

Execution of Fiduciary Guarantees against Defaulting Debtors Who Resist the Execution

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Abstract. *This research aims to determine the obstacles in the implementation of the fiduciary guarantee execution process. As well as to find out the efforts made by the bank in carrying out the execution process. Method The approach in this research is the Sociological Juridical research method. This research specification uses descriptive analysis. The type of data used in this research is primary data including Law Number 42 of 1999 concerning Fiduciary Guarantees, the Civil Code, as well as secondary data containing documents and other supports. Collecting research data using interview techniques and studying documents or library materials. The data analysis method used in analyzing the data is qualitative analysis. The results of this research are: (1) The executive power possessed by the Fiduciary Guarantee is the same as a court decision which has permanent legal force, this is because the Object of the Fiduciary Guarantee has included instructions which read "For the sake of Justice Based on Belief in One Almighty God". Obstacles and solutions found in the process of executing fiduciary collateral objects include resistance from the executed party through civil lawsuits, through debt acknowledgment letters, and through selling collateral carried out privately or through an auction.*

Keywords: *Agreement; Credit; Executorial; Fiduciary; Guarantee.*

1. Introduction

The development of the national economy, the Indonesian people in fulfilling their various life needs certainly need funds, so banks have helped fulfill funding needs for economic activities. Bank credit in this case distributes funds to the public in the form of credit. Before providing credit to the borrower, the bank will make a credit agreement first. This credit is carried out based on the

trust of the fund owner to the party who needs the funds.¹So, the government can assign the banking world to implement a program aimed at developing certain economic sectors, or pay greater attention to cooperatives and economically weak groups or small entrepreneurs in order to improve the standard of living of the people at large.²

The definition of guarantee in this case is a special guarantee, not a general guarantee, which is regulated in Article 1131 of the Criminal Code. In the world of banking, banks are prohibited from providing loans or credit to anyone without sufficient collateral. Guarantee is essentially a form of security for funds lent by debtors. In banking, the main function of collateral is that it is intended to protect public funds managed by the bank and to protect the continuity of the banking business and debtors are required to be responsible for returning their debts. The bank as a creditor must be guided by the principle of *Commanditering Verbood*, which means that the bank does not bear the risk of the debtor's business with the credit provided.³

Engagements arise from the law as a result of the actions of people who violate the law as regulated in Article 1345 of the Civil Code, the law stipulates the obligation to perform. Problems will arise if one of the obligations is to pay the debt, then the creditor has the right to claim the debtor's assets, in the amount of the debt owed to the debtor (*verhaalsrecht*).⁴the party apparently committed a breach of contract or breach of contract. If the debtor is in default, the creditor can realize the promised performance himself at the expense of the debtor based on the power of attorney given by the Judge, if the debtor is reluctant to carry out the achievement.⁵

Article 4 states that a fiduciary guarantee is a subsidiary agreement and a main agreement which creates an obligation for the parties to fulfill an achievement.⁶And if in an agreement there has been a breach of contract (default) then a resolution is needed which can be achieved through litigation and non-litigation. Litigation can be interpreted as resolving disputes between

¹HPPangabea, 2012, *Standard Contract Practices in Banking Credit Agreements*, Bandung, PT.Alumni, P.72.

²Mohammad Djumhana, 2003, *Banking Law in Indonesia*, Ctra Aditya, Bandung, P.66

³Supianto', 2015, *Fiduciary Guarantee Law*, Jember, Garudhawaca, Pg. 10-11

⁴Binov Handitya, 2021, *Redesign The Relevance of Justice In Debtor Protection Related to Parate Executions Performed By Separate Creditors In Liability Agreements*, *Jurnal Deeds*, Vol. 8, no. 4, Pg. 224.

⁵Sugiyono, Heru, 2017, *Legal Protection for Third Parties as Collateral Owners When Banks Do Not Implement the Prudential Principle in Credit Agreements Using Collateral*, *Juridical Journal*, Vol. 4, no. 1, Pg. 98-109.

⁶Diah Sulistyani RS, Muhammad Junaidi, (2019) *Execution of Fiduciary Guarantees in the Study of Law Number 42 of 1999 concerning Soegianto Fiduciary Guarantees*, *Jurna IUS Constituendum*, Volume 4 Number 2 October 2019, Pg 211

parties carried out before the court, while non-litigation dispute resolution can be carried out outside the court, namely by means of consultation, negotiation, mediation, conciliation or expert assessment.⁷

The Fiduciary Guarantee Certificate has the same executorial power as a court decision that has permanent legal force. Execution through public auction of fiduciary collateral objects without going to court. In practice, execution of fiduciary guarantees occurs due to default by the debtor. The fiduciary law also makes it easier to carry out executions through execution agencies.

If the debtor is in default, the creditor can realize the promised performance himself at the expense of the debtor based on the power of attorney given by the Judge, if the debtor is reluctant to carry out the achievement. As is known, to carry out an execution, one condition must be met, namely permission from the judge, as a result of the application of a legal principle, namely that people are not allowed to be their own judge. A creditor who wants the implementation of an agreement from a debtor who does not fulfill his obligations must ask the court for assistance, but it often happens that the debtor himself has given his agreement from the start that if he is negligent, the creditor has the right to carry out his own rights according to the agreement without having to ask a judge to intermediary.

Execution if the debtor defaults on the Fiduciary Guarantee, then according to Article 15 paragraph (3) of Law Number. 42 of 1999, fiduciary recipients have the right to sell objects that are the object of fiduciary guarantees under their own authority. However, the phrase breach of contract is contrary to the 1945 Constitution of the Republic of Indonesia and does not have binding legal force as long as it is not interpreted to mean that the existence of a breach of contract is not determined by one party alone, but rather on the basis of an agreement between creditor and debtor or on the basis of determining legal action. there has been a breach of contract. This is as decided by the Constitutional Court in Constitutional Court Decision Number 18/PUU-XVII/2019.

2. Research Methods

Method The research approach used in this thesis is the Sociological Juridical research method. Sociological Juridical Research is an approach that looks at the legal reality in society. This legal research approach is also carried out using secondary data as initial data, then continued with primary data in the

⁷Tri Jata Ayu Pramesti, Litigation and Alternative Dispute Resolution Outside of Court, Accessed from <https://Hukumonline.com/klinik/detail/lt52897351a003f/litigation-dan-alternatifpengelasan-sengketa-di-besar-pengadilan/> on Wednesday, January 4 2023

field.⁸The research specifications in this research are descriptive analysis, namely describing and illustrating the condition of the object under study and a number of facts obtained systematically, factually, and accurately linked to the juridical provisions contained in the laws and regulations. Data sources in this research are divided into two, namely primary data and secondary data. The data collection method used in this research is a literature study by collecting various sources of data needed from statutory regulations, court decisions and books related to fiduciary guarantees. Such as Law Number 42 of 1999 concerning Fiduciary Guarantees, and obtained through interviews. The data analysis method used in analyzing the data is qualitative analysis.

3. Results and Discussion

3.1. Implementation of the Execution of Fiduciary Security Objects at Bank Rakyat Indonesia

The banking sector functions as a financial intermediary institution that has a very strategic role in financing various proactive business activities through banking credit activities. The definition of credit according to Article 1 number (11) of Law Number 10 of 1998 concerning Banking is: "Credit is the provision of money or bills that can be equated with it based on an agreement or loan agreement between the Bank and another party which requires the borrower to pay off the debt after a certain period of time with interest"

One of the important elements in granting credit is the guarantee given by the debtor. Guarantee means assets that can be tied up as collateral to ensure certainty of debt repayment if in the future the debtor is unable to pay off the debt, namely by selling the collateral and taking repayment from the sale of the assets. be that guarantee.

Article 5 paragraph 3 of Law Number 42 of 1999 concerning Fiduciary Guarantees, regulates that; "If the debtor breaks his promise, the fiduciary recipient has the right to sell the object which is the object of the fiduciary guarantee under his own authority." This means that if the debtor fails to promise, in this case a bank customer, then the fiduciary recipient, namely the bank, has the right to sell the object which is the object of the fiduciary guarantee himself. However, because basically the object that is the object of the fiduciary guarantee is controlled by the fiduciary giver, this is what sometimes hampers the process of executing the fiduciary guarantee.

⁸Amiruddin, 2005, Introduction to Legal Research Methods, University of Indonesia Press, Jakarta, p. 51

According to "Law no. 42 of 1999 concerning Fiduciary Guarantees, Article 15 paragraph 3 "provides that" in the event that the debtor defaults, the fiduciary recipient has the right to sell the object that is the object of the fiduciary guarantee under his authority. This means "if the debtor defaults or defaults, the creditor can execute the fiduciary guarantee directly. Because the fiduciary guarantee certificate has the same executorial power as the court decision". Where every collateral object is guaranteed, the collateral pledge must be registered and have permanent legal force. Because every written guarantee, especially a fiduciary contract that has been reported, will have executorial power or executorial title in the guarantee deed. There is also the aim of registering fiduciary guarantees to "provide legal certainty to interested parties. And provide special privileges to fiduciaries who receive other creditors." it can be concluded that "the fiduciary guarantee deed does have executive power so that without going through a court decision because the executive power of the fiduciary guarantee certificate has the same legal force as a court decision which has permanent legal force."⁹

In the world of banking, the considerations commonly used to evaluate prospective customers are often called the 5C principles or "the five C's principles". The 5C principles include:

Characteris data about the personality of a potential customer such as personal characteristics, habits, way of life, family circumstances and background and hobbies. This character is to find out whether the prospective customer will honestly try to fulfill his obligations.

Capacitis the potential customer's ability to manage their business which can be seen from their education, business management experience (business record), history of the company they have managed (whether they have experienced difficult times or not, how to overcome difficulties). This capacity is a measure of ability to play or ability to pay.

Capitalis the condition of the wealth owned by the company it manages. This can be seen from the balance sheet, profit and loss report, capital structure, profit ratios such as return on equity, return on investment. From the conditions above, it can be assessed whether it is appropriate for prospective customers to be provided with financing, and what the appropriate financing ceiling is.

Collateralis a guarantee that may be confiscated if it turns out that the prospective customer really cannot fulfill his obligations. This collateral is

⁹Widodo Winarso (Lecturer at BRI Company University Campus Yogyakarta), Interview with Lecturer at BRI Company University Campus Yogyakarta,

calculated last, meaning that if there is still doubt regarding other considerations, then you can assess the assets that might be used as collateral.

Condition, the financing provided also needs to take into account economic conditions related to the prospective customer's business prospects. There is a business that is very dependent on economic conditions, therefore it is necessary to link economic conditions to the business of potential customers. If there is an agreement to borrow and borrow money, it is absolutely necessary to have a legal solution for a guarantee institution to provide certainty for the repayment of the loan.

The implementation of credit with fiduciary guarantees at Bank Rakyat Indonesia Pekalongan Branch has procedures regarding terms and conditions that must be met from the time the customer's application is submitted until the credit granted by the bank is paid off. The conditions in the credit procedure that must be handled by the bank are:¹⁰

1. New application to obtain a type of credit facility
2. Request for additional credit that is currently running
3. Request for extension or renewal of credit validity period which has expired
4. Other requests for changes to facility conditions
5. Ongoing credit, including exchange of collateral, grant or postponement of collateral, change or postponement of installment schedules and so on.

The conditions that must be met by customers who wish to apply for a loan include:¹¹

1. Indonesian citizen, proven by an identity card in the form of the customer's original KTP
2. Have a business that has been running for at least 6 months
3. Have a BRI account
4. Have a business license such as NPWP and the like
5. Willing to take part in mentoring programs from the Bank or other institutions

¹⁰Interview with Mr Muhamad Kharis Associate Mantri BRI Pekalongan

¹¹Procedures from PT. Bank Rakyat Indonesia (Persero) Tbk.

6. Not currently receiving credit from other banks.

Every credit application letter received must be recorded in a special register which is declared complete if it has fulfilled the requirements specified for submitting an application according to the type of credit. While the credit application is being processed, the application files must be maintained in the application file.

The role of a Notary through the deed he or she makes is to provide legal certainty for the parties, namely the bank as the creditor and the customer as the debtor. This legal certainty guarantees the rights and obligations of each party in the credit agreement as stated in the authentic deed. Considering that an authentic deed made by and before a Notary is a perfect means of proof.

Regarding the Executorial Implementation of Fiduciary Guarantees in Article 29 of Law Number 42 of 1999 concerning Fiduciary Guarantees, it regulates that if the debtor or fiduciary of the collateral is in default, the execution of the object which is the fiduciary guarantee of the object can be carried out based on the executorial title by the fiduciary recipient for the purposes of justice based on God. The Almighty, becomes the object of fiduciary collateral under the authority of the fiduciary recipient himself through a public auction and takes repayment of the receivables from the sale proceeds. Sales can be carried out privately based on an agreement between the fiduciary and the fiduciary if that way the highest price can be obtained that benefits the parties.

The sale of collateral objects, "is carried out after 1 (one) month has passed since the written notification by the giver and/or recipient of the fiduciary to the Parties concerned and announced in at least 2 (two) newspapers circulating in the concerned area. 16 The customer bank, as the pledger of the grantor, is forced to surrender the object as the object of fiduciary collateral in the framework of implementing the fiduciary guarantee. This means that if there is a default by a bank customer and the bank confiscates the collateral, the customer may not refuse to provide the collateral, because this has been regulated in the Act.

However, it should be noted that the execution of the object which is the object of fiduciary guarantee in a manner that is contrary to the provisions of the laws and regulations, in particular the Law on fiduciary guarantee, the agreement on fiduciary agreement is null and void. As a consequence, the agreement is deemed not to have existed from the start. If, after executing the collateral and its sales value exceeds the value of the debtor's loan, the fiduciary recipient must return the excess to the fiduciary giver. However, if the proceeds from the sale of collateral are less than the value of the debt owed by the fiduciary or are

inadequate for repayment of the debtor's debt, the customer's bank must remain responsible for paying off the debt.

There are several obstacles and legal problems that occur as a result of the execution of collateral. Legal problems can occur due to errors on the part of the debtor; it could also be due to the fault of the creditor. The problem regarding the execution of collateral pledges in Indonesia often occurs, especially regarding unilateral withdrawals by way of leasing companies, on motor vehicles. This is considered by the Constitutional Court to be unfavorable and contrary to the 1945 Constitution of the Republic of Indonesia.

3.2. Obstacles and Efforts Made by the Bank During the Process of Executing Fiduciary Security Objects

Guarantees that have been agreed to be pledged as fiduciary collateral in a credit agreement can be made by making a Fiduciary Guarantee Deed as authentic evidence for the parties concerned, namely the bank as the creditor or known as the fiduciary provider and the customer as the debtor or referred to as the fiduciary provider. According to Article 1 point (7) of the Notary Position Law Number 30 of 2004, a Notarial Deed is an authentic deed made by or before a Notary in the form and procedures stipulated in this Law.

For example, the object of collateral that is burdened with a fiduciary must be stated in full, for example, for cars it must be described: license plate number, model or type, color, year of manufacture, frame number, engine number, including date and number of Proof of Ownership certificate.

Motor Vehicle (BPKB), and the date and invoice number. The value of the fiduciary collateral object used for cars is the market value or off the road value (free market price) which is sometimes stated on the invoice. However, it could also be another value according to the agreement between the fiduciary giver and recipient or based on a unilateral determination by the fiduciary recipient.¹²

The inhibiting factors in the execution of fiduciary guarantees are influenced by external factors. There are factors inhibiting the execution of fiduciary guarantees which are inhibiting factors seen from a non-judicial perspective, including:

- a. Fiduciary cannot be executed if there are still priority receivables, such as workers' salaries.
- b. The fiduciary collateral does not exist or is destroyed.

¹²Procedures from PT. Bank Rakyat Indonesia (Persero) Tbk.

- c. The decreasing value of fiduciary guarantees can be seen through the example of fiduciary guarantees, namely machines.
- d. Lack of accuracy in registration of fiduciary guarantees.
- e. Collateral placed by confiscated collateral cannot be executed by the bank.
- f. Psychological factors by creditors can also cause the execution of fiduciary guarantees to not be carried out.

External factors that cause problematic credit include changes in government policy, increases in prices for production factors due to increases in fuel prices, transportation costs, increases in loan interest rates, natural disasters, and so on. Factors that can be identified as causes of bad credit from the bank's side include data manipulation, excess collateral, credit faking, fictitious appearances or credit, weak analysis by credit officers from the start of the credit granting process, weaknesses in guidance and supervision.

"Efforts to resolve problematic credit, namely negotiations and solutions to the implementation of the process of recovery from non-performing loans at Bank Rakyat Indonesia Pekalongan branch, are carried out in stages by negotiating with debtors to determine a credit recovery scheme, then carrying out analysis and evaluation, recovery decisions, documentation and supervision, repayment of problematic loans begins with summoning the debtor and giving a warning and collection 3 (three) times. After approaching the debtor for analysis that the debtor's financial condition has declined, in this case the bank offers and decides to save credit".

Efforts made by Bank Rakyat Indonesia to recover problem loans are credit restructuring. Steps to overcome non-performance of loans with collateral pledged by Bank Rakyat Indonesia include:

- a. Monitoring and coaching problem debtors, based on the results of monitoring and coaching if the customer has good confidence and the business prospects are still there, debtor credit restructuring can be carried out in the form of changes in interest rates, reduction of interest arrears, fines and/or penalties, an extension of term credit time/rescheduling of credit, sale of collateral and others.
- b. If the debtor does not have good faith, and the business no longer exists, what Bank Rakyat Indonesia will do is sell the collateral, selling the collateral can be done privately or through an auction.

c. A significant effort that is often made by banks in resolving problem loans, especially with fiduciary guarantees, is the family approach through parents, relatives, and even through local community leaders.

4. Conclusion

The Credit Implementation Process using Fiduciary Guarantee has the requirements of attaching a KTP, Business Certificate, having a BRI account, and not being tied to credit with another bank. As a debtor, the debt and receivable agreement process using Fiduciary Guarantee must still be accompanied by a notarial deed. The process of a debt and receivable agreement made with a private agreement will be made by a notarial deed by the bank. After the bank approves the files, the bank will check the completeness of the files that have been prepared by the customer. If the conditions are complete, there are no lawsuits and there are no problems, the bank will verify whether it is feasible or not, if it is feasible, a notary will make a deed. The debtor will be given an explanation by the bank how much they owe.

5. References

- Amiruddin, 2005, *Pengantar Metode Penelitisaan Hukum*, Universitas Indonesia Press, Jakarta,
- Binov Handitya, 2021, Redesign The Relevance of Justice In Debtor Protection Related to Parate Executions Performed By Separate Creditors In Liability Agreements, *Jurnal Akta*, Vol. 8, No. 4,
- Diah Sulistyani R.S, Muhammad Junaidi, 2019 *eksekusi Jaminan Fidusia Dalam Kajian Undang- Undang Nomor 42 Tahun 1999 Tentang Jaminan Fidusia* Soegianto, *Jurna IUS Constituendum*, Volume 4 Nomor 2,
- H.P.Pangabean, 2012, *Praktik Standaart Contract dalam Perjanjian Kredit Perbankan*, Bandung, PT.Alumni,
- Mohammad Djumhana, 2003, *Hukum Perbankan di Indonesia*, Ctra Aditya, Bandung,
- Sugiyono, Heru, 2017, Perlindungan Hukum Terhadap Pihak Ketiga Sebagai Pemilik Jaminan Ketika Tidak Dilaksanakannya Prinsip Kehati-Hatian Oleh Bank Dalam Perjanjian Kredit Dengan Memakai Jaminan, *Jurnal Yuridis*, Vol. 4, No. 1,
- Supianto', 2015, *Hukum Jaminan Fidusia*, Jember, Garudhawaca.