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# Reconstruction of the Guarantee's Objects in the Fiduciary Agreement in Indonesia

*Reconstrucción de los objetos de garantía en el acuerdo fiduciario en Indonesia*

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### ABSTRACT

Normally, the laws and fiduciary agreements made by the parties also affect the *lex specialis*, therefore, it is necessary to carry out the reconstruction of the fiduciary law. This research was a descriptive study that was analyzed qualitatively from secondary data. The approach used was the normative legal approach. The problem that often arises in the fiduciary law is with respect to the position of the fiduciary security object. Problems arise when fiduciary recipients execute collateral objects obstructed by the donor that has been transferred to a third party.

**Keywords:** Fiduciary agreement, Indonesia, object of guarantee, reconstruction.

### RESUMEN

Normalmente, las leyes y acuerdos fiduciarios hechos por las partes también se aplican a la *lex specialis*, por lo tanto, es necesario llevar a cabo la reconstrucción de la ley fiduciaria. Esta investigación fue un estudio descriptivo que se analizó cualitativamente a partir de datos secundarios. El enfoque utilizado fue el enfoque jurídico normativo. El problema que a menudo surge en la ley fiduciaria es con respecto a la posición del objeto de seguridad fiduciaria. Los problemas surgen cuando los receptores fiduciarios ejecutan objetos de garantía obstruidos por el donante que ha sido transferido a un tercero.

**Palabras clave:** Acuerdo fiduciario, indonesia, objeto de garantía, reconstrucción.

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## INTRODUCTION

Debt agreements can be made without guarantee and with guarantee. The guarantee can be in the form of objects, both movable and immovable objects. With this guarantee, the creditor has the right to guarantee to repay his debts if the debtor cannot repay the debt. [Abdul Kadir Muhammad, 2000, Standard Agreement in Trade Practices, Citra Aditya Bhakti, Bandung, p. 170] Objects as guarantee in the agreement are objects that are generally used as guarantee in the debt and credit agreements, so in this case it can also be the material rights in the agreement. These objects can be either tangible or intangible objects, movable or immovable objects, economic objects or non-economic objects.

The discussion of guarantee rights can cover a broader field and this is consistent with what is seen in current practice, where people can get credit with guarantee for objects that are non-transferable or even have no economic value for third parties. Now it is no longer solely confined to (traditional) transferable guarantees that are usually interpreted to be able to be sold to and interested in third parties and hence are said to be guarantees that have a monetary value. [R. Subekti, 1981, An Overview of the National Assurance Legal System, Bina Cipta, p. 24. Mr. Nugroho, Discussion on Working Paper; Legal Arrangements on Hypothesis, Creditverband and Fiduciary, contained in the same book above, p. 62]

One form of debt receivable with guarantee is receivable debt with fiduciary guarantee. Debts with fiduciary guarantee are born based on trust between the fiduciary giver (debtor) to the fiduciary recipient (creditor). The emergence of fiduciary is determined by the principal agreement, namely the debt and credit agreement between the debtor and creditor, so that the nature of the fiduciary agreement is the access or as a complement to the agreement principal. The existence of a fiduciary agreement even though the fiduciary recipient has provided funds to the fiduciary giver, but the object that is the object of agreement is still controlled by the fiduciary giver. It can be said that the presence or absence of a fiduciary guarantee agreement is determined by the presence or absence of a debt agreement between the debtor and the creditor.

Oey Hoey Tiong explains that, Fiduciary or complete fiduciaire Eigendomsoverdrach, often called a guarantee of trust in property rights, is a form of guarantee for movable objects in addition to pawning developed by jurisprudence. In fiduciary, it is different from the pawn that is given as guarantee to the creditor that is the right of ownership while the goods are still controlled by the debtor so that what happens is *contitutum possessorium*.

In fiduciary terms comes from the word *fides* which means trust. The legal relationship between a fiduciary debtor and a fiduciary creditor is a legal relationship based on trust. The fiduciary giver believes that the fiduciary creditor is willing to return the ownership rights that have been surrendered. Fiduciary creditors also believe that the fiduciary giver will not misuse objects that are objects of guarantee that are within his authority [Ibid., P. 22] To guarantee payment of installments on a regular and good basis, during an agreed period of time, the creditor and the debtor enter into an agreement to surrender fiduciary property rights. In order to protect their interests and ensure legal certainty for this, Law No. 42 of 1999 concerning Fiduciary Guarantees issued.

A very important thing in fiduciary security is the position of the object which is the object of guarantee in the fiduciary agreement. Actually, the existence of objects which are the object of guarantee in the fiduciary agreement has been regulated in Article 1 number (1), (2), Article 4, Article 27, Article 28 of Law No. 42 of 1999 concerning Fiduciary Guarantees. Basically, the existence of objects is as guarantee with prior rights to pay off debts from debtors. Objects that become fiduciary guarantee objects belong to the fiduciary giver (debtor) and the fiduciary giver obtains credit from the fiduciary recipient (creditor). However, legal problems often arise that make an issue with objects that are the object of fiduciary security.

The legal problem begins with the default of the fiduciary provider (default) in making payments to the fiduciary recipient. While the creditor when executing fiduciary guarantee is always prevented by the debtor, although legally the fiduciary guarantee has an executive power. In fact, fiduciary givers often transfer, transfer or pawn fiduciary guarantee objects to third parties without the fiduciary's knowledge.

On the other hand the fiduciary agreement follows the provisions of article 1338 of the Civil Code (Civil Code) on freedom of contract. This means that everyone has the freedom to make any agreement whatever form and content. The argument that is often used by debtors when fiduciary guarantee objects will be executed by the fiduciary recipient that is not willing to submit to fiduciary laws because there is an agreement made by the parties. The status of the agreement made by the parties is also a law. If the fiduciary giver does not want objects to be executed, then only defaults. Such is the importance of the object's position in the fiduciary agreement so that it needs to be reconstructed and explored philosophically to find the values contained in the object's position in the agreement and Law number 42 of 1999 concerning fiduciary guarantees (UUJF).

## **METHODOLOGY**

### **Research Approach**

This research was a qualitative research with a normative juridical legal research using library data or secondary data as material that relates to the object of research. Rony hanitijo Soemitro mentions normative research with research with a literature approach based on regulatory regulations, books or legal literature and related research material. The research was focused on the study of the application of legal norms.

#### **Research Specification**

This research was a descriptive that aims to provide a concrete description or explanation about the situation or the object of research.

#### **Data Source**

The data source in this study used secondary data that includes official documents, library books, regulatory regulations, scientific work and others. Secondary data sources consisted of primary legal materials, namely binding legal material covering the Civil Code, Fiduciary Law number 42 of 1999. Secondary legal material is providing explanations of primary legal materials such as legal designs, research results, legal papers and others. Tertiary hukum material, provides an explanation of secondary legal material such as a legal dictionary.

## **ASPECTS OF THE FIDUCIARY GUARANTEE PHILOSOPHY**

Reconstruction of the position of objects, which become guarantee in the fiduciary agreement cannot be separated from the guarantee legal system in Indonesia. The position of the object is regulated in UUJF and outside UUJF, specifically in the Civil Code. As guarantee in the loan agreement, the object will be used to pay off fiduciary debt if the fiduciary debtor cannot repay his debt. To be able to elaborate on this, it is necessary to describe philosophically about the object that is the object of guarantee. In terminology, the term guarantee is derived from the word guarantee that means responsibility, so that the guarantee can be interpreted as a dependent.

In this case, the dependents on all commitments from a person as specified in article 1131 of the Civil Code, which states: "All material things that are owed, both movable and immovable, both existing and new will exist in the future, is a responsibility for all individual engagement ". Furthermore Article 1132 of the Civil Code that states: "The material is a joint guarantee for all those who impose him; the sales revenue of the objects is divided according to balance, that is according to the size of the respective receivables, except if among the receivables there are valid reasons to come first ".

Article 1131 and Article 1132 of the Civil Code mentioned above constitutes the spirit of the agreement entered into by the parties in a credit agreement. However, Article 1131 and Article 1132 of the Civil Code only have the right or position as concurrent creditors, meaning that all creditors have the same position and each gets a payment proportional to the amount of their respective receivables. Repayment proportionally without special rights (precedence) will certainly result in creditors not recovering all of their receivables. This condition

will harm the creditors. To solve this condition, in addition to a general guarantee, the creditor may enter into an additional agreement with the debtor which is a special guarantee.

The special guarantee by showing certain objects either those belonging to the debtor or even third parties as guarantee for debt repayment. With this guarantee, the creditor's position will turn into a preferred creditor, that is, if the debtor fails to fulfill his obligations (default), then the preferred creditor has the right to sell the guarantee to pay off his debt, without the need to pay attention to other creditors.

Pawn as a material security guarantee function serves to provide legal certainty for creditors that the debtor will carry out his obligations. Liens are placed by bringing a pawn object under the authority of the creditor or under the authority of a third party. The emergence of a lien, the pledge must be submitted to the creditor (or third party) or called *inbezitstelling* (real).. Submission (in pledge) of movable and non-bodied movable objects in the form of invoices is carried out by actual surrender. As for non-bodied objects in the form of invoices for orders, it is carried out with *endossement* accompanied by actual surrender (Article 1152 bis of the Civil Code). Submission / levering here is not a juridical submission and is not a surrender which results in the recipient becoming the owner and therefore the pawn holder with such surrender remains only as a holder, never on the basis of such surrender being a *bezitter* in the sense of *bezite* of civilization (*burgelijk bezit*) . That is why the *bezite* is called *pandbezit*.

At first time, pawn is considered sufficient to meet the needs of the community in the field of credit. However, when the agricultural crisis hit Europe in the middle of the 19th century, there is an obstacle for agricultural companies to get credit. If surrendering his farming tools as a pledge in taking credit is the same as suicide, because what is the credit obtained if the agricultural equipment needed to cultivate land that is already in the control of creditors. The existence of differences in interests between creditors and debtors makes it difficult for both parties. To carry out a pawn without mastery collided with the provisions of Article 1152 (2) of the Civil Code.

Starting from the pawn, then people think about how the debtor get credit, but the debtor still receive economic benefits from the object that has been used as guaranteed for debt. To obtain this, a legal breakthrough must be built in the debt and credit agreement with movable property as guarantee. The legal breakthrough is the surrender of ownership rights in confidence to the debtor's movable property to the creditor with the physical authority over the fixed object to the debtor. Provided that if the debtor repays his debt in accordance with a predetermined time period (without default), the creditor is obliged to return the ownership of the object to the debtor (*contitutum possessorium*).

In Netherlands these fiduciary institutions first surfaced based on *Brierbrouwerij Arrest* on January 25, 1929 while in Indonesia fiduciary institutions were recognized by jurisprudence under *Hooggerichtshof* on August 18, 1932 which subsequently enacted law number 42 of 1999 concerning Fiduciary Guarantees. The issuance of the Fiduciary Guarantee law is an official acknowledgment from the legislators of the Fiduciary guarantee institution, which has only recently gained recognition through jurisprudence. Thus, henceforth there will be no more opportunity for polemics on agreeing or disagreeing about the Fiduciary Security institution as a form of material security institution that stands alone outside the pawn.

The Fiduciary Law as mentioned in the weighing section sub c aims to provide a more complete arrangement that has been available so far and is intended to provide better legal protection for the parties concerned. In the explanation of the fiduciary law in general part I sub 3 it is said that, the fiduciary law in addition to accommodating the needs of practices that have been there also wants to provide legal certainty to the parties concerned. In line with the principle of providing legal certainty, the fiduciary law takes the principle of registration of a Fiduciary guarantee. The registration is expected to provide legal certainty to Fiduciary givers and recipients as well as to third parties.

## **FIDUSIA LEGAL RELATIONS OF THE PARTIES IN THE FIDUCIARY AGREEMENT**

Historically in Roman period, the fiduciary creditor was the owner of the fused goods but in UUJF, the fiduciary recipient is only a guarantee holder. This means that in Roman times the transfer of property rights to fiducia cum creditore occurred perfectly so that the position of the fiduciary recipient as the owner was also perfect. Consequently, as the owner is free to do whatever he pleases with the goods, but based on the fiduciary fides the recipient is obliged to return the ownership rights if the fiduciary provider repays his debt.

The fiduciary guarantee agreement is in principle the same as the agreement in general that must fulfill the elements of Article 1320 of the Civil Code, namely agreeing to bind themselves, able to make agreements, there are certain objects and may not conflict with applicable law. The legal relationship between the fiduciary giver (debtor) and the fiduciary recipient (creditor) in freedom of contract must have a balance and harmony. This balance can be achieved if there is a growing balance between rights and obligations among all parties in legal and economic relations.<sup>1</sup>

Realization of law in agreement according to Van Dunne<sup>2</sup> consists of stages in entering into an agreement, namely the pre contractual stage, the contractual stage and the post contractual stage. The pre-contractual stage is the preliminary stage before entering into an agreement. The contractual stage is an agreement or agreement of that will that gives rise to an agreement and gives birth to a legal relationship and at the same time an engagement occurs. The post contractual stage is the stage of implementing the agreement or how the agreement was carried out by the parties based on the previous agreement. Thus there was a legal relationship between the parties who entered into an agreement. This also applies to fiduciary guarantee agreements.

Voluntary legal relations can occur between fiduciary givers and fiduciary recipients by entering certain agreements. This legal relationship creates equal rights and obligations for each party because the fiduciary guarantee agreement is carried out based on the agreement of the parties so that the implementation must be in good trust. Although in business practice, known as a standard contract, namely an agreement in which all the clauses are standardized by the user and the other party basically has no chance to negotiate or ask for changes. Often in practice these agreements are set out in forms prepared by business actors or fiduciary recipients who must be filled out or signed by the fiduciary giver.

Although the standard agreement arises from the freedom of the parties in making the agreement, on the other hand it actually limits the freedom of the parties to reach an agreement. So that it suggests an unbalanced position between the parties, where the fiduciary recipient can freely determine the conditions or achievements that must be done by the fiduciary giver, while by the fiduciary giver, has no bargaining space for the conditions or achievements demanded by the fiduciary recipient. However, the fiduciary giver does not necessarily lose freedom in making the contract, because he still has the freedom to not agree to the agreement or not to enter into the standard agreement. No party can force someone to agree on an agreement. The existence of coercion indicates that there is no agreement between the parties. Therefore, fiduciary givers are given the right to enter to other agreements. There is still room for freedom for fiduciary givers who are the basis of the justification of the existence of standard agreements, because the existence of standard agreements cannot be separated from the business world.<sup>3</sup>

Standard agreements arise because of the demands of the business world that wants every transaction to take place efficiently and effectively, so that it requires speed in transactions. This is stated by Sultan Renny Sjahdeni that The validity of the standard agreement does not to be questioned because the standard agreement of its existence is already as a reality, namely the use of a standardized agreement extensively in the business world for more than 80 years. This reality was formed because business agreements could no

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<sup>1</sup> Soerjono Sukanto, 1983, *Faktor faktor yang Mempengaruhi Penegakan Hukum*, Rajawali Press, Jakarta, page 70

<sup>2</sup> Van Dunne cited by Sudikno Mertokusumo, "Perkembangan hukum Perjanjian", paper at the national seminar of the association of civil / trade law teachers in collaboration with the Faculty of Law UGM-Consortium of Law, Yogyakarta, 12-13 March 1990, page 7

<sup>3</sup> Abdul Kadir Muhammad, *op cit.*, page 96

longer take place without standard agreements. Standard agreements are needed by and therefore accepted by the public.<sup>6</sup> The principle of freedom of contract and the open nature of treaty law support developments in legal relations, both national and international.<sup>7</sup>

Judging from the legal protection of fiduciary givers, the existence of standard agreements is also not contrary to the law. Although the fiduciary recipient has the freedom to set out the terms of a standard agreement or standard clause, it is not substantially permissible to contain clauses that are detrimental to the interests of the fiduciary giver, called the exoneration clause. Mariam Darus Badruzaman said that one of the contents of the clause was: "The clause included in an agreement whereby one party avoids fulfilling the obligation to pay full or limited compensation that occurs because of broken promises or unlawful acts".<sup>4</sup>

Pasal 1338 KUH Perdata menentukan bahwa segala persetujuan harus dilaksanakan secara jujur dan itikat baik.

Article 1338 of the Civil Code stipulates that all agreements must be carried out honestly and in good trust<sup>5</sup>, whereas according to Article 1339 of the Civil Code both parties are not only bound by what is explicitly stated in the agreement but also by those required according to the nature of the customs and law compliance agreement. Even more clear is Article 1337 of the Civil Code that if an agreement entails promises that are commonly used by the community, that is custom, then the promises are considered contained in the contents of the agreement, even though the two parties in forming the agreement did not mention it.

Article 1339 of the Civil Code states that, in addition to what is contained in the agreement, the customs and laws regarding the matter contained in the agreement must also be considered. Whereas Article 1337 of the Civil Code promises that according to custom is inherent in such agreements considered to be contained in the contents of the agreement that must be implemented honestly. Honesty in the implementation of the agreement must be distinguished from honesty when the legal relationship starts, such as honesty is indeed goods or objects as one of the conditions of the goods held in the past. Honesty referred here is an estimate in the hearts of parties who hold the goods or objects as the object of the agreement to carry out the contents of the agreement in good faith as agreed between the parties...<sup>6</sup>

In terms of fiduciary recipients, the provisions in Article 11 through Article 18 of the UUJF are clearly intended to provide legal protection to fiduciary recipients. Therefore, the law places an obligation on fiduciary recipients to register a fiduciary guarantee deed (AFJ). Imposition of material with fiduciary security is made with a notarial deed in Indonesian (Article 5 paragraph (I) UUJF). Fiduciary security rights legally give ownership rights to creditors for security right burdend goods, but control of the goods is in the debtor. The ownership of the object given as guarantee is transferred by the owner to the creditor of the guarantee, so the ownership of the guarantee is on the creditor of the guarantee. Even though there is a surrender of ownership rights, the surrender is actually not intended to the creditor of the owner of the guarantee, but only gives creditor rights. That is in accordance with the intention of surrendering guarantee to a Fiduciary institution, the purpose is to provide a guarantee for a bill. The Trust here means that the guarantor believes, that the surrender of his "right of ownership" is not intended to actually make the owner's creditor for the object surrendered to him and that later if the principal engagement obligation - for which the fiduciary guarantee is paid, then the object the guarantee will again be the property of the guarantor. Normatively what is surrendered is its jurisdiction over the object. Thus, the right to use it (the right to use guarantee) remains with the guarantor. In such case the juridical property rights are in the fiduciary creditor, while the socio-economic rights are in the fiduciary giver.<sup>7</sup> Based on the history of fiduciary guarantee institution development, the construction of the transfer of ownership in a *constitutum possessorium* is held to meet the need for the practice of guaranteeing movable objects, where

<sup>4</sup> Mariam Darus Badruzaman, 1994, *Aneka Hukum Bisnis*, Bandung, Alumni, page 47.

<sup>5</sup> Nindyo Pramono, "Problematika Putusan Hakim dalam perkara pembatalan perjanjian," *Mimbar Hukum*, Volume 22, nomor 2, Juni 2010, hlm 226

<sup>6</sup> Supriyadi, 2014, *Dasar dasar Hukum Perdata di Indonesia*, Kiara Science Kudus, page 76

<sup>7</sup> Supriyadi, "Problematika Jaminan Fidusia", National Seminar Paper organized by APSI (Indonesian Shariah Lawyers Association) at Honocoroko Kudus on April 12, 2014

the guarantee object remains the fiduciary giver's power because it is needed for the business activities of the fiduciary giver (the guarantor).

### **THE FIDUCIARY GUARANTEES POSITION**

The guarantee legal system in Indonesia consists of material guarantees (*zakelijkezekerheid*) and individual guarantees (*persoonlijkezekerheid*). Material guarantees including fiduciary guarantees that have certain material characteristics and have inherent properties and follow the objects concerned. Fiduciary guarantee is an alternative choice for business actors to obtain venture capital in the form of credit from financial institutions with guarantee. Fiduciary guarantees can be obtained easily, simply and quickly and flexibly, so that it becomes the choice of business actors. The business actors simply surrender their property as a credit guarantee to financial institutions with fiduciary guarantee.

The material character in fiduciary guarantee is contained in Article 1 paragraph (1), Article 20 and Article 27 of Law number 42 of 1999. With the material character, the fiduciary recipient is the preferred creditor and has the nature of *zaaksevolg*. [J. Satrio, *Law of guarantee ... Op.cit*, Bandung, p. 13] Definition of objects in fiduciary guarantees in Law Number 42 of 1999 concerning Fiduciary Guarantees (UUJF), that is, everything that can be owned and transferred, both tangible and intangible, registered or unregistered, movable or immovable cannot be guaranteed mortgage or mortgages, as stated in Article 1 paragraph (4). In addition to the objects mentioned, fiduciary objects also include, unless otherwise agreed, the results of objects such as receivables from the sale of goods, insurance claims, in the case of objects that are objects of fiduciary security insured (Article 10) thus fiduciary guarantee objects are intangible goods, as in Article 1 point 2. Furthermore, Andi Prajitno<sup>11</sup> that the fiduciary security object is quite variable and complex, especially in determining the criteria and status and authority or basis for the rights of the object.

Fiduciary security agreements as the other material guarantees are generally *accessoir* agreements of a principal agreement in the form of a debt agreement. But now in fiduciary guarantee, although it has to do with debts, it is also used in buying and selling. Buying and selling is not done in cash where the remaining unpaid price is agreed as debt, it is possible to guarantee the debt with fiduciary guarantee.<sup>8</sup>

The legal relationship between ownership of an object is called a real relationship or relation in *rem* from the Latin *res*, which means object and it is distinguished from interpersonal relationships which are called personal relationships. The main elements that signify the ownership relationship of an object include the right to use the object physically, the right to obtain income from ownership of the object in the form of money or obtain other services, the right to transfer it to someone else.<sup>9</sup>

Fiduciary agreement objects in fiduciary law function as agreement for paying off debtors' debts. These agreement rights generally have the characteristic, that in addition to being more guaranteeing the fulfillment of a receivable, most also give the right to take precedence in taking repayment. Although some of the guarantee rights are property rights, but the guarantee rights here are guaranteed by material rights such as property rights, *opstal* rights and others, which are given the right to enjoy (*genotsrechte*) that has the nature of providing guarantees, and hence called *zekerheidsrechten*, which gives a sense of security.

Guarantee rights in taking repayment than other creditors, on the proceeds of the sale of a certain object or group of certain objects, which are specifically bound<sup>12</sup>. Judging from the emergence of the material security rights, then included in the group that is deliberately promised. Fiduciary guarantee function in receiving a domicile as a creditor takes precedence over other creditors. This affirmation can be seen in Article 1 and Article 27 of the UUJF that in essence fiduciary recipients have the right to take precedence over other creditors. The right comes first to take the payment of receivables from the execution of objects that become fiduciary

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<sup>8</sup> Oey Hoey Tiong, *Fidusia Sebagai Jaminan Unsur-Unsur Perikatan*, Ghaila Indonesia, 1985, page 75

<sup>9</sup> F.H. Lawson & Bernard Rudden, *The Law Of Property*, Scord Edition, Clarendon Law Series, Oxford University Press, Oxford, 1982, p 8

guarantees. This guarantee right is not nullified because of bankruptcy and / or liquidation of the fiduciary giver. Thus, there is no reason to state that fiduciary guarantees are only obligatory agreements that bears individual rights (persoonlijk) for creditors. Article 4 UUJF also expressly states that fiduciary guarantees are an agreement of *accessoir* from a main agreement that raises the obligation for the parties to fulfill an achievement in the form of giving something, doing something or not doing something that can be valued in money.

Objects that become fiduciary security have material rights in which their rights are attached to the material wherever the material rights are transferred (*droit de suite*), it means that if a material right is in the form of a guarantee, then with the death of the guarantee grantor, the material rights will not expire and for the sake of the law is transferred to the heirs because of the basis or title of general rights (Article 20 UUJF), except for fiduciary object guarantee in the form of inventory or merchandise (Article 20 through Article 24 of the UUJF) and the object of guarantee referred in the Act of warehouse receipt system<sup>10</sup> (Law Number 9 year 2006)

The advantage of charging fiduciary guarantees is that the procedure is easier, more flexible, and faster than they are cheaper. In addition to providing convenience and procedures for providing guarantees, creditors are guaranteed for loans given to debtors, while debtors can still use the guaranteed items.<sup>11</sup>

## **LEGAL ASPECTS OF FIDUCIARY GUARANTEES**

Normally, the existence of UUJF has guaranteed legal certainty, as the Article 11 UUJF that requires burdened objects with fiduciary guarantee be registered at the fiduciary registration office located in Indonesia. This obligation even applies even if the material burdened with a human security is outside the territory of the Republic of Indonesia. The registration of objects burdened with fiduciary guarantees is carried out at the fiduciary giver's domicile, and registration includes objects, both inside and outside the territory of the Republic of Indonesia to fulfill the principle of publicity. This registration is a guarantee of certainty to other creditors regarding objects that have been burdened with fiduciary guarantees.

Provisions regarding the existence of fiduciary registration obligations, according to Gunawan Wijaya & Ahmad Yani<sup>12</sup>. It is an important breakthrough considering that generally fiduciary security objects are movable and unregistered objects so it is difficult to know who the owner is. This breakthrough will be more meaningful if it is associated with the provisions of Article 1977 of the Civil Code which states that whoever controls a movable object is considered the owner (*bezit geldt als volkomen title*).

Article 11 UUJF requires that objects which are burdened with fiduciary guarantees must be registered. The registration of obligation is to provide legal certainty for fiduciary security objects. With the certainty of the law that will provide legal protection for fiduciary recipients. Actually, legal protection for fiduciary recipients is not only regulated in Article 11 but also regulated in Article 11 through Article 18 UUJF. Article 11 to 18 UUJF has provided protection for fiduciary recipients, so that the obligation to register lies with the fiduciary recipient. Thus the law requires fiduciary recipients to register a fiduciary deed (AJF). This AJF has the executive power as regulated in Article 14 of the UUJF.

Philosophically, the registration of guarantee bonds for objects which are the object of fiduciary guarantee has given the creditors legal protection to third parties. The legal protection will be seen when the debtor (fiduciary giver) defaults, then the fiduciary recipient can execute the object which is the object of guarantee. Fiduciary recipients have a priority right to repay debts from other creditors, as Article 27 UUJF states that: (1). Fiduciary recipients have priority rights over other creditors. (2). The precedence right as referred to in paragraph (1) is the right of the Fiduciary Recipient to take the payment of his receivables from the execution

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<sup>10</sup> A.A. Andi Prajitno, *op. cit.*, page 82

<sup>11</sup> Indrawati Suwarso, 2002, *Aspek Hukum Jaminan Kredit*, IBI, Jakarta, page 53

<sup>12</sup> Gunawan Wijaya & Ahmad Yani, 2000, *Seri Hukum Bisnis, Jaminan Fidusia*, PT. Raja Grafindo Persada, Jakarta, page 141



of the Object which is the object of the Fiduciary Guarantee. (3). Priority rights from Fiduciary Recipients are not nullified due to bankruptcy and / or liquidation of Fiduciary Givers.

The regulatory objectives that require the registration of a fiduciary guarantee certificate are as follows:

a. To provide legal certainty to the parties concerned

b. Give preferred rights to the fiduciary recipient of other creditors. This is due to fiduciary guarantees granting the right to fiduciary givers to retain control over their objects which are the objects of fiduciary guarantees based on trust (explanation of Government Regulation Number 86 of 2000)

c. Meet the principle of publicity.<sup>13</sup>

The right to fiduciary guarantee gives the creditor ownership rights to the goods that are burdened with the fiduciary guarantee right, but the control over the goods is on the debtor. The ownership of the object given as guarantee is transferred by the owner to the creditor of the guarantee, so the ownership of the guarantee is on the creditor of the guarantee. Even though there is a surrender of ownership rights, the surrender is actually not intended to really be the creditor of the owner of the guarantee, but only gives creditor rights. It is in accordance with the intention of surrendering guarantee to a Fiduciary institution, the purpose of which is to provide a guarantee for a bill. Trust here means that the guarantor believes, that the surrender of his "right of ownership" is not intended to actually make the owner's creditor for the object surrendered to him and that later if the principal engagement obligation - for which the Fiduciary guarantee is paid, then the object the guarantee will again be the property of the guarantor. Normatively what is surrendered is its jurisdiction over the object. Thus, the right to use it (the right to use guarantee) remains with the guarantor. In such case the juridical property rights are with the fiduciary creditor, while the socioeconomic rights are with the Fiduciary giver.<sup>14</sup> Based on the history of the development of the Fiduciary guarantee institution, the *constitutum possessorium* is held to fulfill the need for the practice of guaranteeing movable objects, where the guarantee object remained in the fiduciary giver's power because it is needed for the business activities of the fiduciary giver (the guarantor).

Based on the history of the development of the Fiduciary guarantee institution the *constitutum possessorium* is held to fulfill the need for the practice of guaranteeing movable objects, where the guarantee object remained in the fiduciary giver's power because it was needed for the business activities of the fiduciary giver (the guarantor).

F. Forms of Sanctions in Fiduciary Guarantees

Fiduciary guarantee in UUJF in principle is the scope of civil law that regulates the relationship between citizens. Therefore, if there is a dispute in a fiduciary guarantee agreement that is illegal in nature (*onrechmatig daad*) or broken promise (*wan achievement*), the sanction can be in the form of administrative witness or civil sanction (compensation, confiscation, etc.). However, it does not rule out the possibility of criminal law sanctions if fraudulent acts have been committed by the parties, especially by the fiduciary giver. Involving criminal law sanctions in civil matters of this kind is a criminalization process that must contain the requirements for potential victims and the impossibility of observing norms and values to be maintained by other legal sanctions. Besides that, there is a requirement that the civil law event contains elements of deceit, manipulation, subterfuge, fraud and forgery. This requirement is important for avoiding oneself to the image of a criminal law regulation which implies the misuse of criminal law sanctions which finally has the appearance of a legal tyranny..<sup>15</sup>

At the implementation stage of the agreement / post-agreement there is sometimes a default. Default or breach of contract is one of the reasons that the contract is not running or the contract is stopped. In this case what is meant by default is one or more parties not carrying out their achievements in accordance with the contract.<sup>16</sup> Article 1239 of the Penal Code stipulates that in the event that a party defaults, the other party may claim compensation in the form of costs, losses and interest. Other alternatives aside from claiming only

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<sup>13</sup> A.A Andi Prajitno...Op. Cit 189

<sup>14</sup> *Ibid*, page 154

<sup>15</sup> John McLean, 1999, *Tiranny of the law, How the Law is taking Away Our Liberties*, Winter Productions Limited, Hongkong, page 12-17

<sup>16</sup> Rasjim Wiraatmadja, 1996., *Pengikatan Jaminan Kredit Perbankan*, PT. Bank NISP, Jakarta, page 32.

compensation by the injured party, it can also be claimed by the implementation of the agreement itself with or without compensation. In the course of the bias, for certain reasons, one of the parties decided on a fiduciary agreement. The reason for termination of the agreement is because the other party has defaulted on one or more clauses in the fiduciary agreement. It doesn't matter whether the accomplishments that are not fulfilled are substantial or not. Unless specified otherwise in the agreement concerned. Defaults usually occur if the fiduciary giver does not pay installments when the due date.

Default of fiduciary giver is more due to economic factors, namely fiduciary giver cannot pay installments in accordance with the agreement. When the fiduciary defaulter is often the recipient of the fiduciary (finance company), the object of the agreement is withdrawn arbitrarily. The reason for the withdrawal of the object by the fiduciary recipient is that it is agreed upon when the fiduciary party signed the fiduciary agreement. Actually, the fiduciary giver also knows that if the default is at any time the fiduciary recipient can draw fiduciary objects, but in general the giver wants to get the goods (fiduciary objects) in a fast, easy and simple way. This is often the fiduciary giver ignores the contents of the fiduciary agreement, what he has in mind is how he can get the item. The issue of the continuation of whether he can pay in installments or not has never been carefully considered, sometimes even the fiduciary giver does not read the contents of the fiduciary agreement. Consumptive mentality is increasingly developing in society, which is a mentality looking for the easiest way to get the greatest benefit by without regard to quality, without much willingness to try in a step-by-step manner caused by symptoms of crisis norms.<sup>17</sup>

This broken agreement promises to give another party the right to sue for damages in the form of costs, losses and interest, as stated in Article 1243 of the Indonesian Civil Code that is as complete as follows: obliged, if the person owes, after being declared negligent to fulfill the agreement, still neglect it or if something must be given or made within the grace period that has been exceeded. This is a form of legal protection for the parties granted by law.

Criminal law sanctions are sanctions provided by UUJF in addition to administrative sanctions as well as civil sanctions. UUJF has normatively provided legal protection for business actors, especially fiduciary recipients. This can be seen from the existence of criminal sanctions in Article 36 of the Law. As regulated in article 36 of Law number 42 of 1999 concerning fiduciary which states;

Fiduciary givers who transfer, pawn as referred to in Article 23 paragraph (2) carried out without prior written approval from the fiduciary recipient, are sentenced to a maximum imprisonment of 2 (two) years and a maximum fine of Rp. 50,000,000.- ( fifty million rupiah) "In Article 23 (2) it is stated that" Fiduciary givers are prohibited from transferring, mortgaging, or renting to other parties objects which are fiduciary objects which are not inventory objects, except with prior written approval from the fiduciary recipient.

Normatively the formulation is an abuse of trust in objects that become fiduciary guarantee, namely transferring fiduciary guarantee objects to third parties, which are still in the period of credit can be categorized as embezzlement.<sup>18</sup> Embezzlement is also regulated in the Criminal Code.<sup>19</sup> Fudging fiduciary objects would certainly complicate the execution of fiduciary recipients, because objects that are used as guarantee do not exist (not within the control of the fiduciary giver)

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<sup>17</sup> Kuntjaraningrat, 1984, *Kebudayaan Jawa*, Gramedia Jakarta, , page 46-47

<sup>18</sup> Supreme Court Jurisprudence number 1237 K/Pid/2010 year I 6 October r 2010, seen also in Andi Hamzah, *speciale Delicten di dalam KUHP*, Sinar Grafika, Jakarta, 2009, page 113 stating that the offense of embezzlement, in essence the legal interest to be protected is the property of another person or trust.

<sup>19</sup> Embezzlement of articles 372 KUHP in Moeljatno, *Kitab Undang-undang Hukum Pidana*, Bina Aksara, Jakarta, 1985 which states that "Anyone who intentionally and unlawfully claims to be his own (aich toeigenen) goods which are wholly or partly owned by someone else, but who are in power not because of crime, threatened with embezzlement, with a maximum of four years imprisonment. or a maximum fine of sixty rupiah ". "

The law gives a certain right to the person / party concerned and in such an event, it is up to the person / party protected to use or not the right. The provisions of Article 36 of the UUJF are clearly intended to provide legal protection to fiduciary recipients. Therefore, the law requires fiduciary recipients to register a fiduciary guarantee certificate. If it is not registered then it is not a fiduciary guarantee agreement as regulated in Article 37 paragraph (3) UUJF.

## **CONCLUSION**

Reconstruction of the position of fiduciary guarantee is based on Article 1131 and Article 1132 of the Civil Code that is the spirit of the agreement made by the parties in a loan agreement. The article without prior rights will emerge pawn. Pawn must fulfill the inbezitstelling element, so people think of how to get the debtor to get credit but the debtor still obtains economic benefits from objects that have been used as guarantee for debt. To obtain this, a legal breakthrough needs to be built. The legal breakthrough is the surrender of ownership rights in confidence to the debtor's property to the creditor with the physical authority over the fixed object to the debtor (Fiduciary). The surrender is actually not intended to truly be the creditor of the owner of the guarantee, but only gives the guarantee right to pay off the debt to the creditor.

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