



Authority and accountability basic of notary regarding fiduciary registration electronically (online)

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Abstract

The research has aims to find out the notary's authority basic in fiduciary registration electronically (online) and find out how is the Notary obligation/responsible for electronic fiduciary registration (online) if there is an error entering data. This writing uses doctrinal and subsequently analyzed by prescriptive approach by using secondary data sourced from primary and secondary legal materials to analyze various laws and regulations in the field of Notary law and regulations regarding fiduciary registration by notaries. Fiduciary registration has now switched to using an electronic system (online), this is certainly a new responsibility for Notaries because basically the Notary is entrusted to have access to fiduciary registration electronically online. Even though, a Notary cannot simply pass the registration electronically (online) after making a fiduciary deed. Notaries need to have authority basis in action.

Keywords: notary, fiduciary guarantee, registration electronically

1. Introduction

Economic development is one of part in national aspect development. The opening of constitution Republic of Indonesia stipulated that objectives of the country are protecting all of its people and all citizen, making improvement for common wealth, improve intelligence of its people and make in piece in the world according to independence, absolut in a piece and social justice. As base of nation, it is Pancasila (Five Principals) and 1945 Constitution of Republic of Indonesia, it is consisting of the objectives to achive social justice and wealthy ^[1]. Economic development can be implemented well if there is coordination between development actors both from government, society, and individuals, or legal entities. Such economic development certainly requires capital in the form of substantial funding. More higher development activities, the higher the need for funding ^[2].

For some parties to fulfill their funding needs, they obtain it through lending and borrowing activities; because on one side there are people who are over-funded but do not have the ability to do it, while on the other hand there are groups of people who have the ability to afford it but do not have funds. Banks provide credit services to be able to meet community needs. Credit facilities in development are a very absolute thing, because credit is the lifeblood in the lives of entrepreneurs in running their business ^[3]. In the increasingly competitive, globalized economy and emergence of new business models, effective and efficient management is vital for any organization offering products and/or services ^[4].

Bank is providing credit services not by common, or in other word, bank need to deep review on economic ability to repay the fund that borrowed without any obstacles or problems. Therefore, bank is not only depended on credit agreement that made by bank and the debtor. Bank requires a collateral to guarantee legal certainty in case default or

debtor is uncapable to repay his debt.

Regarding to the guarantee, then adding it to the agreement. As known, 2 kinds of guarantee, personal guarantee and material guarantees. Practically, the fre

In practice, guarantees that are often used are material guarantees, it is fiduciary guarantees for movable objects because they are often in demand by the public. Creditors should understand the fiduciary context within which managers make decisions that affect the credit-worthiness of the enterprise ^[5].

Fiduciary guarantees in Indonesia itself have existed since the Dutch colonial era as a form of guarantee was originated based on Arrest hoggerechtshof dated August 18, 1932 (BPM-Clynet Arrest). The emergence of Arrest was due to the influence of concordance. It was influenced by the urgent needs of small entrepreneurs, retailers, intermediate traders and wholesalers who needed credit facilities for their businesses. Briefly the case originated from the Heineken brewery buying inventory items belonging to the restaurant Societeit Harmoni has name Bos, which the restaurant owner went insolvency. Receiveship (AW de Haan) refused to submit inventory items to Heineken. This case goes to the cassation level. In the cassation level, the judge's decision is the same as the appeal decision that won Heineken's side, with the following considerations: First, that the scope of the agreement held by the parties with contents are Boss's inventory will be a debt guarantee and the reason has been determined so that the reason is allowed. Second, the agreement does not conflict with the pawn rules because the parties do not make the mortgage agreement. Third, this agreement does not conflict with the principle of the same creditor (creditorium parity), because the agreement concerning Heineken's property and does not belong to the Boss. Fourth, in this agreement there is no conflict with decency. The recent community may be primed to embrace a fiduciary model of sovereignty ^[6].

Fiduciary guarantees are considered as guarantees that both provide benefits for both corporate institutions that provide financing (creditors) and for consumers (debtors). Fiduciary guarantees requires a deed, to ensure legal certainty for creditors and it was made by the notary and registered with the Registry Office of Fiduciary (KFP) in the Ministry of Law and Human Rights. Guarantee is a given by the debtor to the creditor to give confidence that the debtor will fulfill its obligations that can be assessed with money arising from an agreement. Fiduciary deed is one of the deeds that must be made in an authentic form, in accordance with the provisions in Article 5 paragraph (1) of Law Number 42 of 1999 concerning Fiduciary Guarantees (hereinafter referred to as the Fiduciary Guarantee Act) with a notarial deed in Indonesian and is a Fiduciary Guarantee deed. Therefore, every fiduciary guarantee must be registered at the Registry Office of Fiduciary Guarantee ^[7]. The Fiduciary Guarantee Act grant an obligation on the fiduciary recipient to carry out the imposition of objects (movable) with a fiduciary deed that must be made by a notarial deed.

Along with the times, registration of fiduciary guarantees carried out by a Notary no longer has to be in the office or manual. The fiduciary guarantee registration system has now transitioned into an electronic registration (online) based on the Republic of Indonesia Minister of Law and Human Rights Regulation Number 9 of 2013 concerning Enactment of Electronic Fiduciary Registration. This is certainly effective to help parties to get easier legal services in the fiduciary field in registering, especially notaries. Although in Law Number 42 of 1999 concerning Fiduciary Assurance it is said that the registration application can be carried out by fiduciary recipient, people with authority, or his representative; but in practice only the Notary has access to register Fiduciary Guarantee. A notary is a party that has the authority to submit a request for enrollment/registration on a fiduciary guarantee. Notaries have a username and password to enter in an online fiduciary registration application. In this case the Notary has other roles and responsibilities that must be done in electronic fiduciary registration (online), not just making a deed. But in this case also, there must be a basis for notary authority in carrying out the registration. Because only the notary is authorized to have access to registration, it is necessary to look at the notary's responsibility for entering data in the event of an error. Some research only discusses how the development of fiduciary guarantee registration and its implementation to the notary, but in this study the author will discuss what becomes basis for a notary in fiduciary registration and how his responsibilities occur if there is an error entering data. Based on the background above, the writer are interested in conducting research on the Overview of the Basic Authority and Obligation of Notaries in Fiduciary Registration Electronically (online).

In the research we will discuss the notary's authority base in fiduciary (online) and accountability in fiduciary registration electronically (online) if there is an error when entering data?

2. Research Methods

The research method used is a normative research method, where this study uses the case in the form of legal behavior products. The nature of this research is descriptive that provides an overview or explanation of the subject and object of research as the results of research conducted. This

research is doctrinal, therefore using secondary data consisting of: Primary legal material such as legislation governing fiduciary guarantees and notaries; Secondary legal material such as literature on fiduciary guarantees and notaries; and tertiary legal material, Legal Dictionary. The analysis technique is used with a descriptive normative approach and combined with the facts and datum found in the field, especially related to implementation of rules in the field of fiduciary registration.

3. Results and Discussion

3.1 Base of Notary's Authority regarding Fiduciary Registration Electronically (online)

As long ago, fiduciary known as one of guarantee instruments of movable goods that non-possessory. While one possessory such as pawn, fiduciary guarantee facilities the debtor as lender of guarantee to keep posses and take advantages from movable goods that guaranteed ^[8]. Fiduciary Agreement is loan agreement of the creditor in case finance enterprise to debtor or customer that includes the guarantor.

"Fiduciary guarantee gives a big advantage to the partie, because the object can still be located by the fiduciary guarantor hand, so that they can be used for everyday purposes. For creditors also can provide safety guarantees loans extended to debtors. For the fiduciary is then to be made by notarial deed and registered at the Registry Office of Fiduciary" ^[9].

Fiduciary registration has now switched from the previous one manually or conventionally, now turning into an electronic system or online system. With the issuance of Circular of the Director General of Legal Administration and Justice and Human Rights of the Republic of Indonesia Number AHU-06.OT.03.01 dated May 5, 2013 concerning the Enactment of Administration System Fiduciary Registration Electronically (online) which is then regulated in Permenkumham Number 9 of 2013 become a legal basis in the shifting of procedures for registering fiduciary guarantees from those originally carried out manually or conventionally, into electronic (online). Changes from manual systems to electronic systems (online) are expected so that the registration can run more efficiently and more effectively. There is an electronic fiduciary registration online, so it can improve legal services of fiduciary guarantees to the society safely, comfortably, quickly and transparant ^[10]. In addition, online fiduciary registration also implements the mandate are stipulated in Article 14 paragraph (1) and Article 16 paragraph (2) of the Fiduciary Guarantee Act. Fiduciary Registration Electronically (online) includes registration of fiduciary guarantee applications, registration of changes to fiduciary guarantees, and elimination of fiduciary guarantees. Same with previous provisions, in this new provision in its implementation it still requires notary's role. Its role in registering fiduciary guarantees is certainly very large.

The registration process for fiduciary guarantees begins with the making of a Fiduciary Guarantee Deed made by a Notary, which is then registered with Registry Office of Fiduciary. Notary is an extension of the State where he fulfills part of the state's duties in the field of civil law. According to Noel Cox, the notary is a non-contentious civil lawyer in matters, but does not have the same relationship with his clients, as does a solicitor. Therefore, when carrying out their duties, the Notary must be positioned as a public official who is in charge ^[11]. This is related to notary

accountability for his deed that was made ^[12].

The services provided by Notaries are closely related to the issue of trust (trust between the parties), which means that the State gives great trust to the Notary ^[13]. Notary is a a people of society / individual appointed by the government as a public official who has duty for carrying out the ratifying / legalizing the commitments made by the society and with providing ratification / legalization services for legal binding by the society, in order to provide legal certainty ^[14].

Calling the position of Notary as this public official, Dante Figueroa in the ILSP Law Journal stated:

“The quintessential role of the civil law notary is to authenticate and record legal acts. They keep a registry—protocol—of all of the documents that they authenticate, referring to instruments that the parties execute without the intervention of a government official of any type, such as contracts and powers of attorney. Notaries public are also witnesses-for-hire, meaning that they attest to a multitude of acts and circumstances ^[15].”

Fiduciary guarantees is called legitimate if the fiduciary deed is made with a notarial deed, which theoretically the function of the deed is as a perfection in a legal act, and in addition it is a proof of repayment of certain debt which is stated in the fiduciary guarantee deed. Registration in fiduciary guarantees means juridically as a series that cannot be separated from the process of the fiduciary guarantee agreement itself. The making of a fiduciary guarantee deed is one of the most important stages in imposing a fiduciary guarantee. With the existence of a fiduciary guarantee deed, both parties are deemed to have been bound by a fiduciary agreement.

Electronic fiduciary registration (online) can be done by kiosk throughout registry office of fiduciary ^[16]. Fiduciary registration does not have provisions that require a notary to register a fiduciary guarantee. Whereas those who have access to electronic fiduciary registration online are only notaries. This also makes doubts whether it is the basis of the notary in the registration, and whether there is sanction if the notary does not pass fiduciary registration electronically (online). Therefore, in this case the notary is considered as the party representing the fiduciary recipient, so that there is a need for a delegation in the form of a power of attorney to the notary to register electronically (online).

Even though the fiduciary recipient has made a fiduciary deed through a Notary, but not made Notary can directly register the fiduciary guarantee through an electronic system (online). Notary in case the application for registration of fiduciary guarantee is positioned as the authorized representatives or representative of the fiduciary recipient. Article 13 paragraph (1) of the Fiduciary Guarantee Act states that the application for registration of fiduciary guarantees is carried out by a fiduciary recipient, attorney, or representative recipient by attaching a fiduciary guarantee registration statement ^[17]. Authorized representatives is a person who gets special power from a fiduciary recipient to represent his interests in receiving fiduciary guarantees from fiduciary providers. Whereas the definition of representative is a person who is legally considered to represent a fiduciary recipient in receiving fiduciary guarantees.

Firstly fiduciary recipients must give authority to Notary as representative to conduct fiduciary registration. Through this authority, the notary conducts fiduciary registration

online. The agreement or power of attorney which is the basis authority of the Notary to register fiduciary electronically (online). As stated in Article 15 paragraph (1) of the Notary Position Act which states that the authority includes: the notary is authorized to make authentic deeds concerning all acts, agreements, and provisions required by regulations and / or those desired by those concerned to be declared in an authentic deed. Ensure the certainty of the date of making a deed, keep the deed, provide a grosse, copy and quote deed, all of that as long as the deed is not also assigned or exempted to other officials or other people as determined by law ^[18]. Regarding the power of attorney, there are no rules that stipulate that it must be made in a certain form.

However, indirectly there is a requirement for fiduciary recipients to authorize fiduciary registration to the Notary regarding administrative reasons. Or in other words as an effort to obey the administration of registration for fiduciary guarantees. The Directorate General of General Legal Administration requires a fast, easy and efficient fiduciary registration system; so that only registered Notaries can register fiduciary guarantees. Moreover, with the existence of Permenkumham Number 10 of 2013 which simplifies the procedures for fiduciary registration by electronic system (online), only registered Notaries can have a username and password to enter the fiduciary registration system. To apply for a fiduciary guarantee registration, a fiduciary may give a authority to a Notary through a power of attorney set forth in a notarial deed. The notarial deed is the basis of the Notary in acting to register fiduciary guarantees.

3.2 Accountability of notary regarding fiduciary registration electronically (Online) if there is error in entering Data

Fiduciary is a guarantee institution that has long been known in Roman society which is derived from customary law, and has become jurisprudence and formalized in the Act. According to Keith L. Johnson

Adoption of a fully evolved understanding of fiduciary duties, along with robust reporting and enforcement, is essential to sustainable development. The details of how to best align understanding and application of fiduciary duties with sustainable development should be tailored to a jurisdiction's culture and legal system. However, model fiduciary duty practices in one jurisdiction can provide guidance as to what is prudent in another ^[19].

In the registration of fiduciary guarantee electronically (online) notary is required to do something as a form of achievement to the fiduciary recipient, so that if the Notary made a mistake, then the Notary can be said to have defaulted. Notaries can also be said to be against the law if they violate matters that are prohibited in the Code of Ethics of the Notary Position and Fiduciary Law when making a Fiduciary Guarantee Deed and also when registering fiduciary guarantees electronically.

Notary's responsibilities as a profession is born from the obligation and authority granted to the Notary. These obligations and authorities are legally bound to the Notary Public since the Notary pronounced his oath of office as a Notary. The oath of office is supposed to control all actions of the Notary in carrying out his office duties. Article 16 paragraph (1) letter a of the Act of Notary Position states: "In carrying out his position, the Notary must act trustfully, honestly, thoroughly, independently, impartially, and

safeguard the interests of the parties concerned in legal actions". The careful word in the Big Indonesian Dictionary means thorough and careful, so that the provisions in Article 16 paragraph (1) letter a of the Notary Position Act can be said to explicitly require a Notary to examine data on objects of fiduciary guarantee before making a deed and registration guarantee fiduciary electronically (online).

There is a Notary error in entering the data, then the Notary must responsible for it. Accountability is a condition where it must bear everything (if there are things that can be prosecuted). In the online fiduciary registration there is a big responsibility in the Notary because after completing filling in the data to continue the next access, the Notary is asked to agree in advance the statement that all data contained in the form is correct by marking the statement. So, it can be seen from the agreement of the statement indeed on the registration of electronic fiduciary guarantees (online), the biggest responsibility lies with the Notary because the Ministry of Law and Human Rights also does not re-examine the data entered into the electronic fiduciary registration database (online).

Accountability for errors made by Notaries due to errors in entering data can be categorized as civil liability. Civil liability is very closely related to lawlessness and compensation as a result of the actions a person has committed. The concept of accountability is when it is associated with the notary profession, the notary can be held accountable for his mistakes and neglect in carrying out his duties and positions. According to Abdulkadir Muhammad the theory of accountability in breaking the law (tort liability) is divided into several theories^[20], *Intertional tort liability negligence tort liability strict liability*.

Seeing from the non-contractual relationship of Notary and Creditors (fiduciary recipients), a Notary can be said against the law when making a Notary's fiduciary deed does not make a deed in accordance with administrative techniques and its provisions. The notary can also be said to be against the law because of negligence if the Notary does not apply the precautionary principle as stipulated in Article 16 paragraph (1) letter a of the Notary Position Act in carrying out fiduciary guarantee data when registering electronically (online). Article 1243 of the Civil Code provides that the party who fails to fulfill an agreement can be prosecuted by the party for not fulfilling the achievements in the engagement, such demands include; compensation in the form of reimbursement of costs and losses suffered as well as benefits that should be obtained. If the action causes harm to the parties, the notary must also compensate and all costs incurred.

A notary may also be a defendant or a includes defendant because he committed an illegal act^[21]. If we see a contractual legal relationship between a notary and a creditor (a fiduciary recipient), the Notary holds the role as representative in conducting an electronic fiduciary registration online. In a civil law, the authorizer is responsible for the mistakes made by the recipient of authority as long as the recipient does his authority in good faith in accordance with the limits of authority granted. Therefore, the mistake of filling in the data made by a Notary as the receiver authority is the responsibility of the applicant for the fiduciary registration as the authorizer to the Notary. However, if the Notary carries out negligence when making an achievement, the Notary can be said to have defaulted and is obliged to pay compensation arising

from his negligence.

In case is not suitable between fiduciary guarantee object contained in the deed and fiduciary guarantee certificate electronically (online), the Notary must fix the certificate as a compensation for the mistake he has committed. In accordance with Article 9 and Article 10 of Government Regulation Number 21 Year 2015, the Notary as the party who receives the authority from the applicant for fiduciary registration must submit a request to fix the fiduciary guarantee certificate. Requests for fixing are submitted to the Minister of Law and Human Rights no later than 30 (thirty) days from the date the fiduciary guarantee certificate is issued. Requests for repair of a fiduciary guarantee certificate are submitted with at least the number and date of the fiduciary guarantee certificate to be repaired, and remedial information by attaching a copy of the fiduciary guarantee certificate to be repaired, photocopy of proof of payment for fiduciary guarantee fees and a copy of the fiduciary guarantee deed. Requests for fixing are also carried out electronically (online). Based on many cases of negligence the registration of fiduciary guarantees electronically (online) must also be addressed by notary carefully, honestly and truly can be an extension of the Government in serving the community and can be accounted for. In this case, if an error is found in the Notary when entering data, then the Notary must pay compensation for changes to the fiduciary guarantee certificate.

4. Conclusion

Notaries are state officials who are given access to register fiduciary guarantees electronically (online). Nevertheless, after Notary making fiduciary deed, it cannot just immediately register a fiduciary guarantee. In registering a fiduciary guarantee, Notary based on authorized representatives from a fiduciary recipient. So that the position in the registration fiduciary guarantees to be authority recipient of fiduciary. In carrying out its duties, the Notary must be professional. If the Notary in the registration of fiduciary guarantee electronically (online) makes a mistake when entering the data, then it would be accounted for. The accountability that must be carried out by Notary, it is the responsibility in a civil manner by compensating for losses and all costs incurred. The notary must change the fiduciary and cost of guarantee certificate will be responsibility of the Notary.

Recommendations for Notaries before registering fiduciary guarantees should be ensured authority from the fiduciary recipient is the basis for acting. In addition, notaries should also examine or check data again before entering data electronically (online) to avoid errors in entering data.

5. References

1. Abdulkadir Muhammad. Hukum Perusahaan Indonesia, Bandung: PT. Citra Aditya Bakti, 1999.
2. Djuhaenah Hasan. Lembaga Jaminan Kebendaan Bagi Tanah dan Benda Lain Yang Melekat Pada Tanah Dalam Konsepsi Penerapan Asas Pemisahan Horizontal (Suatu Konsep Dalam Menyongsong Lahirnya Lembaga Hak Tanggungan). Bandung: Citra Aditya Bakti, 1996.
3. Evan Criddle J. Evan Fox-Decent. Fiduciaries of Humanity; How International Law Constitutes Authority, Oxford University Press, 2016.
4. Gunawan Buntarman. Hukum Jaminan Fidusia.

- Bandung: Erresco, 2004.
5. Gunawan Widjaja dan Ahmad Yani. *Jaminan Fidusia*. Jakarta: PT RajaGrafindo Persada, 2001.
 6. Lexi J Molenong. *Metodologi Penelitian Kualitatif*. Bandung: Remaja Rosdakarya, 2008.
 7. Salim H. *Perkembangan Hukum Jaminan Di Indonesia*. Jakarta: Raja Grafindo Persada, 2007.
 8. Dody Radjasa Waluyo. *Kewenangan Notaris Selaku Pejabat Umum, Media Notariat (Menor) Edisi Oktober-Desember, 2001*.
 9. Figueroa Dante. "The Evolving Role of the Latin American Notary Public", *International Legal Studies Program Law Journal*, 2009, 1(3).
 10. Gladys Octavinadya Melati. *Pertanggungjawaban Notaris Dalam Pendaftaran Fidusia Online Terhadap Penerima Fidusia*, *Jurnal Repertorium*, Edisi Nomor, 2015, 3.
 11. Habib Adjie. *Undang-Undang Jabatan Notaris Sebagai Unifikasi Pengaturan Hukum Tentang Notaris*, *Jurnal Renvoi Tahun III Nomor*, 2005, 28.
 12. John Tyler. *Negating The Legal Problem Of Having "Two Masters": A Framework For L3c Fiduciary Duties And Accountability*, *Jurnal Vermont Law Review*, 2010, 35.
 13. Nabeel A. Jurdi, Fadia Moosa Rasheed, Radhakrishnan. "The Concept of Academic Excellence: A Macro Analysis". *Journal of Law, Policy and Globalization*, 2019, 81.
 14. Ni Wayan Indah Junyanitha. *Pendaftaran Fidusia Dalam Praktek Pemberian Kredit Pada PT. Bank Perkreditan Rakyat Raga Jayatama Di Batubulan Gianyar*, *Jurnal, Fakultas Hukum, Universitas Udayana*, 2015.
 15. Noel Cox. *The Notary Public- the third arm of the legal profession*, *Barrister and Lecturer in Law, Auckland University of Technology (2000) 6 New Zealand Business Law Quarterly*, 2000.
 16. Pingkan Sundah. "Tinjauan Yuridis Terhadap Tidak Dilaksanakannya Kewajiban Jabatan Notaris Menurut Undang-Undang Nomor 2 Tahun 2014", *Jurnal Lex et Societatis*, 2014, 2(4).
 17. Siti Malikhatus Badriyah. *Problematic of Fiduciary Guarantee in the Consumer Finance Agreement without a Notarial Deed*, dalam *The International Journal Of Humanities & Social Studies*, terdapat dalam, 2015, 3(6). www.theijhss.com,
 18. Yoyon Mulyana Darusman. "Kedudukan Notaris sebagai Pejabat Pembuat Akta Otentik dan sebagai Pejabat Pembuat Akta Tanah", *Jurnal Hukum ADIL*, 2016, 7(1).
 19. Keith L Johnson. "Introduction to Institutional Investor Fiduciary Duties", dalam *ISSD Report*, terdapat dalam, 2014. <http://www.reinhartlaw.com/wp-content/uploads/2016/01/introduction-to-Institutional-Investor-Fiduciary-Duties.pdf>
 20. *Undang-Undang Dasar Negara Republik Indonesia Tahun, 1945*.
 21. *Undang-Undang Republik Indonesia Nomor 42 Tahun tentang Jaminan Fidusia, 1999*.
 22. *Undang-Undang Republik Indonesia Nomor 2 Tahun 2014 tentang Perubahan Atas Undang-Undang Nomor 30 Tahun 2004 tentang Jabatan Notaris*
 23. *Peraturan Menteri Hukum dan Hak Asasi Manusia Republik Indonesia Nomor 9 Tahun 2013 tentang*

Pemberlakuan Pendaftaran Jaminan Fidusia secara Elektronik.