

## Legal Protection for Creditors Against Guarantees Fiducia In The People's Business Credit Agreement (KUR) That Have Not Been Registered At The AHU KEMENKUMHAM (Case Study at PT. Bank Mandiri (Persero) Tbk Bombana Branch, Southeast Sulawesi)

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**Abstract.** *Currently, many debtors are in default in taking credit with fiduciary collateral so that many assets are sold underhand and there are also debtors who are not responsible for the collateral, thus harming the creditor. The purpose of this study is to determine, review and analyze legal protection for creditors against fiduciary collateral in people's business credit agreements (KUR) that have not been registered with the AHU Kemekumham by PT. Bank Mandiri (Persero) Tbk Bombana Branch, Southeast Sulawesi and to determine, review and analyze the legal remedies owned by creditors if the debtor is in default. This study uses analytical descriptive specifications, the approach method used is a sociological legal approach, the types and sources of data in this study use primary data and secondary data. Secondary data includes primary legal materials, secondary legal materials and tertiary legal materials. The primary data collection method uses observation and interviews, the secondary data collection method uses document studies and literature studies. The data analysis method uses qualitative analysis methods. The results of the research and discussion show that legal protection for creditors against fiduciary guarantees in people's business credit agreements (KUR) that have not been registered with the AHU Kemenkumham if the debtor defaults, with the fiduciary guarantee law is the granting of preferential rights over his receivables and then according to the provisions of Article 21 paragraph (4) of the Fiduciary Law, the results of the transfer and/or bills that arise, by law become the object of a substitute fiduciary guarantee for the object of the transferred fiduciary guarantee. With the inclusion of the value of goods or objects that are used as objects of fiduciary guarantees, if the objects used as objects of fiduciary guarantees do not exist or are not available according to what is stated in*

*the attachment, then the recipient of the fiduciary in this case the creditor can sue the party providing the fiduciary to fulfill his obligations, namely the amount of the guaranteed value as regulated in Article 6 of the Fiduciary Guarantee Law and the legal remedies owned by the creditor after the debtor defaults, which are carried out at PT. Bank Mandiri (Persero) Tbk Bombana Branch is the settlement of its dispute. First of all, this is done by giving a warning in the form of a reprimand, then continuing by giving a warning letter to the debtor, but if the debtor still does not comply, the creditor can take further action, namely through non-litigation and litigation methods.*

**Keywords:** Creditors; Fiduciary; Guarantee; Protection.

## 1. Introduction

Guarantees have a very important function in economic activities in general because in providing capital loans from financial institutions (both banks and non-banks) require a guarantee, which must be filled with capital seekers if they want to get a loan/additional funds capital (in the form of credit) is both long term and short term.<sup>1</sup>

For the debtor, a good form of collateral is a form of collateral that... will not paralyze daily business activities, whereas for creditors A good guarantee is a guarantee that can provide a sense of security and legal certainty that the credit given can be reclaimed promptly time. One of the guarantee institutions known in the legal system guarantee in Indonesia is a fiduciary guarantee institution. Fiduciary which means transfer of property rights on the basis of trust gives position to the debtor to retain control of the collateral, even if only as a borrower use temporarily or no longer as the owner. Moreover, the Institution This fiduciary is linked to Article 1152 of the Civil Code which also states that if goods If the guarantee is still left in the possession of the debtor, the guarantee will be invalid.

According to the provisions of Law Number 42 of 1999 concerning Fiduciary Guarantee (hereinafter referred to as the Fiduciary Guarantee Law Number 42/1999), the encumbrance of an object must be stated in a notarial deed as referred to in Article 5 paragraph (1) and the fiduciary guarantee deed. registered at the fiduciary registration office as regulated in Article 11 paragraph (1).<sup>2</sup>

In addition to Law Number 42 of 1999 concerning Fiduciary Guarantees Fiduciary guarantee registration is also confirmed by the Minister of Finance Regulation Republic of Indonesia Number 130/PMK.010/2012.

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<sup>1</sup>Jatmiko Winarno, Legal Protection for Creditors in Fiduciary Guarantee Agreements, Independent Journal, Faculty of Law, Lamongan Islamic University, p. 44.

<sup>2</sup>Fiduciary Guarantee Law Number 42/1999 Article 5 & 11, p. 3 & 4

Fiduciary guarantee is a guarantee right over movable objects, both tangible and intangible, registered or unregistered and also movable or immovable move on condition that the object is not burdened with rights liability as referred to in Law Number 4 of 1996 regarding the right of mortgage or collateral as referred to in Article 314 paragraph (3) Commercial Code in conjunction with Article 1162 of the Civil Code.<sup>3</sup>

In principle, not all guarantees can be pledged to the Institution banking or non-bank financial institutions, but objects that can be The collateral is an object that meets certain conditions. The conditions Good collateral items are:

1. Can easily help obtain credit by parties who need it;
2. Does not weaken the potential (strength) of the credit seeker to carry out or continue his business;
3. Providing certainty to the creditor, in the sense that the collateral is available at all times to be executed, and if necessary can be easily cashed in to pay off the debt of the credit recipient (taker).<sup>4</sup>

The Fiduciary Guarantee Institution allows Fiduciaries to control the collateralized objects, to conduct business activities financed by loans using Fiduciary Guarantees. Initially, objects that became fiduciary objects were limited to tangible movable property in the form of equipment. However, in its development, objects that became fiduciary objects also included intangible movable property, as well as immovable property.<sup>5</sup>

The guarantee in fiduciary takes the form of "transfer of ownership rights through trust (fides)" or commonly called Fiduciare Eigendom. The trust factor in the transfer of ownership rights through "trust" is aimed at the trust given reciprocally by one party to another, that what "outwardly appears as a transfer of ownership", is actually (inwardly, internally) only as a "collateral" for a debt, the debtor's trust in the creditor that his ownership rights will be returned after his debts are paid off.<sup>6</sup> To provide a fiduciary guarantee, the transfer is carried out in a constitutional possessorium form, a form of transfer where the goods transferred are left in the possession of the party making the transfer, so that only the property rights are transferred. only. Such a transfer is not recognized in the Civil Code, however, the

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<sup>3</sup> Sri Soedewi Masjoen Sofyan, Law and Individual Guarantees, (Yogyakarta: Liberty, 1995), p. 40.

<sup>4</sup> Subekti, Guarantees for the Granting of Credit (Including Mortgage Rights) According to Indonesian Law, (Bandung: Citra Aditya Bakti, 1996), p. 73.

<sup>5</sup> <https://jdih.kemenkeu.go.id/fulltext/1999/42TAHUN1999UUPenjel.htm> accessed on August 13, 2024 at 22.28 WITA

<sup>6</sup> Subekti, Op. Cit , p. 66.

transfer of constitutional possessorium can be carried out legally because basically the parties are free to promise what they want.<sup>7</sup>

Fiduciary has an important meaning in meeting the credit needs of the community, especially for small to medium businesses or UMKM because it is considered very helpful for the debtor's business. The debtor can still control the collateral object for daily business and banking practically. Because, the bank does not need to provide a special place like a pawnshop (pand).<sup>8</sup>

The application of the fiduciary agreement to the creditor stops at the making of the credit agreement and authentic deed only and is not registered with the Fiduciary Registration Office. In addition, negotiations are carried out by providing additional costs to the fiduciary recipient when implementing the fiduciary guarantee object. Providing legal certainty as a form of legal protection requires a rule of law. Even in practice, creditors are always harmed by debtors who violate the contract.<sup>9</sup>The registration process for fiduciary guarantee certificates is regulated in Articles 11 to 18 of the Fiduciary Guarantee Law. However, to improve the service of fiduciary guarantee registration easily, quickly and cheaply, it is necessary to register fiduciary guarantee services electronically. In connection with this, the Government then approved Government Regulation Number 21 of 2015 concerning Procedures for Fiduciary Guarantee Registration and Costs for Making Fiduciary Guarantee Deeds (online registration).<sup>10</sup>

## 2. Research Methods

The approach method that will be used in writing this thesis is empirical legal approach method, or in other words called normative *empirical*.research that was initially conducted on secondary data to then be continued with research on primary data in field, or to the reality that exists in society.<sup>11</sup>

The empirical legal approach is carried out by collecting primary data information obtained directly in the field which is aimed at the application of laws relating to use related party witnesses.<sup>12</sup>

The research specifications in this study are: This research using analytical descriptive specifications. Analytical descriptive research identify laws and regulations that are relevant to the legal theories that are the focus of the

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<sup>7</sup> J. Satrio, Law on Guarantee of Property Guarantee Rights, (Bandung: Citra Aditya Bakti, 1991), p. 170

<sup>8</sup> Resty Lombogia Journal Development of Fiduciary Guarantee Institutions in Indonesia Vol. 1 Number 4 (2013): Lex Privatum

<sup>9</sup> J. Satrio. 2002. Law on Guarantee of Fiduciary Vehicle Guarantee Rights. Bandung

<sup>10</sup> Nadya Kumala Dewi, Widhi Handoko, 2022, Legal Protection for Creditors in Fiduciary Collateral Not Registered at the Fiduciary Registration Office, Notarial Journal, Volume 15 Number 1.

<sup>11</sup>Journal of Legal Reform Volume II Number 3 September - December 2015 Sudiharto FH. Unissula

<sup>12</sup> <https://www.google.com/search?q=method+of+empirical+approaches> accessed on August 15, 2024 at 18.05 WITA

research. Descriptive research includes one or more variables that are not directly related to each other, so that it can be categorized as descriptive research. Data analysis in this case it is still based on the samples taken, following deductive approach, using general theories or concepts which are then applied to explain data or compare relationships one set of data with another set of data.

### **3. Results and Discussion**

#### **3.1. Implementation of Credit Provision with Fiduciary Guarantee at PT. Bank Mandiri (Persero) Tbk Bombana Branch, Southeast Sulawesi**

The mechanism for providing credit with fiduciary guarantees at PT. Bank Mandiri (Persero) Tbk Bombana Branch, Southeast Sulawesi based on the research results is as follows:

##### 1) Credit Application Stage

###### a) Register Application

b) Calon debtors coming to the micro unit / branch office of PT. Bank Mandiri (Persero) Tbk.

c) Meet Customer Service (CS) and convey your needs.

d) *CCustomer Service* (CS) then explains the provisions that must be met, including: Proof of identity: Valid KTP / Resident Certificate; Business license / NIB (Business Identification Number) owned if necessary; Proof of ownership of credit collateral in the form of a certificate or BPKB; and Proof of previous credit repayment (for old customers).

Afterh all credit application requirements are met by the prospective debtor, then PT. Bank Mandiri (Persero) Tbk Bombana Branch will register the credit application for processing.

##### 2) Credit Analysis Stage

This stage the steps are as follows:

a) After in SID / BI Checking submitted to the Unit Head

b) The Unit Head follows up based on the order of the credit application list to be subjected to Credit Analysis by the Credit Analyst officer to make a decision on whether the credit application will be realized or rejected.

c) Decision making must be unanimous (all agree). If there are those who disagree, it will be rejected or reviewed by the Board of Directors re-examining the prospective debtor.

d) The analysis of the debtor's ability is the existing business ability plus the assumption of additional capital proposed, which has a positive impact, meaning

it can be accepted by the market and has the ability to complete its obligations under its business capacity in accordance with the agreed agreement. In analyzing credit, PT. Bank Mandiri (Persero) Tbk Bombana Branch adheres to the principle of prudence.

### 3) Credit Guarantee Analysis Stage

Related to collateral, based on the results of research at PT. Bank Mandiri (Persero) Bombana branch, has had a debtor's collateral management system. The provisions for collateral management at PT. Bank Mandiri (Persero) Bombana branch include the following:

- a) The purpose is to be implemented by officers who have been appointed as Credit Administrators
- b) Remain responsible for enforcing the authenticity of the guarantee, notarial binding and also storing the guarantee while it is collateral in the bank environment.
- c) The collection of collateral guarantees is carried out after the credit is completed/paid off, or for the purposes of external/internal inspection by filling in the collateral loan register book by whom, for whom, for when, for what purpose, on what date, full name signature, return date, full name signature.
- d) Thus, the bank has carried out the measurement of the guarantee/collateral in accordance with the provisions, namely in the bank safe.

From the description above, at this stage what is done is to analyze the credit guarantee with fiduciary guarantee from the prospective debtor. MKA (Micro Credit Analyst) of PT. Bank Mandiri (Persero) Bombana branch checks the validity of the guarantee. After that MKA (Micro Credit Analyst) of PT. Bank Mandiri (Persero) Bombana branch conducts a local review to find out and assess the physical condition of the goods to be guaranteed with fiduciary guarantee, whether the goods are in accordance with those listed in the existing document files. After conducting the review, an assessment will be carried out. The last thing done in this process is to make a report regarding the assessment of the collateral, where the report is prepared to be submitted to the authorized unit leader.

### 4) Credit Approval and Realization Stage

The stages of credit approval and realization can be explained as follows:

- a) The initiative to provide credit to customers begins with the activities of MKA (Micro Credit Analyst) PT. Bank Mandiri (Persero) Tbk Bombana branch should be able to act as a Financial Advisor for customers. For that, MKA (Micro Credit Analyst) must have adequate knowledge of accounting, management, company spending, economics and understand the business field of the customer.

b) MKA (Micro Credit Analyst) will present a Credit Granting proposal in a Credit Proposal Note (NUK). This NUK is an attempt at qualitative analysis and quantitative analysis that is arranged systematically, concisely, informatively, and efficiently so that it is relevant to credit granting decision making. A NUK will contain:

- (1) Proposed credit structure
- (2) The purpose of using the credit is stated specifically.
- (3) Source of payment Back
- (4) Customer background / customer qualitative conditions
- (5) Financial report / customer financial condition
- (6) Quantitative analysis/analysis of customer financial conditions and projections
- (7) Collateral data and its assessment
- (8) Credit granting recommendations, requirements and covenants.

c) *Credit Checking*

In customer management (account management) and as a consideration in deciding on a credit proposal, it is necessary to verify the reputation and condition of (potential) debtors through Credit Checking to related parties. This Credit Checking is needed to ensure the condition of the debtor's business related to the provision of credit. The existing sources of information are in the form of sources of information that have been arranged institutionally.

d) *Retrieval File*

The data contained in the Credit File must be periodically culled by removing data that is not up to date and moving it to the Non Current File / Culled File.

e) *Reject File / Canceled File*

If the credit application is rejected by the Bank or canceled, the relevant Credit File should be kept separately as a Reject File/Cancelled File because it may be needed as information at some point. The Head of Credit has the right to reject a credit application if the quality of the existing credit checking is inadequate.

### **3.2. Legal Protection for Creditors Against Fiduciary Guarantees That Have Not Been Registered with the AHU Kemenkumham**

In a guarantee agreement, usually certain promises are agreed between the creditor and debtor, which are generally intended to provide a strong position for the creditor and later after being registered are intended to also bind third parties. Therefore, it can be interpreted here that registration includes both registration of

the object and the guarantee bond, so all promises contained in the deed, fiduciary guarantee (which in Article 13 paragraph (2) b is recorded in the register book of the Fiduciary Registration Office) and bind third parties.<sup>13</sup>

The description above shows that the parties in the fiduciary guarantee agreement, both the fiduciary recipient and the fiduciary provider according to the Fiduciary Guarantee Law are both given legal protection, for the provider of protection in the form of the right to use the collateral, and the default of the fiduciary provider will not cause the collateral with the fiduciary guarantee law to be given preferential rights over its receivables, and the application of the *droit de suite* principle over the collateral, for third parties the principle of publicity in the fiduciary guarantee agreement will provide information on the fiduciary objects. Fiduciary Guarantees must be registered, as regulated in Article 11 of the Fiduciary Guarantee Law.

Legal protection and creditor interests in the fiduciary guarantee law can be seen in Article 20 of the fiduciary guarantee law: "Fiduciary continues to follow the object that is the object of the Fiduciary Guarantee in the hands of anyone who holds the object, except for the transfer of the object, except for the transfer of inventory objects that are the object of the Fiduciary Guarantee."

The provisions emphasize that fiduciary guarantees have a material nature and the principle of *droit de suite* applies to them, except for the transfer of inventory items that are the object of fiduciary guarantees.

The same content can also be seen in Article 23 paragraph (2):

"Fiduciary granters are prohibited from transferring, pawning, or renting to other parties the objects that are the objects of Fiduciary guarantees that are not inventory items, except with prior written approval from the Fiduciary Recipient."

Violation of the above provisions is a criminal offence as referred to in Article 36 of the Fiduciary Guarantee Law:

"Loyal person who intentionally falsifies, changes, removes or in any way provides misleading information, which if known by one of the parties would not give rise to a fiduciary guarantee agreement, shall be punished with imprisonment for a minimum of 1 (one) year and a maximum of 5 (five) years and a fine of at least Rp. 10,000,000.- (ten million rupiah) and a maximum of Rp. 100,000,000.- (one hundred million rupiah).

For all actions and negligence of the fiduciary provider, the fiduciary recipient based on such negligence is not responsible, as referred to in Article 24 of the Fiduciary Guarantee Law:

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<sup>13</sup>Independent Journal of Faculty of Law Jatmiko Winarko p.53



"The recipient of Fiduciary does not bear any liability for the consequences of the actions or negligence of the Fiduciary Provider, whether arising from a contractual relationship or arising from an unlawful act in connection with the use and transfer of the Object which is the object of the Fiduciary Guarantee."

### **3.3. Legal Notice Regarding Fiduciary Deeds That Have Not Been Registered at the AHU Kemenkumham**

Based on Article 1320 of the Civil Code, for an agreement to be valid, the parties must fulfill the requirements to agree to bind themselves, which can be seen in the form of a Power of Attorney with the Right of Substitution that has been signed by the parties (Bank or Credit customer), the ability of the parties to make an agreement that has also been fulfilled by the existence of a *waarmerking* or which is recorded in a notary's register and the agreement is legalized by a notary, fulfilling the requirements of a certain thing, namely this agreement is made to provide credit to the debtor with a fiduciary guarantee and fulfilling the requirements of a lawful cause because this agreement is made based on Law Number 42 of 1999 concerning Fiduciary Guarantees.<sup>14</sup>

#### **1. Legal Remedies Available to Creditors If the Debtor Commits Default**

Based on the research results, the legal efforts made by creditors are:

##### **1. Dispute Resolution Through Non-Litigation Methods**

Penon-litigation dispute resolution is a dispute resolution outside the court. Dispute resolution through an out-of-court process results in a win-win solution or mutually beneficial agreement that guarantees the confidentiality of the parties' disputes, avoids delays caused by procedural and administrative matters, resolves problems comprehensively together and maintains good relations. The advantage of this non-litigation process lies in its confidentiality, because the trial process and even the results of the decision are not published.<sup>15</sup>

The legal basis for resolving disputes through non-litigation means is:<sup>16</sup>

a. Article 1338 of the Civil Code states that all agreements made legally apply as laws for those who make them. This provision contains the principle of an open agreement, meaning that in resolving a problem, everyone is free to formulate it in the form of an agreement with any content to be implemented in order to resolve the problem, furthermore as stipulated in Article 1340 of the Civil Code that an agreement only applies between the parties who make it. Dispute resolution by non-litigation makes this provision important in terms of reminding

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<sup>14</sup> Journal of Legal Dynamics Vol. 18 Np. April 1, 2018 Ricky Rahardjo, Adi Suliantoro, SH., MH.

<sup>15</sup> I Wayan Wiryawan and I Ketut Artadi, *Dispute Resolution Outside the Court*, (Bali: Udayana University Press, 2010), p. 7.

<sup>16</sup> Bambang Sutiyoso, *Arbitration Law and Alternative Dispute Resolution*, (Yogyakarta: Gama Media, 2008), p. 11.

the disputing parties that they are given the freedom by law to choose a path to resolve their problems that can be stated in an agreement, as long as the agreement is made legally, meets the requirements for a valid agreement as stipulated in Article 1320 of the Civil Code.

Based on the explanation, the agreement made by PT. Bank Mandiri Bombana Branch as a creditor if the debtor defaults, has met the requirements referred to in Article 1320 and Article 1338 of the Civil Code, so that after the default is committed by the debtor, both parties can choose the dispute resolution that will be used.

b. Article 1266 of the Civil Code states that the condition of cancellation is always considered to be included in the reciprocal agreement, if one of the parties does not fulfill its obligations.

The provisions of this article are very important to remind the parties, in this case the creditor and debtor, who make an agreement to resolve their problems, that the agreement must be implemented consistently by both parties.

c. Article 1851 to Article 1864 of the Civil Code concerning Peace, which states that peace is an agreement, therefore a peace agreement is valid if it is made in accordance with the requirements for a valid agreement and is made in writing.

Peace can be done in court or outside the court. Dispute resolution by non-litigation means, peace is made outside the court which is more emphasized on how legal disputes can be resolved by peace outside the court and the peace has the power to be implemented by both parties in dispute in this case PT. Bank Mandiri Bombana Branch as a creditor with a defaulting debtor.

This out-of-court dispute resolution results in a win-win solution or mutually beneficial agreement that guarantees the confidentiality of the parties' disputes, avoids delays caused by procedural and administrative matters, resolves problems comprehensively together and maintains good relations. This out-of-court dispute resolution is more widely chosen because the judicial process in Indonesia is considered inefficient and ineffective.

If the dispute resolution method in the case of default experienced by PT. Bank Mandiri Bombana Branch is carried out in a non-litigation manner or dispute resolution outside the court, either by negotiation, mediation or arbitration, is unsuccessful, then PT. Bank Mandiri Bombana Branch as a creditor can take steps to resolve the dispute through litigation or through the courts by filing a lawsuit against the debtor through a court in the general court environment for the default committed with the aim of obtaining its rights to compensation in the form of a refund or capital that has been provided by PT. Bank Mandiri Bombana Branch and interest that should be paid by the debtor.

## 2. Dispute Resolution by Litigation

Litigation a dispute resolution system through a judicial institution. Disputes that occur and are examined through litigation will be examined and decided by a judge, which through this system it is impossible to achieve a win-win solution or a solution that takes into account both parties because the judge must make a decision where one party will be the winning party and the other party will be the losing party. The dispute resolution process through litigation can be carried out by filing a lawsuit against the debtor through a court in the general court environment if no dispute resolution agreement is found between PT. Bank Mandiri Bombana Branch as a creditor with debtors who are in default by non-litigation or outside the court.

## 4. Conclusion

Legal protection for creditors with fiduciary guarantees in the people's business credit agreement (KUR) at PT. Bank Mandiri (Persero) Tbk Bombana Branch if the debtor defaults, with the Fiduciary Guarantee Law is given preferential rights over his receivables and then according to the provisions of Article 21 paragraph (4) of the Fiduciary Law, the results of the transfer and/or bills that arise, by law become the object of a substitute fiduciary guarantee for the object of the transferred fiduciary guarantee. With the inclusion of the value of goods or objects that are used as objects of fiduciary guarantee, if the object used as the object of the fiduciary guarantee does not exist or is not available according to that listed in the attachment, then the recipient of the fiduciary in this case the creditor can sue the party providing the fiduciary to fulfill his obligations, namely the amount of the guaranteed value as regulated in Article 6 of the Fiduciary Guarantee Law. Legal remedies owned by creditors after the debtor defaults, which are carried out at PT. Bank Mandiri (Persero) Tbk Bombana Branch, are dispute resolution. First, it is done by giving a warning in the form of a reprimand, then continued by giving a warning letter to the debtor, but if the debtor still does not fulfill it, the creditor can take further action, namely through non-litigation and litigation.

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