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In Effect of fiduciary agreement of moving object as a guarantee against obligation-violating debtor

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Abstract

The purpose of this study is to examine and analyze the consequences of the Indonesian fiduciary agreement law on moving objects as debt guarantees against obligation-violating debtors (Tort). This research's approach method is empirical juridical. Data type used in this research is primary and secondary data. Primary data collection techniques are obtained through guided-free interviews. Determination of sample research uses purposive non random sampling. While the secondary data are obtained through literature study that includes principles, concepts, teachings and theories of law and justice with data analysis using analytical description method. The findings of this study are fiduciary assurance is an Assesoir agreement of basic agreement which issues obligations for parties to fulfill an achievement. The nature of the assesoir agreement in an agreement will be waived if the loan on the principal agreement on which the fiduciary agreement is born has been settled or paid. Due to the law of the debtor or fiduciary giver of wansprestasi (Indonesian's term of not fulfilling the obligation), the fiduciary shall obligate to submit the fiduciary assurance object in the course of execution. The execution may be executed by executing the title executorial by the fiduciary recipient, or through the parate institution, the sale of fiduciary security objects on his own power through a public tender for the repayment of the debtor's loan. With the need to implement risk management with risk transfer to third parties.

Keywords: legal effect, fiduciary agreement, debtor, obligation violation

Introduction

Bank is a financial institution which aims is to provide credit and services [1]. In giving credit to customers, they will be bound by agreement. The Agreement is a series of words containing promises or abilities that are spoken or written. The Agreement [2] issued by a commitment between the two man who made it. The requirement of an agreement as stipulated in Article 1320 of the Civil Code, which contains subjective and objective terms. If the subjective terms are not met, then the agreement is null and void. In the subjective terms, if the condition is not met, then the agreement can be canceled at any time [3]

A legal relationship is a relationship that is regulated and recognized by law and has legal consequences. In a legal relationship, if one of the parties does not keep the promise voluntarily, then the party who feels their rights are violated can sue in front of the court for the fulfillment of an achievement [4].

Its Legal Construction of Constitutum possessorium [5] makes fiduciary lenders [6] the recipient of rights, guaranteed property ownership, and only accepting them in a trustworthy manner. This means that the material of fiduciary guarantee is still in the hands of the debtor, while the creditor only controls the documents of possession of material possessions of the debtor hand delivered to the creditor [7]. For fiduciary lenders there is difficulty in claiming their rights if the debtor makes a misrepresentation or actio pauliana (the act of a debtor that harms the creditor, eg: selling or transferring the material rights that become fiduciary collateral to others).

Legal signs have been provided through the notarial deed drafted by the Notary, namely: [8] The first phase through the obligatory agreement, where the debtor declares to borrow money with the collateral of moving objects. The Obligatory agreement only creates rights and obligations between the parties concerned. The second phase is through material agreement (zakelijke recht), where the transfer of ownership of the debtor to the fiduciary lender by Constitutum possessorium. The third phase is through a borrowing agreement, in which the fiduciary owner lends his / her existing property in his / her power to the fiduciary receiver

[1] O.P. Simorangkir, 2015, *Kamus Perbankan Inggris Indonesia*, PT Bina Aksara, Jakarta, hlm. 33.

[2] Agreement is a legal relationship between two people or two parties. Based on that, one party has the right to demand something from the other and the other party is obliged to fulfill the demands. The party entitled to demand something is called the creditor, while the party who is obliged to fulfill a claim is called the debtor. Look in Subekti, *Hukum Perjanjian*, Intermasa, Jakarta, 1998, hlm. 1.

[3] Subekti, *op.cit.*, 1998, hlm. 20.

[4] Etty Mulyati, *Kredit Perbankan, Aspek Hukum dan Pengembangan Usaha Mikro Kecil Dalam Pembangunan Perekonomian Indonesia*, Cetakan Kesatu, Refika Aditama, Bandung, 2016, hlm. 96.

[5] Menurut kamus hukum, *Constitutum possessorium* Artinya Penyerahan dengan melanjutkan penguasaan atas bendanya. Lihat dalam https://kamushukum.web.id/arti-kata/constitutumpossessorium/, yang diakses pada hari senin, 3 Juli 2017

[6] In broad terms, a fiduciary is a person of trust or confidence with respect to another person, who is often referred to as the "beneficiary or prinsipal". The term derives from the latin words fides and fiducia, meaning faith and trust. Benjamin J. Richardson, Fiduciary law and Responsible Investing in Nature's Trust, Routledge, 2013. Fiduciary or Fiducia Eigendom Overdracht (FEO) is one form of material security that is well known in business life. In essence the fiduciary is the transfer of the right of ownership of an object on the basis of belief, provided that the object whose right of ownership is transferred, remains in the possession of the object owner (debtor), see in Sri Soedewi Masjchoen Sofwan, 1980, *Hukum Jaminan di Indonesia, Pokok-Pokok Hukum Jaminan dan Jaminan Perseorangan,* Liberty, Yogyakarta, hlm.47.

[7] Sentosa Sembiring, 2012, *Hukum Perbankan,* Edisi Revisi, Mandar Maju, Bandung, hlm 221

[8] Muhamad Djumhaud, 1993, *Hukum Perbankan di Indonesia*, Citra Aditya Bakti Bandung hlm 241

(Bruiklening) [9]. Based from the description given above, the authors are interested to study it more deeply especially about the weakness and the consequence of the fiduciary agreement law on the moving object as debt guarantee against the debtor who violate the agreement.

Method of Research

The research paradigm used is constructivism. The paradigm of constructivism is a paradigm that seeks to see that the truth of a legal reality is relative, applicable in the specific context considered relevant by social actors. The reality of law is a diverse multiple reality, based on individual social experience because it is a mental construct of man, so the research undertaken could emphasizes empathy and dialectical interaction between researchers and those studied to reconstruct the reality of law through qualitative methods [10].

The method of this research approach is normative juridical. This type of descriptive analytical research aims to find a new knowledge that previously did not exist in this case things to be found is the result of fiduciary agreement law when the debtor violates the agreement.

Data type in this research is primary and secondary data. Primary data source, ie data obtained directly from a number of respondents. Whereas secondary data sources consist of: Primary Legal Material: (Civil Code, Jurisprudence, Related Laws), Secondary Law Material: (scientific works, past research results, notarial deeds related to fiduciary), And Tertiary Law Material: (bibiliography, cumulative index, and others).

Data collection techniques that have been done are as follows:

a. To obtain field data / primary data, the researcher conducted free guided interviews. Determination of research sample using purposive non random sampling;
b. While secondary data are collected through researcher library that includes principles, concepts, teachings and theories of law and justice. Whether expressed or implied in the Pancasila, the 1945 Constitution of the State of the Republic of Indonesia (Preamble and Body Body especially Article 34), the Fiduciary Guaranty Act and so on.

This research uses qualitative descriptive analysis model with Milles and Huberman interactive model. The main activities of this model analysis includes: data reduction, data presentation, conclusions: withdrawal / verification [11].

Research Result and Discussion

Law is a part of its social environment. Thus, law is one of the subsystems among other social subsystems, such as social, cultural, political, and economic. That means, that the law can not be separated with the community as the basis of its work. Here it appears that law is between the world of values or the world of ideas with the world of everyday reality [12].

Theory of system of law from Lawrence M. Friedman [13] states that as a legal system of the social system, the law includes three components:

1. legal substance; Composed of rules and regulations on how the institution should behave. H.L. A Hart argues that the peculiar nature of a legal system is a double collection of rules [14]
2. legal structure ; Is a framework, a persisting part, a section that provides some form and restriction to the whole law enforcement agencies. In Indonesia which is the structure of the legal system, among others; Institutions or law enforcement agencies such as advocates, police, prosecutors and judges [15].
3. legal culture ; Is an element of social attitudes and values. The term social forces itself is an abstraction; as this power can not directly affect the law system [16].

The fiduciary guarantee deed in the imposition of fiduciary guarantee on the financing agreement are indispensable as the initial momentum fiduciary. The process of fiduciary there are two stages, namely the imposition of fiduciary and fiduciary guarantee registration. The imposition of fiduciary stage is done by notarial deed, as authentic evidence and as a condition for registration of fiduciary [17].

In the practice of fiduciary assurance of moving objects as an object of debtors' debt guarantee, there are some disadvantages, such as [18]:

a) Time and Cost

The existence of a judicial process that requires a lot of time and expensive costs into its own problems. In this case that the principle of "pacta sun servanda" agreement which states that the agreement made by the parties to the agreement, shall be a law for both, shall remain in effect and shall be the prime principle of the treaty law. But there is no execution under the treaty that provides under informal fiduciary (Not through the notary deeds). The process of execution must be done by filing a civil suit to the District Court through a normal procedural law process until the decisions of the court released. This is the procedural choice of formal law in order to maintain justice and enforcement of the material laws it contains. This process will almost certainly take a long time, if the parties use all available legal remedies. Costs that must be issued will not be small. Of course, this is a dilemmatic choice. The pretext of pursuing large margins should also consider the sense of justice of all parties. Communition that generally become customers must also be more critical and meticulous in making transactions. As for the Government, certainty, justice and legal order are important.

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[9] Jaminan fidusia, diunduh pada tanggal 31 Juli 2016 pada situs yang beralamat di http://dianaanitakristianti.blogspot.com/2013/12/jaminan-fidusia.html

[10] Esmi Warassih, Tanpa Tahun, *Metode Penelitian Hukum,* Yayasan Dewi Sartika, Semarang, hlm. 162.

[11] Milles dan Huberman, 2000, *Analisis Data Kualitatif,* Percetakan Muhamadiyah, Solo, hlm.20.

[12] Esmi Warassih, *Pranata Hukum: Sebuah Telaah Sosiologis*, Semarang: Pustaka Magister, 2014, hlm. 61-62.

[13] Lawrence M. Friedman, 2009, Sistem Hukum Dalam Perspektif Ilmu Sosial, The Legal Sistem: A Sosial Science Perspektive. Nusa Media, Bandung, hlm 16. Diterjemahkan dalam buku Lawrence M. Friedman, 1969. The Legal Sistem: A Sosial Science Perspektive. Russel Soge Foundation, New York

[14] Ibid., hlm. 16

[15] Ibid., hlm. 15

[16] Ibid., hlm. 17

[17] Siti Malikhatun Badriyah, *Problematic of Fiduciary Guarantee in the Consumer Finance Agreement without a Notarial Deed,* The International Journal Of Humanities & Social Studies (ISSN 2321 -9203), Vol.3 Issue.6, June 2015, p.288.

[18] Wawancara dengan Kristina Magdalena Yosida, kepala Bank Panin Semarang, 20 Desember 2016

In theory the existence of the court is an institution that serves to coordinate the disputes that occur in society, and is a 'house of protection' for the justice seekers, who trust the litigation path, and is considered a 'justice company' capable of managing disputes and using product of justice [19] Which is acceptable to all societies. The duties and functions of the courts are not merely resolving disputes, but also to guarantee a form of public order in society. It is on this basis that some experts give honorable places to the courts. R. Dworkinv states the court is the capital of law's empire [20] According to J. P. Dawson [21], According to J. P. Dawson, the judge is a prominent and respected member of the local community. In fact, JR. Spencer said the court ruling was like a "judgment was that of god" [22].

Issues that arise from the normative provisions set forth in the laws and regulations governing the judiciary in resolving disputes includes [23]

First, the process of settling the case usually runs too formal and rigid so it is less flexible and does not reach all aspects of the dispute (case).

Secondly, the judicial process is horrible because it only concerns the juridical aspect only without considering the sociological, psychological and religious aspects in which are elements of the dispute from a holistic view.

Third, the judicial process runs slowly and convoluted, so it is considered wasteful and cost too much to justice seekers.

Fourth, there is no mutual communication between judges and parties. Judges over-dominate the judicial process and lack the opportunity for parties to be active as subjects in the dispute resolution process. Judges tend to place parties as objects to be examined and tried.

Fifth, truth and justice are measured with unilateral opinions, beliefs and feelings of judges so that parties can not understand and accept judgment judges who are subjectively beyond their opinions, beliefs and feelings.

Sixth, judges tend to be formal because they only pay attention to legal aspects that are based on doctrine or legal text without considering the legal awareness of the parties.

Seventh, turns out most of the civil cases are getting appealed. This indicates that most judex factie judgments are not accepted, by the justice seekers, although the case has been decided and the verdict has a permanent legal force, but in fact the dispute between the parties has not been extinguished, and tends to generate resentment and hatred and Prolonged hostilities resulting in negative excesses in society and so on. Based from this condition it is then required a judicial system for fiduciary that is fast and precise in getting justice. Here then the role of all parties to make it happen together as an effort to run a just and civilized law order.

b) Absence of awareness to register it

In Law No. 42/1999 on Fiduciary Guarantee (hereinafter referred to as UUJF), the provisions that must be fulfilled and obeyed in the agreement with the fiduciary Guarantee, including the provisions requiring the registration of objects of fiduciary collateral in the Fiduciary Registration Office Article 11 and Article 12 of the UUJF). In practice the provision of credit with fiduciary guarantee should be referring to UUJF, but in fact there are still many violations. One of them is, there are still many banks or finance institutions that do not register fiduciary objects to the Fiduciary Registration Office on the grounds that the registration fee is more expensive than the credit obtained, efficiency in the face of competition with other financing institutions

as seen in Article 11 paragraph (1) of Law Number 42 Year 1999 has stipulated that objects subject to fiduciary collateral shall be registered [24]. With respect to unregistered fiduciary assurances, the provisions of the Fiduciary Guaranty Act does not apply; in other words for the coming into effect of the provisions of the Fiduciary Guaranty Act, it is then must be fulfilled the requirement that the fiduciary assurance object is registered. Creditors who do not register fiduciary security objects in the Fiduciary Registry Office can not enjoy the benefits of the provisions of the Fiduciary Guarantee Act such as preference or the rights to be the first to fulfill. Another consequence with the non-registration of a fiduciary security object is that if the debtor is defaulted, the creditor can not immediately execute the fiduciary guarantee but must file a civil suit in court under the provisions of the Civil Code (Civil Code).

If there is a decision of the court that has obtained a permanent legal force then can only be requested execution of fiduciary security objects. The registration of objects to fiduciary security is exercised in the place of fiduciary positions, and this registration is made to fulfill the principle of publicity, as well as a guarantee of certainty to other creditors of objects which have been encumbered by fiduciary assurances.

Against the absence of strictly sanctioned rules when the fiduciary charge is not registered and consequently for a society that does not know its legal consequences, regards the registration as a non-absolute obligation. J. Satrio on this assumption gives the following statement: The Fiduciary Guarantee Act adheres to the principle of fiduciary guarantee registration. Although Article 11 of the Fiduciary Guaranty Act states that "objects with fiduciary collateral shall be registered", but otherwise read "fiduciary collateral" shall be registered, because from further provisions it is known that that's what the rule maker meant to. J.Satrio's opinion is justifiable as the registration of fiduciary guarantee have a juridical means as a sequence that can not be separated from

[19] According to Satipto Rahardjo, Justice is an abstract item and therefore hunting for justice is a tough and an exhausting endeavor. See Satjipto Rahardjo, 'Not Being a Prisoner of the Law', Kompas, May 24, 2000, On another occasion Satjipto Rahardjo also revealed that justice based on a more abstract value is "truth". Thus acting justly equals acting appropriately and justice is an attempt to pursue the truth. See, Satjipto Rahardjo, 2006, Ilmu Hukum, Citra Aditya Bakti, Bandung, hlm. 166. pada Sedangkan menurut Clarence Darrow, "There is no such thing as justice, In fact, the word cannot be defined", Lihat dalam Gerry Spence, 1989, With Justice for None, Pengiun Book, New York, p. 5.

[20] Ronald Dworkin, Law's Empire, Harvard University, Press, Cambridge, p. 407.

[21] John P. Dawson, 1996, Peranan Hakim di Amerika Serikat, dalam Harold J Berman, Ceramah-ceramah Tentang Hukum Amerika Serikat, terjemahan Gregory Churchill, Jakarta, PT. Tatanusa, hlm. 22.

[22] J.R. Spencer, 1989, Jackson's Machinery of Justice, Cambridge University Press, hlm.19. Lihat juga Harold J.Berman, 1996, "Segi-segi Filosofis Hukum Amerika". Harrold J. Berman, Ceramah-ceramah Tentang Hukum Amerika Serikat, penterjemah Gregory Churchil, J.D., PT. Tatanusa, hlm. 271.

[23] A. Mukti Arto, 2001, Mencari Keadilan, kritik dan Solusi terhadap Praktek Peradilan Perdata di Indonesia, Pustaka Pelajar, Yogyakarta, hlm. VI-VII.

[24] H. Salim, 2004, *Perkembangan Hukum Jaminan Di Indonesia*, RajaGrafindo, Jakarta, hlm.82.

the process of fiduciary guarantee agreement and that the registration of fiduciary is a requirement to fulfill the publication principle so that the law certainty can be achieved.

To provide legal certainty, Article 11 of the UUJF requires articles subject to fiduciary collateral to be registered with the Fiduciary Registry Office. This obligation can remains in force even though the items under fiduciary guarantees are outside the Territory of the Republic of Indonesia, as well as a guarantee of certainty to other creditors regarding objects that have been encumbered by fiduciary assurances. An agreement with an effective fiduciary guarantee to provide protection for the benefit of the creditor, since an agreement with a fiduciary guarantee other than giving priority to the Fiduciary Receiver to the other creditor, nor shall such right be withheld by the bankruptcy and / or liquidation of the Fiduciary (Article 27 Paragraph (3) UUJF).

Furthermore, an agreement with a fiduciary guarantee in which, after registration, will result in a fiduciary guarantee certificate shall have the same executive power as the court decision which has obtained permanent legal force so that if the debtor is defaulted, the fiduciary receiver shall have the right to sell the object to which the fiduciary security object On its own powers (Article 15 paragraph (2) and (3) UUJF). Therefore, to obtain the legal protection of object loading by fiduciary guarantee deed must be made by notarial deed (Article 5 paragraph 1 UUJF) and registered in Fiduciary Book List. If such provision is not met, the creditor can not be in legal protection as mentioned in UUJF.

c) Use of the under hand deed

Under Hand deed (Akta Dibawah Tangan) is a deed created not through the authorized officials (Notary) but by related parties only.There is a Financing Institution, a Leasing Institution that implements a fiduciary charge by using a deed under the hand or not by notarial deed. Deed under the hands is not an authentic deed that has perfect proof value. Instead, an authentic deed is a deed made by or in front of an official appointed by the Act and has the power of absolute evidence.

Currently, many finance institutions and banks (commercial banks and lenders) provide consumer finance, leasing, factoring. They generally use a treaty procedure that includes a fiduciary guarantee for a fiduciary security object. In practice, financing institutions provides moving goods that are demanded by consumers (such as motorcycles or industrial machines) and then on behalf of consumers as the debtor (credit / loan recipient). Consequently the debtor hands over to the creditor (lender) in fiduciary. This means that the debtor as the owner on behalf of the goods becomes the fiduciary giver to the creditor who is in the position of fiduciary receiver. Simple practice in fiduciary guarantee is the debtor / party who has goods to finance the creditor, then both sides agree to use fiduciary guarantee to the debitor's possessions and made the notary certificate and then registered to the Fiduciary Registration Office. The creditor as a fiduciary receiver will receive a fiduciary certificate, and a copy is given to the debtor. With a fiduciary guarantee certificate, the creditor / fiduciary receiver immediately has the right of direct execution (parate execution), as happened in borrowing in banking. The legal power of the certificate is the same as a court decision that already has a permanent legal force.

Facts in the field shows, financing institutions in financing agreements include words pledged fiduciary. But the irony is not made in the notarial deed and is not registered at the Fiduciary Registration Office to obtain a certificate. Such a deed may be called a fiduciary guarantee deed under the hand.

Fiduciary collateral which is not made fiduciary guarantee certificate gives rise to complex and risky legal consequences. The creditor can exercise his / her right of execution because it is considered unilateral and may result in arbitrariness of the creditors. It could also be because given the financing of goods objects of fiduciary are usually not full in accordance with the value of goods. Or, the debtor has already performed part of the obligations of the agreement, so it can be said that the above goods stand the rights of some of the debtor and some belong to the creditor. Moreover, if the execution is not through the official price appraisal agencies or public tender bodies. Such actions may be categorized as Acts against the law(PMH) as stipulated in Article 1365 of the Civil Code and may be claimed for damages.

In the conception of criminal law, the execution of fiduciary objects under the hand is included in the criminal offense of Article 368 of the Criminal Code if the creditor exerts coercion and threats of deprivation. This Article states that:

1. Whosoever with the intent to benefit himself or others unlawfully, compel a person with violence or the threat of force to give something, wholly or partially, belongs to that person or other person, or in order to make debts or to abolish accounts receivable, is threatened For extortion with a maximum imprisonment of nine months.
2. The provisions of Article 365 of the second, third and fourth verses apply to this crime.

This situation can occur if the creditor in the execution of coercion and takes the goods onesidedly, even though its known that the goods are partly or wholly owned by others. Although it is also known that some of the goods are owned by creditors who want to execute but are not registered in the fiduciary office. Even the imposition of other Articles can occur given that everywhere execution is not an easy thing, for it requires legal guarantees and legal support of legal apparatus. This is the urgency of balanced legal protection between creditors and debtors.

Even if the debtor transfers the fiduciary object undertaken under the hands of the other party, it can not be charged with Law no. 42 of 1999 on fiduciary collateral, because it is where the terms of a fiduciary guarantee agreement is legal or not is made. It is probable that the debtor who transfers the fiduciary guarantee object is reported on the appropriate embezzlement charges

Article 372 of the Criminal Code stipulates that: Whoever intentionally and unlawfully owns the goods wholly or in part belongs to another person, but who is in his power not because the crime is threatened by embezzlement, with a maximum imprisonment of four years or a fine of not more than nine hundred rupiahs.

By the creditors, this can also be a blunder because they can report to each other because some of the goods belong to both creditors and debtors, it takes a civil decision by the local state court to position the portion of each owner for both parties. If this is taken then there will be a long legal process, tiring and cost high. As a result, the margin to be achieved by

the company can not be realized and may even lose money, including loss of time and thought.

Financing institutions that does not register fiduciary security are actually lose out on their own because they have no legal executorial rights. Problem in business that requires speed and excellent customer service is always not in line with the existing legal logic. Perhaps because of legal vacuum or law that is not always as fast as the times. Imagine, a fiduciary guarantees should be made before a notary while a finance institution makes fiduciary agreements and transactions on the ground in a relatively quick.

d) Weakness in Execution Executed by executor

The creditor as Fiduciary Receiver has the right to execute collateral if the debtor makes a default. Based on Article 15 paragraph 2 and paragraph 3 UUJF which asserts that if the debtor breaches the pledge, the creditor as the Fiduciary Receiver has the right to sell the Object which becomes the object of fiduciary guarantee on his own power.

The right to sell a fiduciary security object to its own powers constitutes the realization of a Fiduciary Guarantee Certificate having the same executorial as a court decision having a permanent legal force. In UUJF, the execution of object objects of fiduciary guarantee can be done by: a. Implementation of executorial title. B. Sale of objects that become the object of fiduciary guarantee on the power of the Fiduciary Receiver itself through the public tender and to take out the receivable from the proceeds of the sale. C. Sale under the hands of the Contractor of the Fiduciary Administration so that if such manner can be obtained the highest price that can benefits the parties [25].

In the event that execution exceeds the value of the guarantee, the Fiduciary Receiver shall return the surplus to the Fiduciary Giver. If the execution costs exceeds the value of the guarantee, the Fiduciary Receiver shall return the excess to the Fiduciary Giver. "In the event that the creditor does not register a fiduciary guarantee, the lender may only execute the object of fiduciary collateral by filing a civil suit in court under the provisions of the Civil Code (hereinafter abbreviated to the Civil Code). Since the birth of credit agreement with fiduciary guarantee is purely based on the provisions of Articles 1320 and 1338 of the Civil Code of freedom of contract. And vice versa if kreditu execute force against object of fiduciary guarantee object hence debtor can file lawsuit to court (Unlawful Acts Article 1365 Civil Code).

In the form of practice execution execution in the field, fiduciary guarantee already have strong legal umbrella for execution if one party does not keep the promise. The Conditions of execution executed by the executor that is assisted by the police are based on Regulation of Chief of Police Number 8 Year 2011 on Fiduciary Guarantee security.

In accordance with the provisions of the Chief of Police in the second part of security requirements Article 6 states that; Safeguards on fiduciary security objects may be carried out on condition ;

1. There is an order from the applicant
2. Has a fiduciary guarantee certificate
3. Fiduciary security registered at fiduciary registration office
4. Have fiduciary and security certificates
5. Fiduciary security is in the territory of the State of Indonesia

Article 8 states that the application for execution as attached to Article 7 is submitted by encloses;

1. A copy of the fiduciary guarantee deed
2. A copy of the fiduciary guarantee certificate
3. Warning letter to creditors to settle their obligations
4. Identity of execution executor, and
5. Letter of duty execution executor

However, in practice, the execution of fiduciary guarantee is more likely to be run by the debt collector. while In the author's view based on observations that exist, the implementation of execution are in fact only through the way of debt collector.

e) Presence of only one party In the making of fiduciary guarantee deed

Article 5 states that the manufacture of fiduciary guarantee is made by both parties in front of a notary. Article 5 of the fiduciary guarantee law states that;;

1. The imposition of objects with Fiduciary Collateral shall be made by notarial deed in the Indonesian language and is a deed of Fiduciary Guarantee.
2. With respect to the creation of the Fiduciary Guarantee Certificate as referred to in paragraph (1), a fee shall be subject to further regulation by Government Regulation..

In practice, many fiduciary assets registered or made to fiduciary guarantee certificates in front of a notary is only one party in this case is the bank that has the capacity of the debtor as well as he represents the creditor in making the fiduciary guarantee certificate. In the latter case, it allows for legitimate weakness and the implication is the occurrence of injustice that will be experienced by creditors because they do not understand and come directly in the process of deed of fiduciary agreement in court.

The practice of minimizing injustice is then required for strengthening their right through the fiduciary guarantee law added in the Section in Article 5 that states that the parties must or must come in the process of making the fiduciary guarantee certificate in front of the notary. The presence of the parties that has becomes part of the effort to make the process of making the fiduciary guarantee certificate transparent and can minimize the injustice that can occur.

Here it can be said that the process of achieving justice is a chain that should not be separated at least since the enactment of legislation, the occurrence of cases or legal events, until the verbal process in the police and prosecution of prosecutors, or lawsuits in civil cases and then ends with a verdict of a judge who has obtained a permanent legal force (inkracht vangeweisde) so that the quality of the process is actually a guarantee of quality culmination point of the results or benefits set of legislation made [26].

f) Weakness in the registration field

As a result of the position of fiduciary security as an accessoir or additional agreement, there is a weakness in the implementation of its registration. One of the disadvantages is the registration provisions stipulated in the Fiduciary Law

[25] Gunawan Widjaja dan Ahmad Yani, 2003, *Jaminan Fidusia*, Raja Grafindo Persada, Jakarta, hlm. 152

[26] Sabian Utsman, 2008, *Menuju Penegakan Hukum Progresif*, Pustaka Pelajar, hlm 13

itself. The weakness is the presence of confusion in the registration of Fiduciary Guarantee. This is evident from the provisions contained in Article 11 paragraph (1) of the Fiduciary Law which reads that: "objects subject to fiduciary collateral shall be registered". From this provision it appears that what must be registered in fiduciary guarantee is "the object".

The provision is reaffirmed in the elucidation of Article 11 of the Fiduciary Law, that "the registration of objects subjected to fiduciary collateral shall be exercised at the place of the Fiduciary's position, and its registration includes objects within and outside the territory of the Republic of Indonesia to satisfy the principle of publicity, As well as a guarantee of certainty against other creditors regarding objects that have been encumbered fiduciary guarantees. However, the provisions of Article 11 paragraph (1) are different from the provisions of Article 12 Paragraph (1) of the Fiduciary Law, which reads: "The registration of fiduciary security, as referred to in Article 11 paragraph (1) shall be done at the Fiduciary Registration Office". Of these provisions which must be registered is "fiduciary guarantee" or "bond guarantee". This situation certainly raises its own problems for legal certainty in fiduciary guarantee, especially for the creditor, because if what must be registered is the object then how is the registration of objects that become the object of fiduciary guarantee in the form of unregistered objects ?. For in the registration of objects and registration bonds of guarantee, each has a different consequence, which for the registration of objects known so far only to the objects listed. As the known objects that can be the object of fiduciary guarantee is in accordance with the provisions of Article 1 point 4 of the Fiduciary Law, among them are registered or unregistered objects. If the object is registered as a fiduciary security object, does the creditor have to re-register the listed item once again, and if it does not have to register then how the ownership of the creditor over the object becomes the object of the fiduciary guarantee. Whereas in the provisions of Article 1 Paragraph (1) of the Fiduciary Law, it is determined that "fiduciary is the transfer of ownership of an object on the basis of trust provided that the object of which the right of ownership is transferred shall remain in the possession of the possessor".

Based on these provisions it is clear that in fiduciary there is a transfer of ownership, of course if the creditor does not register the registered object then how the ownership rights to the creditor / recipient of fiduciary. Besides, what if the unregistered objects are subjected to fiduciary collateral, such as inventory, how to register for items whose condition is always changing, in addition to the form and quantity as well as the brand, should they report the change constantly ? To the Fiduciary Registration Office. Since Article 16 Paragraph (1) of the Fiduciary Law is determined in the event of any change in matters contained in the fiduciary guarantee certificate as referred to in Article 14 paragraph (2), the fiduciary receiver shall apply for registration of such amendment to the Fiduciary Registration Office.

This situation of course in addition to causing uncertainty in the law is also very inconvenient because fiduciary recipients should always register changes that may occur very much even infinitely, especially for objects in the form of stock merchandise (inventory) them.

Where the fiduciary collateral is required to be registered, then how does the fulfillment of the principle of property rights for the fiduciary recipient lenders as stipulated in the provisions of Article 1 paragraph (1) of the Fiduciary Law which says that "fiduciary is the transfer of ownership of an object on the basis of trust provided that the object The ownership rights transferred remain in the possession of the object owner ". Since the registration of the guarantee by itself means that there is no real evidence of the recognition of property rights as stipulated in the provisions of Article 1 paragraph (1) of the Fiduciary Law, because so far there has been no registration of guarantee rights against unregistered objects, and if not known then How the legal certainty is for the fiduciary recipient lenders. Thus, the intended confusion between the provisions of Article 11 paragraph (1) and Article 12 paragraph (1) of the above mentioned Fiduciary Law shall be the matter registered in the registration of the Fiduciary Guarantee. In fact, the registration referred to by the Fiduciary Act is listed as "the object" or its "fiduciary guarantee" (guarantee bond), because as stated above, that in the registration of objects or registration of bonds of guarantee will bring different consequences. Therefore the implementation of precautionary risk management policies is important [27]. Fiduciary guarantee agreement based on Law no. 42 of 1999 on Fiduciary Guarantee is implemented through 2 (two) stages, namely the loading stage and registration phase of fiduciary guarantee. Article 4 of UUJF Number 42 Year 1999 states that fiduciary guarantee is an Assesoir agreement of basic agreement which issues obligations for parties to fulfill an achievement. The nature of the assesoir agreement in an agreement will be waived if the loan on the principal agreement on which the fiduciary agreement is born has been settled or paid. In the event that the debtor or fiduciary giver fails to make a pledge, the fiduciary giver is obligated to submit the fiduciary assurance object in the course of execution. Execution can be executed by executing executorial titles by fiduciary recipients, meaning the executing execution directly, or through paratelist institution of execution-sale of fiduciary security object object to its own power through public auction and taking out repayment from sale proceeds. In practice, fiduciary agreements should be implemented accordingly, so it is expected Fiduciary Guarantee will have a very important function in economic activity in general because in lending capital from financial institutions (both banks and non-banks) requires a guarantee that must be met by capital seekers If they want to get a loan / additional capital in the form of credit that is good for long term and short term. For the debtor a good form of guarantee is a form of guarantee that will not cripple its daily business activities, while for a good guarantee lender is a guarantee that can provide a sense of security and legal certainty that the credit provided can be recovered on time. With the need to implement risk management with risk of transfer to third parties..

Conclusion

The weakness of the fiduciary agreements that have been enrolled among them does not meet the following elements

[27] James Hawley, Keith Johnson, and Ed Waitzer,*Reclaiming Fiduciary Duty Balance*, Rotman International Journal of Pension management, Volume 4, Issue 2, Fall 2011, Canada, p.4.

of: fast, cheap and definite in the execution process, no clarity about the way of fiduciary execution, the lack of awareness for the parties to come directly in the process of making fiduciary collateral. In practice only one of the parties comes so it is possible if there is a problem because of the consequences of disagreement in the agreement made.

As a result of the debtor's or fiduciary's law, a fiduciary shall be obligated to submit fiduciary security objects in the course of execution. Execution can be executed by executing executorial titles by fiduciary recipients, which means directly executing the execution, or through paratelist institution execution-sale of fiduciary security objects on their own power through public auction. Furthermore the creditors will take out the repayment of the proceeds of the sale. For the debtor a good form of guarantee is a form of guarantee that will not cripple its daily business activities, whereas for the creditor a good guarantee is a guarantee that can provide a sense of security and legal certainty that the credit provided can be recovered in time.

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