

Conference Paper

The Urgency of Strengthening Creditor Legal Protection in Fiduciary Guarantee Agreements

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ORCIDNur Putri Hidayah: <https://orcid.org/0000-0003-0789-3596>**Abstract.**

In a fiduciary guarantee agreement, both the fiduciary recipient and the fiduciary giver according to the fiduciary guarantee law are equally given legal protection. However, there are still weaknesses in legal protection for creditors, exacerbated by the practice of implementing fiduciary agreements in the field, among others in the form of not registering fiduciary objects (only stopping at making authentic deeds). Then, in the practice that occurs, the financial institution in entering into a financing agreement includes the words fiduciary guarantee. However, ironically, it is not made in a notarial deed and is not registered at the Fiduciary Registration Office to obtain a certificate. So, it is not surprising that due to such practice, cases of slow and difficult execution of fiduciaries are a problem. This research is to answer the question: the urgency of implementing strengthening legal protection for creditors in fiduciary guarantee agreements? To answer this problem, the author conducted normative legal research by looking at sociological conditions that occurred or were based on field facts. The results of this study indicate that a fiduciary guarantee that must be made with a Notary Deed, can provide legal protection if the process and procedures are following Law No. 42 of 1999 concerning Fiduciary Guarantee, and Fiduciary Guarantee was born since it was registered. In addition, in the practice of administering fiduciary guarantee agreements in Indonesia, legal protection efforts for creditors have not been fully implemented for fiduciary guarantee agreements. This is due to the juridical and non-juridical inhibiting factors in the form of inconsistencies between the mandates contained in the legal basis of fiduciary guarantees and the practices of their organizers.

Keywords: legal protection, creditors, fiduciary guarantee

1. INTRODUCTION

In economic activities in general, guarantees have a very important function because in providing capital loans from financial institutions (both banks and non-banks) requires a guarantee, which must be met by capital seekers if they want to get a loan / additional capital (in the form of credit) both for the long term and short term [1]. For creditors, a good guarantee is a guarantee that can provide a sense of security and legal certainty that the credit given can be regained in time[2], while for the debtor, a good form

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of guarantee is a form of guarantee that will not paralyze his daily business activities. One of the known guarantee institutions in the guarantee law system in Indonesia is the fiduciary guarantee institution. The Fiduciary Guarantee Institution has been recognized for its existence with the existence of the Law of the Republic of Indonesia Number: 42 of 1999 concerning Fiduciary Guarantees, which was promulgated on September 30, 1999.[3]

As it is known that a Fiduciary Guarantee is a right of collateral / guarantee on movable objects that are tangible or intangible, or that cannot be burdened with dependent rights according to Law No. 4 of 1996 concerning Dependent Rights owned by Fiduciary Recipients registered at the Fiduciary Registration Office, namely as collateral for the repayment of certain debts and who have the right to take precedence over other creditors[4]. The existence of this fiduciary institution is associated with the provisions of Article 1152 of the Civil Code which does seem to be very contrary because according to the provisions of the Article requires that the collateral goods be handed over physically to the creditor (creditor). The provisions of Article 1152 of the Civil Code also state that if the collateral is still allowed to be controlled by the debtor, the guarantee will be invalid.[5] The provision of fiduciary guarantee is an agreement that is an *accessoir* of a principal agreement as stated in the explanation of Article 6-letter b of Law No. 42 of 1999 and must be made with a notarial deed referred to as the Fiduciary Guarantee deed.[6]

In a fiduciary guarantee agreement, both the fiduciary beneficiary and the fiduciary grantor according to the law the fiduciary guarantee are equally given protection 2 laws, for the grantor of protection in the form of the right of use of the collateral object, and the default of the guarantee provider will not cause the collateral object to change its ownership rights[3]. With the Fiduciary Guarantees Act, the granting of preferential rights over its receivables and the enactment of the principle of *droit de suite* over the objects of guarantee[7], for third parties the principle of publicity in a fiduciary guarantee agreement will provide information on fiduciated objects. Then in Article 11 jo Article 13 jo Article 15 of Law Number 42 of 1999 specifies that objects (which are in the territory of the republic of Indonesia or outside the state of the Republic of Indonesia) that are burdened with fiduciary guarantees must be registered at the Fiduciary Registration Office whose registration application is submitted by the Fiduciary Recipient taking into account the conditions as stated in Article 13 and upon the grant of the registration application, hence to, the fiduciary beneficiary is given a Fiduciary Guarantee certificate wearing an "irah-irah" (head of judgment meaning oath) "For the Sake of Justice Based

on the One True Godhead” whose date is the same as the stay of receipt of the fiduciary registration application (registration of titles).

But, in fact, in a fiduciary guarantee agreement, both the fiduciary beneficiary and the fiduciary grantor according to the law the fiduciary guarantee are equally given legal protection, for the grantor of protection in the form of the right of use of the collateral object, and the default of the guarantee provider will not cause the collateral object to change its ownership rights[8]. With the Fiduciary Guarantees Act, the granting of preferential rights over its receivables and the enactment of the principle of *droit de suite* over collateral objects, for third parties the principle of publicity in fiduciary guarantee agreements will provide information on the objects that are legalized. But on Article 11 of the Law on Fiduciary Guarantees says that:[9] 1) Objects burdened with Fiduciary Guarantees must be registered. 2) In the event that the object burdened with the Fiduciary Guarantee is outside the Territory of the Republic of Indonesia, the obligations as referred to in paragraph (1) shall remain in effect.

In addition, in a guarantee agreement, usually between the creditor and the debtor, certain promises are agreed, which are generally intended to provide a strong position for the creditor and later after registration are intended to also bind the third party. It can therefore be construed herein that registration includes, both the registration of the object and the bond of 3 guarantees thereof, then all the promises contained in the fiduciary guarantee deed (which in Article 13 subsection (2) b are recorded in the register book of the Fiduciary Registration Office) and are binding on the third party. Thus, the weaknesses of legal protection for creditors are exacerbated by the practice of applying fiduciary agreements in the field, including the non-registration of fiduciary objects (only stopping at making authentic deeds)[10], the conduct of negotiations that provide additional costs to the fiduciary beneficiary at the time of executing the fiduciary's security, so that the fiduciary certificate does not provide legal education in society. Therefore, it is not surprising that as a result of such peaceful practices, cases of slowness and difficulty in fiduciary executions are a problem. The Mass alone, in some People's Credit Banks, where fiduciary guarantee agreements are ineffective due to the difficulty of execution. Then, in the practice that occurs, the financing institution in carrying out the financing agreement includes the words fiduciary pledge. Ironically, however, it was not made in the notary deed and was not registered with the Fiduciary Registry Office for a certificate[11]. Such a deed can be called a fiduciary guarantee deed under hand. For deeds carried out under the hand, they usually have to be re-authenticated by the parties if they want to be used as valid evidence[12], e.g. to sue in court.

The weaknesses of the aforementioned legal protections are exacerbated by the practice of applying fiduciary agreements in the field, including the non-registration of fiduciary objects (only stopping at the creation of authentic deeds), the conduct of negotiations that provide additional costs for the fiduciary recipient at the time of executing the fiduciary guarantee object, so that the fiduciary certificate does not provide legal education in society. So, it is not surprising that the consequences of such a practice, cases of slowness and difficulty of fiduciary execution are a problem, for example in some People's Credit Banks the fiduciary guarantee agreement is ineffective due to the difficulty of execution. Therefore, legal remedies are needed to maintain a balance (checks and balances) between the creditor's right to fiduciary guarantees from the debtor, and the debtor's right to get a loan from the creditor. Adanya efforts to strengthen legal protections for creditors against fiduciary guarantee agreements can reduce or even eliminate the practices of making notarill deeds that are not in accordance with established procedures. 4 (four) The weaknesses of the aforesaid protections are exacerbated by the practice of applying fiduciary agreements in the field, including the non-registration of fiduciary objects^{[13][14]} (only stop at the creation of authentic deeds), the conduct of negotiations that provide additional costs for the fiduciary beneficiary at the time of executing the fiduciary guarantee object, so that the fiduciary certificate does not provide legal education in society.

For this reason, there are things that need to be considered and must be done so that the fiduciary guarantee can really provide legal protection and rights for the parties (debtors and creditors) as well as information for third parties. The issue of registration for example, the registration of the object of the fiduciary guarantee provides that the object to which the fiduciary guarantee is burdened must be registered. Because the nature of registration is a legal protection for creditors^[15]. To give rise to legal certainty, the registration of a fiduciary guarantee causes the fiduciary guarantee to meet the element of publicity, so it is easy to control. This will avoid the emergence of unhealthy things in practice, such as the existence of a fiduciary twice without the knowledge of the creditor, the transfer of fiduciary goods without the knowledge of other creditors. This is then very necessary for efforts to strengthen legal protection for creditors against the practice of fiduciary guaranteed agreements, in order to create justice, expediency and legal certainty for creditors for the fiduciary guarantee agreement. In accordance with the explanation, that with a fiduciary agreement by notarial deed is not enough, but it must be registered, the notarial deed is an authentic deed in the fiduciary agreement. A notarial deed without registration, will not give a right of preference to a fiduciary beneficiary, nor is there a strict arrangement in the Fiduciary Guarantee Act as to who

shall execute the fiduciary guarantee object, whereas the fiduciary guarantee object is a movable object that is very risky to move, as a result of which the fiduciary beneficiary in field application is difficult to carry out the principle of *droit de suite*.

Based on the explanation above, the author affiliates several problems into an order of formulation of the problem that will later be discussed, namely "What is the urgency of implementing the strengthening of legal protection for creditors in the fiduciary guarantee agreement? "

2. METHODOLOGY/ MATERIALS

The method used in this study is to use the normative legal approach method by looking at the sociological conditions that occur or based on field facts, and is based on the doctrine or theoretical views of legal experts who discuss fiduciary guarantee agreements. In this study, the researcher also used the types and sources of legal materials that became the basis for conducting this research, namely primary type legal materials (Material 6 Primary Law) which are binding materials, in the form of laws and regulations related to fiduciary guarantee agreements. As well as using secondary type legal materials (Secondary Legal Materials) which are explanations of primary legal materials, consisting of textbooks, including theses, theses, and legal dissertations, the internet, legal dictionaries, and related legal journals. In addition, there is also a technique used to collect legal materials in this research method, namely literature studies. To study and analyze legal materials, the technique used by researchers is to use the deductive method, that is, a legal reasoning which is a major premise is the rule of law, while the minor premise is a legal fact[16].

3. RESULTS AND DISCUSSIONS

Basically, an agreement is a bond of agreement or agreement in both written and unwritten (oral) forms that bind both parties who have agreed with the existence of conditions that can be a strong benchmark in order to maintain and carry out the rights and obligations between the two parties.) is a dependent on the loan received. Meanwhile, fiduciary is an origin of the word derived from the word "Fides", which means belief.[17] So that in accordance with the meaning of this word, fiduciary is a relationship law between the debtor (power of attorney) and the creditor (beneficiary) is a legal relationship based on trust[18]. Meanwhile, according to the Law of the Republic of Indonesia No. 42 of 1999 concerning Fiduciary Guarantees Article 1 number (1) states

that, Fiduciary is the transfer of ownership rights of an object on the basis of trust with the provision that the object whose ownership rights are transferred remains in the control of the owner of the object. Based on the explanation above[19], then a simple conclusion can be drawn that, a fiduciary guarantee agreement is a bond of agreement involving two parties who agree in this case the debtor (authorizer) to an object with the existence of a dependent which is a condition for the implementation of the agreement on the treasury, for the fulfillment of the rights of the debtor and creditor and the necessity to carry out obligations on the rights obtained. Talking or reviewing fiduciary guarantee agreements, in essence, it is inseparable from the practice of organizing fiduciary guarantee agreements by debtors and creditors. Where the practice of administering fiduciary guarantee agreements in Indonesia has not been implemented absolutely and has not been able to provide justice, expediency, and legal certainty for creditors. This is because, for creditors, a good guarantee is a guarantee that can provide a sense of security and legal certainty that the credit given can be regained on time[20]. For this reason, it is necessary to study concretely and comprehensively related to the practice of implementing Legal Protection in the Practice of Fiduciary Guarantee Agreements to Creditors, by looking at the factors inhibiting the Provision of Legal Protection for Creditors in a Fiduciary Guarantee Agreement, in order to provide a Legal aspect that can be done by the parties, in order to Protect and Provide Justice, Expediency and Legal Certainty to Creditors against the Guarantee Agreement Fiduciary, without injuring the rights of the Debtor.

Methodologically, a fiduciary guarantee agreement is an agreement on an object (treasury), with the transfer of rights as a condition of the clarity of the agreement, as well as translating the existence of a guarantee law between the creditor and the debtor. In the fiduciary agreement, the authority to control the object, what is meant is the delegation of authority to control the collateral object, but this needs to be underlined that the authority to control cannot be the same as the will of possession, because the will of possession is a prohibited part of the fiduciary agreement, the delegation of authority is more part of the responsibility that the fiduciary giver to the fiduciary beneficiary to complete his loan by selling collateral objects, the surrender in question is more symbolic such as the surrender by *constitutun possessorium* for tangible movable objects, or by *cessie* means for accounts receivable. Against surrender by *constitutum possessorium*, it should be noted that there are also known forms of unreal surrender, namely:[21]

a. *Traditio brevi manu*, which is a form of surrender in which the goods to be handed over because something is already in the possession of the party who will receive the

surrender, for example the surrender in a lease-purchase. The tenant-buy party because the lease- purchase agreement already controls the goods while the ownership remains with the seller, if the rental-purchase price, it has been paid in full then only then will the seller hand over (*traditio brevi manu*) the goods to the tenant-buy and then become his property.

b. *Traditio longa manu*, which is a form of surrender in which the goods to be handed over are in the possession of a third party. For example, A bought a car from B on the condition that his car be handed over a week after the sale and purchase agreement was made. Before that one-week period through A sold the car again to C while B was told by A that the car would be handed over to C only. Such a form of buying and selling is commonplace. for the business world, a fiduciary guarantee agreement was formed.

Fiduciary guarantees have long been used in Indonesia, but regulations regarding fiduciary guarantees have only emerged with the issuance of Law Number 42 of 1999 concerning Fiduciary Guarantees. Article 1 number (2) of Law Number 42 of 1999 concerning Fiduciary Guarantees states that: "Fiduciary guarantees are the right of guarantees for movable objects both tangible and intangible and immovable objects, especially buildings that cannot be burdened with dependent rights as referred to in Law Number 4 of 1996 concerning Dependent Rights[22] which remains in the possession of a fiduciary grant, as repayment of certain debts, which gives the fiduciary beneficiary a position of precedence over other creditors.

In fact, the presence of the Law on Fiduciary Guarantees does not appear out of thin air, but is a reaction to the need and implementation of fiduciary practices that have been running, so it will be easier for us to understand the provisions of the Fiduciary Guarantee Law.[23] The Fiduciary Guarantees Act aims to provide a more complete regulation than it has always been, and in line with that it seeks to provide better protection for interested parties. In the explanation of the Fiduciary Guarantee Act, in addition to accommodating the needs within those that have existed so far, it also wants to provide legal certainty to interested parties. In line with the principle of providing legal certainty, the Fiduciary Guarantees Act takes the principle of registration of fiduciary guarantees. The registration is expected to provide legal certainty to fiduciary givers and recipients as well as to third parties.

3.1. The Urgency of Implementing Protection Strengthening

In essence, a fiduciary guarantee agreement is an agreement against an object (material), with the transfer of rights as a clear condition of the agreement, as well as

translating the existence of a guarantee law between creditors and debtors. In the fiduciary agreement, the authority to control the object, what is meant is the delegation of authority to control the collateral object, but this needs to be underlined that the authority to control should not be the same as the will to control, because the will to control is a prohibited part of the fiduciary agreement. From the responsibility given by the fiduciary giver to the fiduciary recipient to settle his loan by selling collateral objects, the intended delivery is more symbolic, such as submission by *constitutum possessorium* for tangible movable objects, or by means of cession for accounts payable. Submission by *constitutum possessorium*, please note that there are also several forms of unreal submission, namely:

a. *Traditio brevi manu*, which is a form of surrender in which the goods to be handed over because something is already in the possession of the party who will receive the surrender, for example the surrender in the lease-purchase. The tenant-buy party because the lease-purchase agreement already controls the goods while the ownership remains with the seller, if the rental-purchase price, it has been paid in full then only then will the seller hand over (*traditio brevi manu*) the goods to the tenant-buy and then become his property.

b. *Traditio longa manu*, which is a form of surrender in which the goods to be handed over are in the possession of a third party. For example, A bought a car from B on the condition that

his car be handed over a week after the sale and purchase agreement was made. Before that one-week period through A sold the car again to C while B was told by A that the car would be handed over to C only. Such a form of buying and selling is commonplace.

Fiduciary guarantees have long been used in Indonesia, but arrangements regarding fiduciary guarantees have only emerged with the issuance of Law Number 42 of 1999 concerning Fiduciary Guarantees. Article 1 number (2) of Law Number 42 of 1999 concerning Fiduciary Guarantees states that:

Fiduciary guarantee is the right of guarantee for movable objects both tangible and intangible and immovable objects, especially buildings that cannot be burdened with dependent rights as referred to in Law Number 4 of 1996 concerning Dependent Rights that remain in the control of fiduciary grants, as repayment of certain debts, which gives priority position to fiduciary recipients to other creditors.

In fact, the presence of the Law on Fiduciary Guarantees does not appear out of thin air, but is a reaction to the need and implementation of fiduciary practice that has been running, so it will be easier for us to understand the provisions of the Fiduciary Jamina

Law, if we understand the practice and practical problems that have existed so far. The Fiduciary Guarantees Act aims to provide a more complete regulation than it has always been, and in line with that it seeks to provide better protection for interested parties.

In the explanation of the Fiduciary Guarantee Act, in addition to accommodating the needs within those that have existed so far, it also wants to provide legal certainty to interested parties. In line with the principle of providing legal certainty, the Fiduciary Guarantees Act takes the principle of registration of fiduciary guarantees. The registration is expected to provide legal certainty to fiduciary givers and recipients as well as to third parties.

With regard to the administration of fiduciary guarantees, the Fiduciary Guarantee Law has mandated several principles adopted in the Fiduciary Guarantee Act, namely:

1. The principle of legal certainty;
2. The principle of publicity;
3. The principle of balanced protection;
4. The principle accommodates practical needs;
5. Authentic written principles;
6. The principle of granting a strong position to creditors.

According to the provisions of article 1 number 8 of Law No. 42 of 1999 concerning Fiduciary Guarantees, it is said that "*A creditor is a party who has receivables due to an agreement or law.*" The creditor himself in the concept of a fiduciary guarantee is referred to as the beneficiary of power over the fiduciary object or beneficiary. The fiduciary recipient himself in the provisions of article 1 number 6 of Law No. 42 of 1999 concerning Fiduciary Guarantees states that "*A Fiduciary recipient is an individual or corporation who has receivables whose payments are guaranteed by Fiduciary Guarantees.*" The above explanation gives rise to the interpretation that, a person or corporation who is a fiduciary beneficiary is required to have a legal relationship in the form of receivables owned against or is the answer of the fiduciary giver, against which the receivable the fiduciary recipient receives an object of guarantee. Problems that may arise in loading and registration[24] against creditors:

1. In a fiduciary guarantee, there has been a transfer of title. In everyday practice, all forms of ownership must be included in the profit and loss balance sheet of an enterprise. This provision regarding the transfer of rights can be difficult for creditors, because if the collateral is not included in the company's balance sheet list, it can be considered as embezzlement, but if it is included in a company's balance sheet list, it

must be as explained in the next financial year about the company's assets excluded from the balance sheet.

2. Another thing that is a problem for creditors is related to the implementation of fiduciary guarantee agreements. Although the deed of encumbrance of the fiduciary guarantee is held with a notarial deed that gives birth to the executory of the deed, and is registered with the Fiduciary Registration Office which causes the receipt of the fiduciary to become a preferred creditor, but in its implementation, the execution of the object of the guarantee is not expressly regulated, so that the fiduciary beneficiary of the fiduciary is executed. Often in similar cases this is resorted to. a peaceful path is pursued, which means the nature of the fiduciary guarantee certificate is numbered in half.

The above problems are the problems faced by creditors in undergoing the fiduciary guarantee agreement process. In order to provide a legal umbrella for creditors' rights, it is necessary to make efforts to strengthen legal protection for creditors against fiduciary guarantee agreements.

Speaking of legal protection, then it is necessary to know in advance what exactly legal protection is. Legal protection comes from two syllables namely protection and law. Protection is the thing or act of protecting. While the law is a rule to safeguard the interests of all parties. According to Wirjono Prodjodikoro in his book, Legal protection is an effort to protect legal subjects[25].

Based on the definition of legal protection, if it is associated with the interests of the fiduciary recipient creditor if the object of the guarantee is in the form of unregistered goods, in this case in the form of inventory objects / stock of merchandise (*inventory*), then the protection that will be received is in accordance with what is agreed and guaranteed asb is described in a fiduciary guarantee certificate held by the creditor. This is in accordance also with the nature of the registration of the fiduciary guarantee as discussed earlier, namely that what is listed is actually the bond of the guarantee. As previously explained against the registration of this guarantee bond adheres to the principle that in the bond of guarantee shall be recorded all matters relating to the guarantee including about the objects related to the guarantee. So for creditors or fiduciary recipients with the object of fiduciary guarantee in the form of unregistered objects, there is no need to worry, because with this guarantee bond registration system, by itself all the stock of merchandise (*inventory*) that is used as a fiduciary object will be recorded in the fiduciary guarantee certificate, so that in the event of a default from the fiduciary provider or debtor, the creditor only needs to execute all merchandise as recorded, or if there is none as recorded then the creditor can execute the existing

stock of merchandise that is worth the pledged one, because what is pledged is the bond of the guarantee not the object.

Legal protection for the creditor in the credit agreement with the fiduciary guarantee is very necessary, considering that the object of the fiduciary guarantee is on the debtor's side, so that if the debtor defaults on the credit agreement with the fiduciary guarantee, the creditor's interests can be guaranteed by the existence of such legal protection. Legal protection of these creditors is regulated in general, namely: regulated in the Civil Code Articles 1131 and 1132 and Law No. 42 of 1999 concerning Fiduciary Guarantees. Article 1131 of the Civil Code states that all materials, both existing and new, will exist in the future, are dependent on all individual agreements.

4. CONCLUSION AND RECOMMENDATION

Fiduciary is the transfer of the right of ownership of an object on the basis of trust provided that the object to which the right of ownership is transferred remains in the possession of the owner of the object. Fiduciary Guarantee is the right of guarantee for movable objects both tangible and intangible and immovable objects, especially buildings that cannot be burdened with dependent rights as referred to in Law Number 4 of 1996 concerning Dependent Rights that remain in the control of the Fiduciary Provider, as collateral for the repayment of certain debts, which gives the Fiduciary Recipient a preferred position over other creditors. Fiduciary guarantees that must be made with a Notarial Deed can provide legal protection if the process and procedures are in accordance with Law No. 42 of 1999 concerning Fiduciary Guarantees, and Fiduciary Guarantees are born from the moment they are registered. The legal consequence of non-registration of fiduciary guarantees is according to Law No. 42 of 1999, that fiduciary guarantees have not been born, so all legal consequences attached to fiduciary guarantees are not valid.

In addition, in the practice of administering fiduciary guarantee agreements in Indonesia, legal protection efforts have not been fully implemented for creditors for fiduciary guarantee agreements that are carried out. This is due to the existence of inhibiting factors from a juridical and non-juridical point of view in the form of inconsistencies between the mandate contained in the legal basis of fiduciary guarantees and the practice of their organizers, coupled with the disharmony of the legal basis of fiduciary guarantees with one another. therefore, efforts are needed to strengthen legal protections in a concrete and comprehensive manner for creditors against fiduciary guarantee agreements based on legal aspects.

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