



The reform of legal protection for creditors in the implementation of fiduciary guarantee registration policy in indonesia based on justice value

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Abstract

The implementation of fiduciary guarantee registration is currently not fair, especially in the case of the Fiduciary Guarantee Registration Procedure, this also results in injustice for the protection of creditors in the implementation of the fiduciary guarantee registration policy. Research that will address the implementation of legal protection in the implementation of the fiduciary guarantee registration policy that has not been fair, using normative juridical methods. The Implementation of Fiduciary Security Registration Obligations Currently Not Just, especially in terms of Fiduciary Guarantee Registration Procedures, Protection of Creditors and Debtors, Affirmation of Cessie Institutions in the case of Transfer of Receivable Rights, Binding of Fiduciary Collateral Collateral, Bookkeeping of Fiduciary Guarantee Registration, Registration of Fiduciary Overseas Objects, Imposition of Objects which become the object of Fiduciary Collateral, and Execution of Fiduciary Collateral Objects.

Research result shows that it is necessary to reconstruct the obligation to register fiduciary guarantees based on justice values by providing legal protection to fiduciary creditors for fiduciary goods (inventory) and debtors in terms of fulfilling their rights and obligations. Carry out monitoring of the implementation of fiduciary guarantees in credit agreements. Provide juridical certainty of the sales authorization for fiduciary security objects that are required to be guarded by a notary public and guarantee equitable completion of the execution of fiduciary guarantees that are not registered with the fiduciary guarantee registration office. So that the value of justice in the implementation of fiduciary guarantee registration can be realized.

Keywords: creditors, fiduciary guarantee, justice value

Introduction

In its development, fiduciary guarantees are guarantees of movable objects both tangible and intangible and immovable objects, especially buildings which cannot be encumbered with security rights. its ownership rights to the Fiduciary Recipient, but the Fiduciary Recipient does not directly have the object which becomes the fiduciary guarantee submitted by the Fiduciary Giver, so that the fiduciary guarantee is a guarantee theory ^[1].

In the registration of fiduciary guarantees there is a requirement to list the objects which are the objects of fiduciary guarantees. This is very important because these items can be sold to get fiduciary debt payments. The object of collateral needs to be understood because the fiduciary guarantee right is a material right attached to the fiduciary object and will continue to follow the object in the hands of whoever the object is (*droit de suite*) as long as the fiduciary guarantee has not been written off or crossed out.

Interpreting, that which must be registered are objects and collateral bonds at the same time, will be very beneficial. Thereby, fiduciary bond guarantees and promises become registered and such can become the property of fiduciary recipients, whereas for fiduciary recipients the legal protection provided through fiduciary agreements is appropriate to bind third parties. In a guarantee agreement, it is usually indeed between the creditor and the debtor the

promise certain promises, which are generally intended to provide a strong position for creditors and later after registration are intended to also bind third parties. Therefore it can be interpreted here that registration includes both the registration of objects and their collateral bonds, all promises contained in the fiduciary deed (which in Article 13 paragraph (2) b are recorded in the Fiduciary Registration Office register) and are binding on third parties. The description above shows that the parties in the fiduciary guarantee agreement, both the fiduciary recipient and the fiduciary giver according to the fiduciary law are equally given legal protection, for the giver of protection in the form of the right to use the collateral, and the default of the guarantor of the fiduciary will not cause the object guarantee with Act Number 42 of 1999 concerning Fiduciary Guarantee is the preferential rights granted to the receivables, and the application of the principle of *droit de suite* on collateral, for third parties the principle of publicity in the fiduciary guarantee agreement will provide information on objects that are fiduciary ^[2].

However, according to Article 11 of Law Number 42 Year 1999 Concerning Fiduciary Guarantee, it is explained that with a notarial deed on fiduciary agreement is not enough, but must be registered. Notarial deed is an authentic deed and can be not if in a fiduciary agreement a notarial deed

¹ Djumhana Muhamad, *Hukum Perbankan Di Indonesia*, Citra Aditya Bakti, Bandung, 2000, p. 14.

² H.A. Chalik and Marhainis Abdul Hay, *Beberapa Segi Hukum Di Bidang Perkreditan*, Badan Penerbitan Yayasan Pembinaan Keluarga UPN Veteran, Jakarta, 1981, p. 24.

does not provide rights Preferent for fiduciary recipients, likewise there is no strict regulation in Law Number 42 of 1999 concerning Fiduciary Guarantees, regarding who must execute fiduciary collateral objects, even though fiduciary collateral objects are movable objects which are very risky for their displacement^[3], consequently the fiduciary recipient is in the application of fiduciary in the field it is difficult to implement the *droit de suite* principle^[4].

On the other hand, not only are notaries not only able to access Fiduciary Guarantee registration, but other parties such as finance companies and the public can also access fiduciary guarantee registration, this allows legal uncertainty and potential abuse of authority.

The weaknesses of the aforementioned protection are 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), conducting negotiations that provide additional costs for fiduciary recipients when executing fiduciary collateral objects, so that fiduciary certificates do not provide legal education in society. Not surprisingly, due to such peaceful practices, cases of sluggish and difficult fiduciary executions are an issue, in the author's survey, for example in several People's fiduciary Credit Bank guarantee agreements are ineffective because of the difficulty of execution.

The issues to be discussed in this paper are related to how to reform the legal protection in the implementation of the fiduciary guarantee registration policy in Indonesia which so far has not been fair.

Method of Research

The research in writing this Article is normative juridical. The Writing aims to provide an overview about a particular society or group of people or a description of a symptom or between two or more symptoms. Furthermore, this research seeks to explain the postulates studied in full in accordance with the findings in the field, then analyze the problem and find new ideas that may help solve the problem.

Research Result and Discussion

1. The current legal protection of creditors in the implementation of fiduciary guarantees

In the development of creditors or beneficiaries of fiduciary with the object of collateral in the form of objects unlisted do not need to worry, because the registration system bail bond is in itself all the stock of merchandise (*inventory*) that made the object of a fiduciary will be listed in the certificate fiduciary, so that in case of default of the fiduciary giver or debtor, the creditor only executes all merchandise as listed, or if there is nothing in accordance with what is recorded, the creditor can execute the existing stock of merchandise worth the collateral, because the collateral is the collateral bond not the object^[5] In addition to the fiduciary object in the form of stock of merchandise (*inventory*) that has been transferred by the fiduciary provider in the event of default

by the fiduciary giver or debtor, according to which states that the results of the transfer and / or claims arising, by law become objects of fiduciary guarantee substitute for the transferred fiduciary security object^[6]. It is then explained that in accordance with the requirements for the registration Fiduciary Fiduciary Registration Office as provided for in Article 13 paragraph (2) of Law Number 42 Year 1999 regarding Fiduciary, which reads: registration statement referred to in subsection (1) must include:

- a. The identity of the Fiduciary Giver and Receiver;
- b. Date, Fiduciary Guarantee Deed number, name and domicile of the Notary who made Fiduciary Guarantee Deed;
- c. Data on basic agreements guaranteed fiduciary;
- d. Description of Objects that become Fiduciary Security Objects;
- e. Guarantee value; and
- f. The value of the object which becomes the object of fiduciary security.

From these requirements, it can be seen that in the Fiduciary Guarantee registered there is an attachment regarding the Description of the Object which is the object of Fiduciary Security as regulated in Article 13 paragraph (1) letter d of the Fiduciary Law, thus clearly which object is guaranteed. If the collateral is in the form of stock of merchandise (*inventory*), it will be detailed about the stock of merchandise according to the list of stock of merchandise made by the fiduciary giver, which is contained in the Fiduciary Guarantee Registration Statement^[7]. The same thing was stated by Iwan Setiawan, the fiduciary guarantee registration officer at the Fiduciary Registration Office of the Special Capital Region of Jakarta who interviewed the writer, who said that in the case guaranteed by the fiduciary guarantee or the object of the fiduciary guarantee in the form of merchandise stock, the fiduciary giver must provide evidence in the form of a list of stock of merchandise which is the object of the fiduciary guarantee in detail and must be signed on the seal by the owner of the goods^[8].

However, in its development according to Article 11 of Act Number 42 of 1999 concerning Fiduciary Security, it is explained that with a notarial deed, a fiduciary agreement is not enough, but must be registered, a notarial deed is an authentic deed and can be a deed of use, in a fiduciary agreement without notarial deed grants preferential rights to fiduciary recipients, likewise there is no strict regulation in Law Number 42 of 1999 concerning Fiduciary Guarantees, regarding who must execute fiduciary collateral objects, even though fiduciary collateral objects are movable objects which are very risky for their displacement, consequently the fiduciary recipient in application in the field it is difficult to implement the *droit de suite* principle.

On the other hand, not only are notaries not only able to access Fiduciary Guarantee registration, but other parties such as finance companies and the public can also access fiduciary guarantee registration, this allows legal uncertainty and potential abuse of authority. The weaknesses of the aforementioned protection are exacerbated by the practice of

³ Arie Sukanti, 2013, Execution of Fiduciary Guarantee Under Law No. 42 of 1999 on Fiduciary Guarantee (A Socio-Juridical Analysis to Anticipate Its Effectiveness), Indonesia Law Review. 2013;3(3):204-212 DOI 10.15742/ilrev.v3n3.38

⁴ Mariam Darus Badruzaman, *KUHPerdata Buku III Hukum Perikatan dan Penjelasannya*, Bandung, Alumi, 1993, p. 92.

⁵ Kartini Mulyadi dan Gunawan Widjaya, *Hak Istimewa, Gadai dan Hipotek*, Prenada Media, Jakarta, 2005, p. 203.

⁶ Salim H.S., *Perkembangan Hukum Jaminan Di Indonesia*, Raja GrafindoPersada, Jakarta, 2004, p. 45.

⁷ Sri Soedewi Masjoen Sofyan, *Hukum dan Jaminan Perorangan*, Liberty, Yogyakarta, 1980, p. 40.

⁸ Interview with staff of the fiduciary registration section of the Fiduciary Registration Office of Semarang City, on April 10, 2019.

implementing fiduciary agreements in the field, among others in the form of not registering fiduciary objects (only stopping at making authentic deeds)^[9], conducting negotiations that provide additional costs for fiduciary recipients when executing fiduciary collateral objects, so that fiduciary certificates do not provide legal education in society. So that the legal protection of creditors in the implementation of fiduciary guarantees today is contrary to the Five Principles of Pancasila, the Fourth Paragraph of the Opening of the Constitution of the Republic of Indonesia, Article 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia. The system of implementing fiduciary guarantees in Indonesia in terms of protecting the interests of creditors is different from several countries. In China the practice of fiduciary guarantees is focused instead on guarantees of pension funds, and with government approval all citizens can have all the state pension funds (Pillars Ia and Ib)^[10]. In the country there is a National Social Security Fund (including licensed managers of funds and custodians), company annuity plans and mutual funds pay attention to ESG issues push high standards in corporate investors and report on how they do it^[11].

On the other hand the government, through organizations such as the People's Bank of China, is developing a comprehensive policy to support the development of fiduciary guarantees in the Chinese financial system so that the demand from financial institutions for investment can be strengthened. The above is supported by the Ministry of Human Resources and Social Security, People's Bank of China, the stock exchange and the investment industry can work together to support high-quality academic research into an ESG issue^[12].

The continued fiduciary guarantee to improve corporate practices is an important step that has been taken by the central and provincial governments to reduce the inefficiency of bank loans from Chinese companies. This must be continued and expanded in all sectors and issues of sustainability. It aims to focus investor attention on company performance and increase pressure on companies to adopt a financial credit management system in a bank^[13]. Next, the Malaysian guarantee legal system. This system clarifies each in the 1991 Employees Provident Fund Act, the 2007 Pension Fund Act, the 2013 Financial Services Act, the 2013 Islamic Financial Services Act and the 2007 Capital Market and Services Act to have all pension funds and investment managers taking account of the issue of ESG, pushing high standards in investor companies and reports on how they do it. The Financial Services Authority can work with the investment industry to ensure effective implementation of the Malaysian Institutional Investor Code. Malaysian stock exchange and the Malaysian Securities Commission can analyze and report disclosures

provided by listed companies and can work together to improve quality in terms of the fiduciary guarantee. The rest, on the other hand, fiduciary guarantees in Malaysia are not only limited to guarantees of bank loans, but also like other developed countries have entered into obligatory and investment loans which are managed by corporations whose funds are far greater than personal loans.

Lastly, the Singapore government. In its guarantee system requires that an examination of the amendment of the effects of future regulations in the case of fiduciary banking financial loans (Licensing and Business Conduct) be required for all relevant investment managers and intermediaries to take into account ESG issues, pushing high standards in investor companies and reports on how they did it and are responsible for paying off debts with guarantees of capital or other valuable objects.

Introducing the management code and monitoring results of management and the Monetary Authority of Singapore can continue to work with the investment industry to introduce the code establishing the responsibilities of management of institutional investors and to monitor the results of management of a company management and to account for fiduciary guarantee issues. In terms of increasing corporate improvement on the Singapore Stock Exchange (SGX), it must continue to plan to have all listed companies produce sustainability reports. Furthermore, the Singapore banking loan problem is prioritizing loans from colleagues such as Taiwan and Hong Kong, so the problem of loan interest is not too large and fiduciary guarantees for dependents are not given much attention.

2. Reformation of Just Fiduciary Guarantee Registration Policy in Indonesia

Efforts taken by the people's credit agency (BPR) to avoid loss due to default of its customers whose credit is based on the credit agreement to achieve justice between parties, one of which is the acquisition of fiduciary goods outside the auction based on voluntary surrender by the collateral owner and based on the power of attorney to sell outside the auction from the owner of the owner collateral with the procedure as regulated in Article 1 number 10 of Bank Indonesia Regulation Number 8/19 / PBI / 2006 so that the implications of completing the execution of fiduciary guarantees that are not registered at the Fiduciary Registration office are Debtors if default, the creditor sues through the litigation process in court and to the Creditors the provisions of Article 1131 and Article 1132 of the Civil Code which places a creditor as a concurrent creditor of an agreement he does and his execution becomes the authority of the head of the district court for his position (ex officio) make a written order to confiscate as many / as needed movable property (Article 197 paragraph (1) HIR / Indonesian Reglement which is renewed), thus the creditor whose fiduciary guarantee is not registered but the power of attorney to sell it is guarded by safekeeping, based on the power of attorney to sell which is guaranteed to provide to him the authority to withdraw / take the vehicle borrowed / used by the authorizer / Debtor based on the voluntary surrender of the Debtor or the existence of an agreement between the creditor and Debtor. Voluntary surrender / agreement means that there is no dispute between the parties so that confiscation without agreement between the bank and the Debtor becomes invalid because the confiscation of movable property according to Article 197 paragraph (1) is

⁹Salim H.S., *Perkembangan Hukum Jaminan Di Indonesia*, Raja Grafindo Persada, Jakarta, 2004, p. 45.

¹⁰<https://en.m.wikipedia.org/wiki/Fiduciary>, Accessed on 23 Agustus 2019

¹¹ Iswi Hariyani, 2017, Comparison of Warehouse Receipt, Pawn And Fiduciary In The Security Law Perspective, *Yustisia*. 2017;6(3):649-671 DOI 10.20961/yustisia.v6i3.7232

¹²<https://unepinquiry.org/publication/fiduciary-duty-in-the-21st-century/>, Accessed on 23 Agustus 2019

¹³https://books.google.co.id/books?id=qGdo8KUx83cC&pg=PT43&lpg=PT43&dq=fiduciary+in+many+country&source=bl&ots=Zy8ZiwOon&sig=ACfU3U3dvgrHtipOQ0TE4v4tAIUkQG6Vw&hl=en&sa=X&ved=2ahUKEwieia_2JjkAhWYSH0KHSM0AkYQ6AEwD3oECAkQAQ#v=onepage&q=fiduciary%20in%20many%20country&f=false, Accessed on 23 Agustus 2019

the authority of the head of the district court over the position (*ex officio*) to make written orders to confiscate as many / as needed movable property. the authority of the confiscation is related to the opinion of the Supreme Court Decree Number Reg. 2414 K / Pdt / 1987 dated February 12, 1990 which essentially states that if a *grosse deed* cannot be executed with the provisions of Article 224 HIR (*parate execution*), then such matter must be sued in an ordinary civil suit.

Based on the discussion above it can then be concluded that the reconstruction can be stated, among others, as follows:

- a. The transfer of the Right to Receivables (*Cessie*) as stipulated in Article 19 paragraph 1 actually confirms the *cessie* institution. So that regarding the obligation to register the *cessie* by the new creditor, the Fiduciary Registration Office will not overlap and problems with the Fiduciary guarantee, therefore the registration must be separate from the old creditor.
- b. Issues Related to the Fiduciary Registration Office. In accordance with article 14 number 3 of the Fiduciary Security Law, Fiduciary Security must be born on the same date as the Fiduciary Security record in the fiduciary register. The registration must be done at the Fiduciary Registration Office and must be carried out in full by holding the Indonesian Notary Code of Ethics and the registration office must be integrated and able to accommodate the needs of each region both in the district and city.
- c. Regarding issues relating to article 11 paragraph 2 of the Fiduciary Guarantee Law concerning Fiduciary Objects which are Abroad. Further explanation is needed regarding the registration procedure and the procedure for its execution both through Ministerial Regulation and other legislation below. So that objects burdened with Fiduciary Guarantees are outside the territory of the Republic of Indonesia, they must still be registered and monitored especially for their registration in Jakarta.

Conclusion

1. The Execution of Fiduciary Guarantee Registration Requirements Currently Not Fairly, especially in the case of Fiduciary Guarantee Registration Procedures, Protection of Creditors and Debtors, Affirmation of *Cessie* Institutions in Transfer of Receivable Rights, Fiduciary Collateral Binding Collateral, Bookkeeping of Fiduciary Guarantee Registration, Registration of Fiduciary Objects in the *Cessie* Institution in Transfer of Receivable Rights, Fiduciary Collateral Binding Foreign Affairs, Imposition of Objects which become the object of Fiduciary Collateral, and Execution of Fiduciary Collateral Objects.
2. There are weaknesses in the current fiduciary guarantee registration obligation, especially in the protection provided by the law to creditors and debtors in the object of fiduciary security besides the weaknesses as follows
 - a. In Article 19 paragraph 1 regarding the Transfer of Receivable Rights (*Cessie*) in practice it has not been understood as an affirmation of the institution itself. So the obligation to register the *Cessie* by a new creditor, the Fiduciary Registration Office is still a problem, whether done separately with Fiduciary registration, or together.

- b. In Articles 4, 5, and 6 of the Fiduciary Security Act concerning the Charging Stage, as a follow-up agreement (*Acesoir*), the Fiduciary Guarantee arises because of the existence of the principal agreement. However, in practice it turns out that the obligation to make a fiduciary deed which must be made notarial is required, especially in the case of retail credit, registration fees are an issue.
 - c. Issues Related to the Fiduciary Registration Office. In accordance with article 14 number 3 of the Fiduciary Guarantee Law, the Fiduciary Guarantee was born on the same date as the date of the recording of the Fiduciary Guarantee in the fiduciary register book. The registration is carried out at the Fiduciary Registration Office. But until now the registration office has not been able to run as a whole. Also because the registration office is only at the provincial level.
 - d. Regarding article 11 paragraph 2 of the Fiduciary Guarantee Law concerning Fiduciary Objects that are Abroad, in practice there are still many objects which are encumbered with Fiduciary Assurance outside the territory of the Republic of Indonesia which is not registered. This article does not regulate where to register in Jakarta or other places. Besides that there are no arrangements regarding the execution.
 - e. In Article 37 paragraph 1 regarding the imposition of Objects which are the object of Fiduciary Guarantee in practice some notaries do not pay attention to whether the previous rules are still valid or not, they are of the opinion that this provision is general in nature, even though in this matter has been limited by the provisions of article 37 (2), namely within 60 days from the founding of the Fiduciary Registration Office.
 - f. Regarding the provisions of chapter V article 29 of Law No.42 of 1999 there are still many notaries who do not yet know how to proceed according to the Fiduciary Security Act in matters of execution of fiduciary collateral objects (if the debtor fails to fulfill his promise).
3. As for the Reconstruction of the Justice Value-Based Fiduciary Guarantee Registration can be explained as follows :
 - a. The transfer of the Right to Receivables (*Cessie*) as stipulated in Article 19 paragraph 1 actually confirms the *cessie* institution. So regarding the obligation to register the *cessie* by the new creditor, the Fiduciary Registration Office will not overlap and problems with its Fiduciary guarantee, therefore it must be registered by the new creditor to the Fiduciary Registration office separately from the previous creditor.
 - b. Issues Related to the Fiduciary Registration Office. In accordance with article 14 number 3 of the Fiduciary Security Law, Fiduciary Security must be born on the same date as the Fiduciary Security record in the fiduciary register. The registration must be done at the Fiduciary Registration Office and must be carried out in full by holding the Indonesian Notary code of ethics and integrated with the needs of each region in the Regency or city.
 - c. Regarding issues relating to article 11 paragraph 2 of the Fiduciary Guarantee Law concerning Fiduciary Objects which are Abroad. Further explanation is needed regarding the registration procedure and the procedure for its execution both through Ministerial

Regulation and other legislation below. So that objects burdened with Fiduciary Security are outside the territory of the Republic of Indonesia, they must still be registered and monitored and registered in Jakarta.

References

1. Arie Sukanti. Execution of Fiduciary Guarantee Under Law No. 42 of 1999 on Fiduciary Guarantee (A Socio-Juridical Analysis to Anticipate Its Effectiveness), *Indonesia Law Review*. 2013; 3(3):204-212. DOI 10.15742/ilrev.v3n3.38
2. Djumhana Muhamad, *Hukum Perbankan Di Indonesia*, Citra Aditya Bakti, Bandung, 2000, p. 14.
3. Chalik HA, Marhainis Abdul Hay. *Beberapa Segi Hukum Di Bidang Perkreditan*, Badan Penerbitan Yayasan Pembinaan Keluarga UPN Veteran, Jakarta, 1981, p. 24.
4. Interview with staff of the fiduciary registration section of the Fiduciary Registration Office of Semarang City, on, 2019.
5. Iswi Hariyani, *Comparation Of Warehouse Receipt, Pawn And Fiduciary In The Security Law Perspective*, *Yustisia*. 2017; 6(3):649-671. DOI 10.20961/yustisia.v6i3.7232
6. Kartini Mulyadi dan Gunawan Widjaya, *Hak Istimewa, Gadai dan Hipotek*, Prenada Media, Jakarta, 2005, p. 203.
7. Mariam Darus Badruzaman, *KUHPerdata Buku III Hukum Perikatan dan Penjelasannya*, Bandung, Alumni, 1993, p. 92.
8. Salim HS. *Perkembangan Hukum Jaminan Di Indonesia*, Raja GrafindoPersada, Jakarta, 2004, p. 45.
9. Salim H.S., *Perkembangan Hukum Jaminan Di Indonesia*, Raja Grafindo Persada, Jakarta, 2004, p. 45.
10. Sri Soedewi Masjoen Sofyan, *Hukum dan Jaminan Perorangan*, Liberty, Yogyakarta, 1980, p. 40.
11. https://books.google.co.id/books?id=qGdo8KUx83cC&pg=PT43&lpg=PT43&dq=fiduciary+in+many+country&source=bl&ots=Zy8ZiwOon&sig=ACfU3U3dvvgrHti pOQ0TE4v4tAIUkQG6Vw&hl=en&sa=X&ved=2ahUKEwieia_2JjkAhWYSH0KHSM0AkYQ6AEwD3oEC AkQAQ#v=onepage&q=fiduciary%20in%20many%20country&f=false, Accessed on 23 Agustus 2019
12. <https://en.m.wikipedia.org/wiki/Fiduciary>, Accessed on 23 Agustus, 2019.
13. <https://unepinquiry.org/publication/fiduciary-duty-in-the-21st-century/>, Accessed on 23 Agustus, 2019.