiduciary Guarantee Certificate grants prior rights to Fiduciary Recipients as creditors (preferred creditors).

If the debtor defaults (breach of contract), the Fiduciary Recipient can execute according to the executorial title. In practice, Fiduciary Recipients still require Fiat Execution from the District Court after first applying for a decision to the District Court.[8]

Execution *parate*, ie Fiduciary Recipient sells fiduciary collateral objects through public auctions. Fiduciary recipients sell fiduciary collateral items under the hand according to the agreement of the parties. However, this requires a period of time after 1 (one) month after being notified in writing by the Fiduciary Recipient and announced at least in 2 (two) newspapers. This practice will add to the execution costs.

Fiduciary givers must surrender objects that become fiduciary guarantees in the course of execution. Any promises to carry out conflicting executions are null and void.[9] Every promise that gives the Fiduciary Recipient the authority to own the object that becomes the object of fiduciary security if the debtor defaults, is null and void.[10]

III. CONCLUSION

According to the fiduciary guarantee law there is an obligation to register objects burdened with fiduciary guarantees at the fiduciary registration office (regional office of the legal and human rights department).

With the registration of fiduciary guarantees provide legal certainty and protection for the parties, namely fiduciary recipients, fiduciary givers and third parties. So that by not registering fiduciary guarantees for interested parties there will be juridical consequences, that is, they have no executive power.

With the registration of fiduciary guarantees juridically has an executorial power. Provision of credit with fiduciary guarantees must be made with a notary fiduciary guarantee deed, then registered at the Fiduciary Registration Office.

After the registration of the fiduciary guarantee, the Fiduciary Registration Office issues a fiduciary guarantee certificate containing the word. The words commonly referred to as the clause "FOR JUSTICE UNDER THE ALMIGHTY GOD", in accordance with the provisions in Article 15 paragraph (1) and paragraph (2) which state that the Fiduciary guarantee certificate as referred to in paragraph (1) has the same executorial power with a court decision that has obtained permanent legal force. The executive power means that the recipient of a fiduciary can directly execute without going through a trial and is final and binding on the parties to carry out the decision.

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