

# Problems of the Execution of Fiduciary Guarantee Goods Which Unregistered by Finance Institutions

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## ABSTRACT

The COVID-19 pandemic that has hit this country has had a major impact on the economic sector in Indonesia. This is due to the large number of employee reductions / layoffs and increased prices for several commodities. Which resulted in human resources in Indonesia being short of work and looking for other ways to get capital, namely by entering into a debt agreement with fiduciary guarantees. and this article aims to analyze the problems of financial institutions (creditors) that cause fiduciary collateral objects not to be registered, then analyze the validity of unregistered fiduciary security agreements, and finally find out the procedure for the execution of collateral that is not registered. This study uses the juridical normative method with a statutory and conceptual approach. The result of this research is that the problem with financial institutions not registering is the addition of costs, time efficiency, and conditional execution in the fiduciary guarantee certificate based on the Constitutional Court decision Number 18 / PUU-XVII / 2019. Then regarding the validity of the fiduciary guarantee that is not registered will result in the procedure of executing the collateral.

**Keywords:** *Fiduciary Security Registration, Finance Institution, Collateral Goods, Execution Procedure.*

## 1. INTRODUCTION

The Corona Virus Disease (Covid-19) pandemic has hit almost all countries, including Indonesia.[1] Where Covid-19 is not just a health disaster, but Covid-19 has also caused chaos in the economic sector, not only large industries, the Covid 19 pandemic has made business actors in the tourism sector, shopping centers and small and medium businesses in Indonesia start to get nervous.[2] This incident had a negative impact because some sectors could not operate normally, which resulted in such things as a reduction in employees/layoffs to an increase in the price of some commodities. This has resulted in people in Indonesia being short of work and looking for other ways to keep working and survive during an unstable situation due to the Covid 19 virus pandemic.[3]

Institutions that are vulnerable to fiduciary guarantee agreements are divided into two, namely banking institutions and non-bank financial institutions, both of which are institutions that facilitate debtors in applying for debt with a fiduciary guarantee system[4]. These institutions act as creditors who become fiduciary recipients and are often known as Financial Institutions.

While the debtor itself can be an individual/corporation that becomes a fiduciary giver. To obtain legality in fiduciary guarantees, creditors are required to register fiduciary guarantees with the fiduciary registration office under the auspices of the Ministry of Law and Human Rights of the Republic of Indonesia. This has been regulated in Article 11 Paragraph 1 of Law no. 42 of 1999 concerning Fiduciary Guarantees. The benefit that will be obtained by the creditor is that the agreement has legal force. And if there is a civil dispute between the creditor and the debtor, it will be easily resolved and will not harm the creditor.[5]

The legal force obtained from the registered fiduciary guarantee is the existence of a fiduciary guarantee certificate that has been issued by the fiduciary registration office.[6] Where the certificate has the executive power to execute collateral if the debtor is in default (Default). However, with the Constitutional Court Decision No.18/PUU-XVII/2019 concerning the Execution of Fiduciary Guarantees Against Default Debtors, where the amended legal norm is regarding the executive power in fiduciary certificates as referred to in Article 15 Paragraph 2 of Law No. 42 of 1999 concerning Fiduciary Guarantees If the debtor does not agree to have the goods executed, the creditor must apply

for execution by the procedures in the district court.[7] However, in practice in the field, many creditors are reluctant to register their fiduciary guarantees with the fiduciary guarantee registration office by considering several factors. Among other things, creditors consider that the registration of the fiduciary guarantee will increase the company's costs for the issuance of certificates that are non-tax state income. While on the other hand, creditors want their receivables back immediately for financing other fiduciary guarantee agreements. With these problems, many creditors prefer to use Debt Collector services so that their receivables are quickly returned or paid off.[8]

The option taken by the creditor in choosing the services of a debt collector under the pretext of a Power of Attorney from the creditor against a third party (Debt Collector) to immediately get the receivables back has caused much anxiety to the debtor. In the field, it is found that debt collectors often intercept debtors on the street accompanied by threats, quarrels, and violence against debtors.[9] This deviates greatly from the procedure for the execution of fiduciary collateral as stipulated in the legislation. On the other hand, the receivables are not necessarily returned, the act can be charged with the provisions of criminal law in Indonesia. Either can be charged with Article 365/368 of the Criminal Code whose elements are determined according to the facts on the ground. Based on the description above, this research will examine several problem formulations as follows: 1) What are the problems with financial institutions in registering objects of fiduciary guarantees?; 2) How is the validity of the fiduciary guarantee agreement that is not registered?; and 3) What is the procedure for execution of unregistered collateral?

## 2. METHOD

This paper was prepared using a normative juridical method,[10] with a statutory and conceptual approach.[11] Based on this approach, several primary legal materials are used, namely laws and regulations relevant to the object of study, especially the Civil Code, the Fiduciary Guarantee Law, the Consumer Protection Law, and the Constitutional Court Decision Number 18/PUU-XVII/2019 supported by secondary legal materials in the form of books. [12]

## 3. RESULTS AND DISCUSSION

### I. FINANCIAL INSTITUTIONS PROBLEMS IN REGISTRATION OF FIDUCIARY GUARANTEE OBJECTS

Finance institutions according to Dahlan Siamat are business entities whose wealth is in the form of financial

assets rather than non-financial or real assets. Where financial institutions have provided credit or financing to customers and invested their funds in securities.[13] Which is the scope of the discussion of this article is in the provision of accounts payable to debtors with a credit system with fiduciary guarantees.

With the existence of financial institutions, it is expected to be able to improve the economy of the people in Indonesia and make it easier for MSMEs or the community, in particular, to obtain capital with a credit system by pledging a personal property. This was responded well by the government with the issuance of a special law that regulates fiduciary matters, namely Law 42/1999 on Fiduciary Guarantees as to the legal umbrella. The law regulates the rights and obligations of creditors and debtors who are the recipient and giver of fiduciary, respectively.

Then the main problem in this discussion is that many creditors do not comply with the applicable laws and regulations. For example, by not registering the fiduciary guarantee with the fiduciary guarantee registration office under the auspices of the Ministry of Law and Human Rights.[14] Even though the law has regulated that objects that are burdened with fiduciary guarantees must be registered, this is stated in Article 11 Paragraph 1 of the Fiduciary Guarantee Law.

The author analyzes the problems that arise because of [14] *First, the* addition of costs, which in this case the costs referred to in terms of registration of fiduciary guarantees and the cost of the process of issuing a letter / notarial deed. *Second, Time Efficiency,* on the other hand, creditors want their receivables to return quickly to be used as capital in other fiduciary agreements, but in this case, creditors are still bothered to wait for registration until the issuance of a fiduciary certificate. *Third, the* implementation of the executorial requirements in the fiduciary certificate, in which the Constitutional Court Decision Number 18/PUU-XVII/2019 requires the creditor to apply to the district court to execute the object of the fiduciary guarantee if the debtor refuses to have his guarantee executed.

From some of the above problems, creditors are reluctant to follow the fiduciary guarantee execution procedure, but creditors prefer another way that is considered faster and more efficient, namely by hiring the services of a debt collector to immediately get their receivables back under the pretext of a direct power of attorney from the creditor. In practice, the debt collector is disturbing the debtor because there are many elements from the debt collector who intimidates even to the point of looting and violence.[15] This adds new problems and

seems to freeze the laws and regulations that have regulated them.

## II. THE LEGALITY OF UNREGISTERED THE FIDUCIARY GUARANTEE AGREEMENT THAT IS

In general, a fiduciary agreement does not necessarily use a special guarantee agreement, where the fiduciary usually begins with a credit agreement that becomes a preliminary agreement (*vooroverenkomst*) of the delivery of money. The preliminary agreement is the result of an agreement between the lender and the borrower regarding the relationship between the two (creditor and debtor).[16]

In granting accounts payable with a credit system, of course, through various stages of the process until the fiduciary is registered if the guarantee from the debtor is movable goods, but in practice, the fiduciary is often not registered or is only limited to standard credit agreements and agreements to deliver goods as collateral to creditors. At this stage, it does not proceed to the registration stage of fiduciary guarantees, in other words, this is what is meant by unregistered fiduciaries. Knowing this, we return to the subject of the discussion about whether or not a fiduciary guarantee agreement is valid if it is not registered with the fiduciary registration office under the auspices of the Ministry of Law and Human Rights (Kemenkumham) as mandated by the Fiduciary Law in Article 11 Paragraph 1 of Law No. 42 of 1999 concerning Fiduciary Security which reads as follows: "Objects that are burdened with fiduciary guarantees must be registered".

So to answer the formulation of this problem, it is necessary to carry out a series of analyses. Not registered means that it is made with a deed under the hand or limited to an agreement between the two parties based on the principle of freedom of contract. Of course, even though the agreement is made under the hand, the agreement is valid, especially from the agreement of both parties who both know this and have complied with the provisions of Article 1320 of the Civil Code. However, the problem is the status of the agreement which has been regulated by two legal bases, namely the Fiduciary Guarantee Act and the Civil Code.

Where the status of the agreement causes different legal consequences. For this reason, the author analyzes the position of the fiduciary law with the Civil Code. Wherein the position rather than a law fiduciary is as Law and the Civil Code as law, as we all know the enactment of the Civil Code as the statute is based on the transitional regulation in Article II of the Constitution of the Republic of Indonesia in 1945, which reads:

"Everything existing state bodies and regulations are still in effect immediately, as long as new ones are made according to this Constitution".

Based on the *Lex Specialis Derogat Legi Generalis* principle, it can be analyzed that a fiduciary deed that is not registered is contrary to the law in particular so that the Civil Code is ruled out, especially in this case Article 1338 of the Civil Code. If there is a problem in the future between the creditor and the debtor, which can be in the form of a defaulting debtor (Default), then the creditor will lose his priority (preference) in the settlement of his receivables. And also lose the executive rights of the creditor to the fiduciary guarantee. Because the executorial rights are only obtained if the guarantee has been registered and has obtained a fiduciary guarantee certificate. which as a result the rights of creditors themselves become weak.

## III. PROCEDURE FOR EXECUTION OF UNREGISTERED COLLATERAL

A discussion of how the validity of a fiduciary guarantee agreement that is carried out under the hand or in other words that are not registered at the fiduciary registration office as above, will certainly have an impact on how confiscation can be carried out on an unregistered guarantee. , considering that the creditor no longer has the right to precede and also the object of the guarantee whether or not it can be confiscated against the object of the guarantee is very dependent on both parties how they defend their rights to each other, but it is important to remember that the important thing is that the creditor still has the right to obtain a settlement of the receivables and the debtor can still retain the object on the pretext of not registering the object with a fiduciary.

However, we also need to know that in a fiduciary guarantee agreement, the status of the fiduciary object is not the property of the creditor itself but only as a tool or process of transferring rights. It can be seen from Mariam Darus Badruzaman's opinion that the process of transferring property rights in fiduciary proceeds through the following stages[16]: First phase: obligatory agreement, which is the stage when the debtor borrows money and submits the collateral to the creditor; Second phase: at this stage, there is a material agreement in which both parties submit the constituted possessory; Third Phase: The occurrence of borrowing and use where the creditor after receiving the property rights from the fiduciary giver, gives a loan to use the property rights to the fiduciary giver.

In addition, if there is an agreement that says in the phrase that the object of the fiduciary guarantee is the property of the creditor, then this provision is null and

void as explained in the Fiduciary Guarantee Law, namely Article 33 of Law 42/1999 concerning Fiduciary Guarantees. Therefore, there is execution if there is a default by the debtor. The category of default according to the debtor refers to Article 1328 of the Civil Code which reads as follows:

"The debtor is negligent if by a warrant or with a similar deed it has been declared negligent or for the sake of his engagement, if this stipulates, that the debtor must be deemed negligent bypassing it. appointed time."

Every finance institution usually never forgets to include the period of an agreement, and the meaning of the article is the lapse of time from the agreement clause, namely the credit agreement, where the debtor has neglected his obligation to pay his debts, properly, when "the debtor is unable to pay normally. the thing that should be done is to make a summons first until the debtor himself is declared or declares himself unable or stops paying".[17] And the form of default that often occurs is in the form of arrears from payments during a predetermined time, but for this problem, the creditor assesses whether the debtor is still able to pay or is no longer.

After that, the next action is to conduct intensive and routine coaching and billing as well as provide advice and solutions to the difficulties experienced by the debtor, and it is hoped that the debtor concerned can fulfill his obligations or pay his installment arrears.[18] If the debtor still does not fulfill its obligations, then the next action is in the form of giving a warning letter. The warning letter is given in stages and three times until at this stage the debtor still does not fulfill its obligations, the bank will take action to execute or take guarantees or collateral from the debtor's power.[18]

Then if some of the efforts above have not yielded results, the creditor's efforts to get the receivables back are by way of negotiation and execution, but the execution is the last resort to do because negotiations prioritize a family settlement and do not burden one another, because if there is an execution of the object the fiduciary where the debtor has carried out his obligations for a long time from the agreement which then remains only for a few installments and then the execution is carried out, of course, this is a burdensome thing for the debtor himself.

If it comes to the negotiation stage, this still cannot be resolved, then the next thing is execution rather than the object of the guarantee. In this case, the creditor will be harmed because he has not registered his fiduciary guarantee with the fiduciary registration office. And then the debtor will object to the absence of a fiduciary certificate as mandated by the Fiduciary Guarantee Act

as the Executorial Power in the execution of the fiduciary guarantee object.[14]

#### 4. CONCLUSION

From the explanation above, it can be concluded that the problem with financial institutions in registering fiduciary guarantees is the *first*, the addition of costs, wherein this case the costs are referred to in terms of fiduciary guarantee registration and the cost of the process of issuing a notarial letter/deed. *Second*, Time Efficiency, on the other hand, creditors want their receivables to return quickly to be used as capital in other fiduciary agreements, but in this case, creditors are still bothered to wait for registration until the issuance of a fiduciary certificate. *Third*, the implementation of the executorial requirements in the fiduciary certificate, in which the Constitutional Court Decision Number 18/PUU-XVII/2019 requires the creditor to apply to the district court to execute the object of the fiduciary guarantee if the debtor refuses to have his guarantee executed.

While the validity of a fiduciary guarantee agreement that is not registered means that it is made with a deed under the hand or is limited to an agreement between the two parties based on the principle of freedom of contract. Of course, even though the agreement is made under the hand, the agreement is valid, especially from the agreement of both parties who both know this and have complied with the provisions of Article 1320 of the Civil Code. However, creditors do not get the privileges that have been granted by the Fiduciary Guarantee Law, namely the right to take precedence (*preference*) and the executive right that is on the fiduciary guarantee certificate. In addition, it will result in the procedure for the execution of collateral items which urgently require a fiduciary certificate as a legitimate executorial power by law. With this series of shortcomings, it will become the object of the debtor's objection if he wants to execute his collateral.

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