

Legal Consequences of Fiduciary Guarantee Objects in Notarial Deeds That Have Not Been Registered by a Notary

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Abstract. *This study aims to analyze: 1) The procedure for charging and registering credit/financing guarantees with fiduciary guarantees according to the Law on Fiduciary Guarantees, which consists of two main stages. First, the charging stage is carried out by making a fiduciary guarantee deed by a notary in Indonesian, which must include the identities of the parties, the main agreement data, a description of the object being guaranteed, as well as the value of the guarantee and the object of the guarantee. Furthermore, the registration stage aims to provide legal certainty for related parties by recording the fiduciary guarantee at the Fiduciary Registration Office, which is now done electronically in accordance with the Regulation of the Minister of Law and Human Rights Number 10 of 2013. The fiduciary certificate issued has the same executorial power as a court decision, so it can be used directly as a basis for execution without requiring a trial process. The cost of making a fiduciary guarantee deed is determined based on the guarantee value, with a percentage of costs that are getting smaller as the value of the collateral object increases. 2) The legal consequences of the object of fiduciary guarantee in a notarial deed that has not been registered by the notary have implications for the legal position of the creditor as the recipient of the fiduciary. Based on Law Number 42 of 1999 concerning Fiduciary Guarantees, registration of fiduciary guarantees is mandatory to provide legal certainty and execution rights to the creditor. If the fiduciary guarantee deed is not registered, the creditor only has rights as a concurrent creditor, not a preferred creditor, so that his rights are not prioritized in debt settlement if the debtor defaults or goes bankrupt. In addition, unregistered fiduciary guarantees also do not have execution powers as regulated in Article 15 paragraph (2) of the Fiduciary Guarantee Law, so that the creditor must go through a civil lawsuit process in court to execute the guarantee.*

Keywords: Credit, Notary, Fiduciary Guarantee.

1. Introduction

Along with the growing economy in Indonesia, the development of businesses in various sectors carried out by business actors is also increasingly widespread. To carry out the development of these businesses, business actors need a very large amount of capital injection in a relatively short time. One source of these funds can be obtained from the Bank.¹A bank is a business entity thatto collectfunds from the community in the form of savings and distribute them in the form of credit and/or other forms in improving the standard of living of the people. The strategic role of banking in harmonizing and balancing the distribution of development, economic growth and national stability, namely by providing loans to the community through credit.²The important factor in granting credit is the credit agreement. Without a credit agreement signed by the creditor and debtor, there is no credit agreement.³The credit agreement is the principal or principle, while the guarantee agreement is a supporting agreement or accessory, meaning that the existence and termination of the guarantee agreement depends on the principal agreement.⁴

There are 4 types of collateral in Indonesia, namely pawn, mortgage, mortgage and fiduciary. Regulations regarding the legal basis of fiduciary are regulated in Law Number 42 of 1999 concerning Fiduciary Guarantee, with an explanation that fiduciary guarantee is a guarantee right for movable objects, both tangible and intangible, and immovable objects, especially buildings that cannot be burdened with mortgage rights. The law relating to Fiduciary Guarantee is Article 15 of Law Number 4 of 1992 concerning housing and settlements, which stipulates that houses built on land owned by other parties can be burdened with Fiduciary Guarantee. In addition, Law Number 16 of 1985 concerning Flats regulates Ownership Rights for flat units that can be used as collateral for debt by being burdened with fiduciary if the land is land with a right of use over state land. The fiduciary guarantee institution allows the fiduciary to control the collateralized object to carry out business activities financed by loans using fiduciary guarantees.⁵

¹Ratih Puspitasari Winarso, and Widodo Suryandono, Legal Power of Cover Notes Made by Notaries Related to Credit Granting Principles at PT Bank BNI Pare-Pare Branch (Case Study of Makassar High Court Decision Number 49/PID.SUS.TPK/2018/PT. MKS), Indonesian Notary, Volume 2, Article 19, p.399

²Sulistiani, Jawade Hafidz, Notary-PPAT Cooperation with Banks in Making Deeds of Granting Mortgage Rights, Jurnal Akta, Volume 4 Number 4 December 2017, p.708

³Putu Deni Wiryanta, I Ketut Mertha, Power of Attorney to Charge Mortgage Rights (SKMHT) in Banking Credit Agreements in Denpasar City, Scientific Journal of Master of Notary, Udayana University, Bali, p. 1

⁴Sutarno, SH., MM, 2004, Legal Aspects of Credit in Banks, Alfabeta, Bandung, p.98

⁵Lutfi Ulinnuha, Use of Copyright as an Object of Fiduciary Guarantee, Journal of Private and Commercial Law Volume 1 No. 1, November 2017, p.88

Law Number 42 of 1999 concerning Fiduciary Guarantees is intended to accommodate the needs of the community regarding fiduciary guarantee regulations as a means to assist business activities and to provide legal certainty to interested parties.⁶ The granting of a credit from a bank to a customer as a debtor is certainly to provide a guarantee of legal certainty for the granting of the credit, so the role of a Notary is needed regarding authentic deeds. A Notary is a public official who is authorized to make authentic deeds and other authorities as referred to in Law Number 2 of 2014 concerning the amendment to Law Number 30 of 2004 concerning the Position of Notary. In its explanation, it is stated that a Notary is a public official who is authorized to make authentic deeds as long as the making of certain authentic deeds is not specifically for other public officials. The need for written agreements to be made before a notary is to guarantee legal certainty and to fulfill strong evidentiary laws for the parties to the agreement.⁷

The authority to make authentic deeds is only exercised by a Notary insofar as the making of certain authentic deeds is not specifically for other public officials.⁸ Notaries in carrying out their duties provide services to the community who need their services as well as possible. Notaries also provide legal counseling to their clients to achieve high legal awareness so that the community is aware of and appreciates their rights and obligations as citizens and members of society.⁹ Notaries are required to know the legal regulations in force in the Republic of Indonesia, and to know what laws apply to the parties who come to the notary to make a deed. This is very important so that the deed made by the notary has its authenticity as an authentic deed because it is a perfect evidence.

According to Law Number 42 of 1999, Fiduciary guarantees occur through 2 stages, namely encumbrance and registration. In practice in society, problems are often found related to fiduciary guarantee deeds that are not registered even though the obligation to register is regulated in laws and regulations. One of the main reasons for this is to save on fiduciary registration costs, which are considered an additional burden that can be avoided, especially in transactions with small values. Lack of understanding or legal awareness of the importance of fiduciary registration is also a contributing factor. Another problem is if the notary as the attorney of the fiduciary recipient neglects to register the fiduciary

⁶R. Subekti, 1982, Guarantees for the Granting of Credit according to Indonesian Law, Alumni, Bandung, p. 11

⁷Abdul Jalal, Suwitno, Sri Endah Wahyuningsih, Involvement of Notary Officials in Unlawful Acts and Participation in Criminal Acts in Document Forgery, Jurnal Akta, Volume 5 Number 1 March 2018, p.228

⁸Habib Adjie, 2009, Indonesian Notary Law (Thematic Interpretation of Law Number 30 of 2004 Concerning the Position of Notary, Refika Aditama, Bandung. p. 40

⁹Ndaru Satrio, Legal Analysis of the Criminal Act of Providing False Information in an Authentic Deed as Referred to in Article 266 Paragraph (1), LEX Certa Journal, Volume 1 Number 1 2016, p.97

guarantee. Of course this is detrimental to the fiduciary recipient, namely the creditor.

2. Research Methods

This type of research is included in the scope of normative legal research. The approach method in this research is the statute approach. The type and source of data in this research are secondary data obtained through literature studies. The analysis in this research is descriptive qualitative.

3. Results and Discussion

3.1. Procedures for Charging and Registering Credit/Financing Guarantees with Fiduciary Guarantees According to the Law on Fiduciary Guarantees

Along with the development of the dynamics of social life, the interaction between individuals is increasingly broad, especially in economic and commercial relationships, including those concerning bonds or agreements. There are several parties who are interconnected with each other, binding themselves to an agreement.¹⁰ Article 1313 of the Civil Code defines an agreement as an act in which one or more persons bind themselves to one or more persons. An agreement is a legal act in which one or more persons often bind themselves to one or more persons.¹¹ An agreement is a legal relationship regarding property between two parties, where one party promises or is deemed to have promised to do something or not to do something, while the other party has the right to demand the implementation of that promise.¹²

One form of such agreement is a debt or credit agreement. Credit guarantees can be divided into two types, namely general guarantees and special guarantees. Special guarantees are divided into two types, namely personal guarantees and material guarantees. Personal guarantees are when a third party guarantees the repayment of a loan if the debtor is unable to pay his debt. This guarantee is divided into personal guarantees and corporate guarantees. While material guarantees are debt guarantees consisting of movable and immovable objects. Material guarantees serve to secure credit given to debtor customers. Examples of material guarantees include pawns, fiduciaries, mortgages, mortgages, ship mortgages, warehouse receipts.¹³

According to Law Number 42 of 1999, Fiduciary guarantees occur in 2 stages:

¹⁰Dewi Kurnia Putri and Amin Purnawan, 2017, Differences between a Paid-In Sale and Purchase Agreement and an Unpaid-In Sale and Purchase Agreement, Jurnal Akta, Vol. 4 No. 4, p. 624

¹¹R. Setiawan, 1999, Principles of Contract Law, sixth edition, Putra Bardin, Bandung, p.49

¹²Wirjono Prodjodikoro, 2000, Principles of Contract Law, Sumur, Bandung, eighth printing, p.4

¹³<https://www.legalku.com/>, accessed February 1, 2025, at 21.00 WIB

1. Stages of Fiduciary Guarantee Imposition

Based on Article 4 of Law Number 42 of 1999 concerning Fiduciary Guarantee, Fiduciary Guarantee is a follow-up agreement of a principal agreement that creates an obligation for the parties to fulfill a performance. Furthermore, Article 5 explains that the burden of objects with fiduciary guarantees is made with a notarial deed in Indonesian and is a fiduciary guarantee deed. There is a fee for making a fiduciary guarantee deed. Article 6 explains that a fiduciary guarantee deed must contain at least:

- a. Identity of the fiduciary giver and recipient
- b. Data on the main agreement guaranteed by fiduciary
- c. Description of the Objects that are the Object of Fiduciary Guarantee
- d. Guarantee value
- e. The value of the object that is the object of the Fiduciary Guarantee.

2. Fiduciary Guarantee Registration Stages

Fiduciary guarantee is one of the guarantee institutions in Indonesia. Fiduciary guarantee is intended for movable objects such as motorbikes or cars. To obtain a fiduciary guarantee, the movable object must be registered to be given a letter or deed of fiduciary guarantee.¹⁴ Law Number 42 of 1999 concerning Fiduciary Guarantees confirms that objects burdened with fiduciary guarantees must be registered. Registration of the fiduciary guarantee is to provide legal certainty to the interested parties.

Objects burdened with fiduciary guarantees must be registered, even though the objects guaranteed by fiduciary are outside the territory of the Republic of Indonesia. Registration of fiduciary guarantees is carried out at the Fiduciary Registration Office. Applications for registration of fiduciary guarantees are made by the recipient of the fiduciary, his attorney or representative by attaching a statement of registration of fiduciary guarantees. Based on Article 13 of the Statement of Law Number 42 of 1999 concerning Fiduciary Guarantees, the guarantee deed contains:

- a. Identity of the Fiduciary Provider and Recipient
- b. Date, number of the Fiduciary Guarantee deed, name, domicile of the notary who made the Fiduciary Guarantee deed
- c. Data on the main agreement guaranteed by fiduciary

¹⁴Junaidi Abdullah, 2016, Fiduciary Guarantee in Indonesia (Registration and Execution Procedures), Journal of Islamic Business and Management, Vol. 4, No. 2, p.120

- d. Description of the Objects that are the Object of Fiduciary Guarantee
- e. Guarantee value
- f. The value of the object that is the object of the Fiduciary Guarantee.

The application for registration of Fiduciary Guarantee is submitted within a maximum period of 30 (thirty) days from the date of the Fiduciary Guarantee deed. The application for registration of Fiduciary Guarantee that has fulfilled the provisions or meets the requirements shall obtain proof of registration. Proof of registration shall contain at least:

- a. Registration number
- b. Application submission date
- c. Applicant's name
- d. Name of Fiduciary Registration Office
- e. Type of application
- f. Fiduciary Guarantee registration fees (Article 5 of Government Regulation Number 21 of 2015 concerning Procedures for Fiduciary Guarantee Registration and Costs for Making Fiduciary Guarantee Deeds).

The applicant makes payment of the fiduciary guarantee registration fee through a perception bank based on proof of registration. Fiduciary guarantee registration is recorded electronically after the applicant makes payment of the fiduciary guarantee registration fee. Regulation of the Minister of Law and Human Rights of the Republic of Indonesia Number 10 of 2013 concerning Procedures for Electronic Fiduciary Guarantee Registration stipulates that fiduciary guarantee registration can be done easily, quickly, cheaply and conveniently. Since March 5, 2013, the administration of electronic fiduciary guarantee registration (online system) has entered a new era in all fiduciary registration offices in Indonesia. This means that in carrying out its duties and functions, receiving fiduciary guarantee registration applications is no longer done manually.¹⁵

Electronic Fiduciary Guarantee Registration Administration System (Online System) based on Article 1 paragraph 2 of the Regulation of the Minister of Law and Human Rights of the Republic of Indonesia Number 10 of 2013 concerning Procedures for Electronic Fiduciary Guarantee Registration that the definition of electronic fiduciary guarantee registration is the registration of fiduciary

¹⁵Gretel Marlene, 2020, Implementation of Duties of the Fiduciary Registration Office Regarding the Implementation of the Electronic Fiduciary Guarantee Registration Administration System in the Special Region of Yogyakarta Province, NOTARIUS, Volume 13 Number 1, p. 390

guarantees carried out by the applicant by filling out the application electronically. The electronic fiduciary guarantee registration administration system applies based on the Circular of the Directorate General of AHU No. AHU-06.OT.03.01 of 2013 and is reaffirmed by the Regulation of the Minister of Law and Human Rights Number 9 of 2013 concerning the implementation of electronic fiduciary guarantee registration.

Electronic Fiduciary Guarantee Registration produces an electronic fiduciary certificate. The fiduciary guarantee certificate is electronically signed by an Official at the fiduciary registration office. The fiduciary guarantee certificate can be printed on the same date as the Fiduciary Guarantee is recorded. In the event of an error in filling in the data in the fiduciary guarantee registration application that is discovered after the fiduciary guarantee certificate is printed, the fiduciary recipient, his/her attorney or representative must submit an application for correction of the fiduciary guarantee certificate to the Minister.

Fiduciary certificates have the words "For the Sake of Justice Based on the Almighty God" which is equated with a court decision. Fiduciary certificates can be directly used as evidence of execution without going through a trial and examination process through the Court and are final and binding on the parties to implement the decision. Article 5 paragraph (1) of Law Number 42 of 1999 concerning Fiduciary Guarantees regulates that the burden of objects with fiduciary guarantees is made with a notarial deed in Indonesian and is a fiduciary guarantee deed. Article 11 paragraph (1) of Law Number 42 of 1999 concerning Fiduciary Guarantees states that objects burdened with fiduciary guarantees must be registered.¹⁶

Gustav Radbruch's theory of legal certainty is very relevant to the procedure for imposing credit or financing guarantees with fiduciary guarantees. The Fiduciary Guarantee Law has fulfilled four principles of legal certainty, namely: Written and positive law in the form of Law No. 42 of 1999, based on the reality of credit and financing needs in society, Clearly formulated, including registration and execution procedures, and not easily changed, thus creating legal stability for creditors and debtors. Thus, the existence of this regulation ensures that the fiduciary guarantee process can run transparently, fairly, and can be trusted, both by financial institutions and the community.

3.2 Legal Consequences of Fiduciary Guarantee Objects in Notarial Deeds That Have Not Been Registered by a Notary

Fiduciary collateral binding must be registered, where the fiduciary guarantee deed must be registered at the Fiduciary Office of the Ministry of Law and Human Rights of the Republic of Indonesia, so that a Fiduciary Guarantee

¹⁶Kenedy, Jhon, 2020, Protection of Witnesses and Victims (Study of Legal Protection of Crime Victims in the Justice System in Indonesia), Pustaka Pelajar, Yogyakarta, p.1

Certificate is issued which has the same executorial power as a court decision that has obtained permanent legal force. Guarantee is to guarantee the fulfillment of obligations that can be valued in money arising from a legal obligation. Guarantee law is closely related to the law of objects.¹⁷

Registration of Fiduciary Guarantee is made with a notarial deed. According to Article 1 paragraph 7 of the Republic of Indonesia Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary, it is stated that a Notarial Deed is an authentic deed made by or before a notary according to the form and procedures stipulated in this Law. Theoretically, the function of the deed is as the perfection of a legal act (*formalitas causa*) and as evidence (*probationis causa*). Then the deed written privately also causes the fiduciary guarantee to not be registered because the private deed does not have strong evidentiary power because the signature on the private deed can still be avoided. However, the Fiduciary Guarantee Law does not have any rules regarding the understanding of the notarial deed, of course the understanding of the notarial deed is only based on Article 1 paragraph 7 of the Republic of Indonesia Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary. Registration is carried out after the Fiduciary Guarantee deed has been signed by the parties at the Fiduciary Registration Office based on the location of the party providing the fiduciary.

The legal consequences that arise are closely related to the process of forming a fiduciary guarantee. In accordance with the provisions of Article 13 paragraph (1) of the Fiduciary Guarantee Law, registration of a fiduciary guarantee is carried out by submitting an application to the fiduciary registration office, accompanied by a statement of registration of a fiduciary guarantee. This registration application can be made by the fiduciary recipient directly, or through a power of attorney or representative. In this case, power of attorney is an agreement in which a person gives authority to another party to act on his behalf in carrying out an affair. Then the power of attorney here is the person who obtains power of attorney based on the power of attorney by the fiduciary recipient, then the representative here is those who, based on the provisions of laws and regulations, are authorized to register a fiduciary guarantee. In practice, generally the registration of a fiduciary guarantee is carried out by a notary as the power of attorney of the fiduciary recipient.¹⁸

¹⁷Ani Wilianita, Legal Consequences of Fiduciary Guarantees That Are Not Registered Electronically (Online) Linked to Law Number 42 of 1999 Concerning Fiduciary Guarantees, *Journal of Law, Politics and Humanities*, Volume 4, Number 6, p. 2801

¹⁸Agil Prasetya, 2020, Legal Consequences of Unregistered Fiduciary Deeds and Legal Force of Registered Fiduciary Deeds in Case of Withdrawal of Collateral Objects by Creditors, Thesis, Faculty of Law, Riau Islamic University, Pekanbaru, p. 62

A fiduciary agreement deed made by a notary remains valid as an authentic deed and has legal force. However, if the deed is not registered at the Fiduciary Registration Office, then the fiduciary guarantee status attached to the collateral object becomes imperfect. Normatively, the legal consequences that arise if the object charged with fiduciary guarantee is not registered, namely:

1. Cannot execute

Parate execution is a legal term that refers to direct execution without going through a court process or a judge's approval. This mechanism has been clearly regulated in Article 15 of Law Number 42 of 1999 concerning Fiduciary Guarantees. In its implementation, if there is a default in the debt agreement that has been agreed upon by the parties, the creditor or fiduciary recipient has the right to sell or auction the collateral object without requiring court approval. This is reinforced by the existence of the irah-irah "For the Sake of Justice Based on the Almighty God" in the fiduciary guarantee certificate, which provides executorial power equivalent to a court decision with permanent legal force. Thus, the fiduciary guarantee certificate becomes the legal basis for the creditor to carry out execution on the collateral object without having to go through a court process. This rule is contained in Article 29 paragraph (1) of the Fiduciary Guarantee Law. The fiduciary guarantee certificate contains the irah-irah "FOR THE SAKE OF JUSTICE BASED ON THE ALMIGHTY GOD". The existence of irah-irah if the debtor does not perform his performance then the creditor as the recipient of the fiduciary guarantee has the right to be able to execute the collateral. Wherever the settlement is carried out in accordance with the following method:

- a. Passing a Court order based on fiat execution (using the executory title).
- b. Parate execution means doing it personally to take what is rightfully yours, without the intermediary of a judge, meaning a collateral object and then selling the item yourself.
- c. The creditor himself sold it underhand.
- d. Through a court action.¹⁹

However, in accordance with the provisions of the Fiduciary Guarantee Law, in order to obtain legal protection, the burden on the collateral must be made in the form of an authentic deed and registered in the Fiduciary Register Book. If this is not done, the creditor's rights—including the right to execute the collateral object in accordance with the procedures stipulated in the Fiduciary Guarantee Law—cannot be fully implemented. In addition, the police also cannot provide security in the execution process based on the Regulation of the Chief of Police Number 8 of 2011 concerning Security of Fiduciary Guarantee Execution,

¹⁹Ibid., p. 63

so that the creditor does not obtain protection as stipulated in the law. If the fiduciary guarantee is not registered as stipulated in Law Number 42 of 1999 concerning Fiduciary Guarantee and its implementing regulations, then the fiduciary agreement deed is only considered an underhand obligation. In practice, the execution of unregistered collateral must involve the courts, where the settlement process must go through a civil lawsuit procedure in the District Court in accordance with civil procedural law until a legally binding judge's decision is obtained. Furthermore, although execution can still be carried out, the execution can be null and void by law if the debtor files a lawsuit with the District Court.

2. Does not create a material agreement for fiduciary guarantees

One of the main objectives of registering a fiduciary guarantee for creditors is to provide priority rights compared to other creditors. In other words, in addition to fulfilling the principle of publicity, registration also serves to provide legal protection for creditors in the settlement of receivables against other creditors. This is because a fiduciary guarantee gives the recipient of the fiduciary the right to continue to control the object of the guarantee based on the principle of trust. Basically, the legal system of guarantees is divided into two, namely material guarantees (*zakelijkezekerheids*) and personal guarantees (*persoonlijkezekerheids*). Based on Article 1 number 2 of the Fiduciary Guarantee Law, fiduciary guarantees are included in the category of material guarantees. As a material right, a fiduciary guarantee has the nature of *droit de suite* (right to follow) and *droit de preference* (right to precede) in the settlement of receivables through execution of the guaranteed object.

The legal consequence of not registering a fiduciary guarantee is that the nature of a material guarantee does not arise on the object of the guarantee. As a result, the characteristics of material rights such as *droit de suite* (the right to follow the object of the guarantee in the hands of anyone who is in the object) and *droit de preference* (the right to precede other creditors) cannot be enjoyed by the creditor receiving the fiduciary guarantee.

3. In the case of carrying out forced execution, it is considered against the law.

Execution of unregistered fiduciary collateral objects raises legal issues because there is no fiduciary collateral certificate as evidence of the creditor's execution rights. In practice, execution is often carried out by debt collectors without a certificate or court decision, which is contrary to the rule of law. Unilateral execution such as confiscation of vehicles on the road, yard, or parking lot often occurs without involving law enforcement officers. In fact, ownership of the collateral object is divided between the debtor and the creditor, considering that the debtor has fulfilled some of his obligations. If the execution is carried out by force against goods that are not entirely the creditor's rights, the action can be

considered an unlawful act. In this situation, the debtor has the right to report the action to the police to protect his rights.

4. Detrimental to State Finances

Basically, registration of fiduciary certificates is part of Non-Tax State Revenue (PNBP). In the process of managing agreement documents, starting from stamp duty to making notarial deeds, the burden of administrative costs is usually borne by the consumer or debtor. These costs are generally deducted after the disbursement of loan funds. However, in practice, it is possible that these administrative funds are not used properly, including in the case of registering fiduciary guarantees as part of PNBP.

4. Conclusion

The procedure for imposing and registering a fiduciary guarantee consists of two stages, namely the preparation of a Fiduciary Guarantee Deed by a notary containing the identities of the parties, data on the main agreement, a description of the object being guaranteed, as well as the value of the guarantee and the object of the guarantee, and the electronic registration stage at the Fiduciary Registration Office in accordance with the Regulation of the Minister of Law and Human Rights Number 10 of 2013. This registration is mandatory to provide legal certainty and execution rights for creditors. The legal consequences if not registered, the creditor only has the status of a concurrent creditor, not a preferred creditor, so that his rights are not prioritized in the settlement of the debt of a debtor who is in default or bankrupt, and does not have execution powers as regulated in Article 15 paragraph (2) of the Fiduciary Guarantee Law, so that the execution of the guarantee must be carried out through a civil lawsuit in court.

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