



Analysis of Fiduciary Guarantee Arrangements and Legal Protection of Creditors in Fiduciary Agreements in Indonesia

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Abstract

This research aims to explore the execution of legal safeguards within fiduciary agreement practices for creditors and to identify the shortcomings in offering legal protections to creditors in such agreements. Through the application of a normative juridical method, the following conclusions can be drawn: 1. The enactment of legal protections for creditors in fiduciary guarantee agreements originates from the creation of a notarized deed of fiduciary transfer and is further validated by registration with the Fiduciary Registration Office to acquire a fiduciary guarantee certificate. The act of registering a fiduciary guarantee satisfies the principle of publicity, thereby ensuring legal certainty for creditors in terms of recovering their claims from debtors. 2. There are some noticeable deficiencies in the provision of legal protections for creditors within fiduciary agreements. In practical business operations involving fiduciary collateral objects, there are often cases where notarized deeds are not consistently registered at the Fiduciary Registration Office or are merely prepared using private deeds. Consequently, the enforceability of these deeds diminishes, leading to a loss of preferential rights for the creditor.

Keywords: *Creditors; Fiduciary Guarantees; And Legal Protection*

Introduction

The Fiduciary Guarantee Institution is legally recognized in the Republic of Indonesia through Law Number: 42 of 1999 regarding Fiduciary Guarantees, enacted on September 30, 1999 (Feryantini et al., 2022). Notably, Fiduciary Guarantees are security rights over tangible or intangible movable assets, or those not burdened by mortgage rights in accordance with Law No. 4 of 1996 on Mortgage Rights. These rights are held by the fiduciary recipients and are registered at the Fiduciary Registration Office. They serve as a security for settling specific debts and maintain a privileged position over other creditors (Atikah, 2019).

In a fiduciary guarantee agreement, both the fiduciary recipient and the giver are legally protected under the Fiduciary Guarantee Law. This protection extends to the provider in the form of a right to use the secured asset, and the failure of the guarantor does not affect the ownership rights of the secured asset. The Fiduciary Guarantee Law also confers preferential rights on their claims and applies the *droit de suite* principle to the collateral. As for third parties, the principle of publicity in a fiduciary guarantee agreement offers information about the assets under fiduciary (Zulfikar, 2022).

However, according to Article 11 of the Fiduciary Guarantee Law, it states that:

1. Objects burdened with Fiduciary Guarantees must be registered.
2. In the event that the object burdened with the Fiduciary Guarantee is outside the Territory of the Republic of Indonesia, the obligations referred to in paragraph (1) will still apply.

This explanation contends that a fiduciary agreement in a notarial deed, by itself, is not enough; it must be officially registered. It argues that an unregistered, notarized deed doesn't give fiduciary recipients priority rights, due to the lack of clear legal provisions regarding the implementation of fiduciary collateral objects, especially when these objects are movable and at high risk of relocation. This leads to practical difficulties for fiduciary recipients in applying the principle of *droit de suite*, or the right of pursuit.

In real-life scenarios, financing institutions often include the term 'fiduciary guarantee' in their financing agreements. However, these are frequently not notarized or registered at the Fiduciary Registration Office, hence they do not hold a certificate (Anwar, 2023). These agreements are known as underhand fiduciary guarantee deeds, which typically require further authentication by the parties involved to serve as legal evidence, such as in court proceedings.

These protections are further weakened by certain practices in executing fiduciary agreements, including not registering fiduciary objects (only making them into authentic deeds) and negotiating additional costs for fiduciary recipients during the execution of fiduciary collateral objects. This leads to a lack of legal awareness among the general public about fiduciary certificates. It is no wonder that these practices result in slow and challenging execution of fiduciary guarantees, with some Rural Banks finding the fiduciary guarantee agreement ineffective due to execution difficulties.

The aim of this discussion is to investigate the legal protection provided to creditors in the practice of Fiduciary agreements and to understand the shortcomings in affording legal protection to creditors in a Fiduciary guarantee agreement.

Method

The approach taken is a normative juridical approach, namely an approach in which research is mainly carried out to examine law in the sense of law as a science of rules or if law is seen as a rule whose formulation is autonomous without being associated with society, which is then supported by secondary data. obtained from books, research results, newspapers, papers, and so on.

Results and Discussion

A. Registration of Fiduciary Guarantees as an Effort to Protect Creditors

The objective of the Fiduciary Guarantee Law is to offer a more comprehensive set of regulations than what currently exists, with the aim of enhancing protection for relevant parties. The interpretation of the Fiduciary Guarantee Law not only aims to meet the existing needs, but also aspires to deliver legal certainty to the involved parties. Consistent with the principle of providing legal certainty, the Fiduciary

Guarantee Law incorporates the principle of registering fiduciary guarantees. The registration process is anticipated to provide legal certainty not only to the providers and recipients of fiduciary guarantees, but also to third parties (Prasetia, 2022).

Some of the principles adopted in the Fiduciary Guarantee Law are (Prasetia, 2022):

- The principle of assured legality;
- The principle of public disclosure;
- The principle of equitable protection;
- The principle of meeting practical requirements;
- The principle of authentic documentation;
- The principle of empowering the position of creditors.

As mandated by Article 11 of the Fiduciary Guarantee Law, fiduciary guarantees must be registered. Through this registration process, the law fulfills the principle of publicity, a key aspect of material guarantee law. This requirement ensures that the collateral truly belongs to the debtor or fiduciary provider, allowing any third party with a claim to the collateral to verify its status via public notice. Fiduciary guarantees are registered at the Fiduciary Registration Office, which falls under the purview of the Ministry of Justice and Human Rights of the Republic of Indonesia. The office, which covers the entire territory of the Republic of Indonesia, was established specifically for this purpose.

Regarding registration (Ufatih, 2021):

1. Application for fiduciary registration

Fiduciary recipients themselves or their proxies or representatives submit to the Fiduciary Registration Office containing:

- a. Identification details of the fiduciary provider and recipient, including full name, religious belief, place of residence, legal domicile, birthplace and birth date, gender, marital status, and occupation.
- b. The date and number of the fiduciary guarantee deed, along with the name and domicile of the notary who authenticated the fiduciary guarantee deed.
- c. Data pertaining to the main agreement.
- d. A detailed description of the items that are subject to the fiduciary guarantee.
- e. The value of the guarantee.
- f. The monetary value of the items that are the subject of the fiduciary guarantee.

2. Fiduciary Registration Office on Duty

- a. Check the data listed in the registration statement and do not evaluate the correctness of the data listed in the fiduciary registration statement.
- b. Document the fiduciary guarantee in the fiduciary register book on the same day that the registration application is received.
- c. Issue and deliver a fiduciary guarantee certificate to the fiduciary recipient on the same day that the application is received.

3. Registration of changes in the fiduciary guarantee certificate

- a. The fiduciary recipient is obligated to submit an application for registration of any alterations to the fiduciary registration office, accompanied by a declaration of registration change detailing the amendments.

- b. The registration office is required to document any modifications in the fiduciary register on the same day the application for changes is received, and must issue a statement of alteration, which forms an integral part of the fiduciary guarantee certificate.

4. Purpose of Registration.

The goal of registration is to offer legal assurance to both the fiduciary recipients and providers, as well as any relevant third parties. Information pertaining to items under fiduciary guarantees is made accessible to the public, except for inventory items, through this registration system the perfect characteristics of fiduciary guarantees are regulated so that they acquire the properties of material rights (right in rem) which are *ang droit de suit*.

5. Place of Registration.

In the Elucidation of article 11 of the Fiduciary Guarantee Law it is stated that registration of fiduciary guarantees is carried out at the place of domicile of the fiduciary giver, in this case it is carried out at the Regional Offices of the Ministry of Justice and Human Rights of the Republic of Indonesia in every Province, the problem is for fiduciary givers whose positions are far away from the provincial capital, this will be a problem in checking which must be carried out by a third party with good intentions.

6. Registration Obligation

For the first time in the annals of Indonesian law, the requirement to register a fiduciary with the appropriate authority is rooted in Article 11 of the Fiduciary Guarantee Law. The registration of a fiduciary takes place at the Fiduciary Registration Office located in the fiduciary provider's place of residence.

The registration of a fiduciary covers the following aspects:

- (1) Fiduciary Guarantee Objects that are in the country (Article 11 paragraph (1)).
- (2) Objects of Fiduciary guarantees that are abroad (Article 11 paragraph (2)).
- (3) Against change. contents of the Fiduciary Guarantee Certificate. (Article 16 paragraph (1)). This change does not need to be made with a notarial deed but needs to be notified to the parties.

7. Purpose and Purpose of Registration

The purpose of registration, be it the registration of objects, mortgages or mortgages, taking into account the principle of publicity that is usually adhered to in the implementation of registration, is so that third parties have the opportunity to know about the registration of objects, the characteristics of the objects registered and if it is about mortgages and mortgages, that certain objects bound as collateral for the benefit of certain creditors, for a certain amount, with certain promises.

The intent of registration is to potentially influence third parties. Through registration, third parties are presumed to be aware of the traits associated with the item in question, and understand that there's a guarantee bond with these specified traits. If a third party neglects to review or monitor the registry, they cannot expect protection under good faith and must bear the potential risk of loss.

However, in connection with the existence of a Fiduciary Registration Office it is only limited to big cities and this has consequences for the costs that must be incurred for registration and checking lists. The question is, can such a principle be applied to fiduciaries? Can it be expected that a person who wants to transfer an object that is not registered to him, will first check with the Fiduciary Registration Office which may be located quite far before closing the transaction regarding said object? this has dire consequences for third parties including pawnbrokers who have good faith.

8. Fiduciary Registration

For the implementation of the provisions of Article 11 of the Fiduciary Guarantee Law, a fiduciary guarantee registration is held, which provides a register, which functions to accommodate the registration of fiduciary guarantees (Article 12 paragraph (1)). We can conclude in Article 12 sub 2 and sub 4 that according to the plan such Registration Offices will be held in various places. However, for the first time a new fiduciary registration office will be held in Jakarta, which for the time being before there were other offices its working area covers the entire territory of Indonesia. That in the future a registration office will be set up in another place as well, presumably it is very appropriate in terms of distance and costs.

One is the problem of cost and the heaviness of the cost more or less depending on the value of the guarantee. The same fee, for guarantees of small value will be felt more heavily than for large guarantees.

Fiduciary Guarantee Registration Office is under the Ministry of Justice and Human Rights of the Republic of Indonesia (Article 11 sub paragraph (3)). An important matter mentioned in the elucidation of Article 11 which is not regulated in Article 11 itself is that registration is carried out at the domicile of the fiduciary giver. The word place of domicile attracts our attention, because as stated in Article 1 sub 5 of the Fiduciary Law, the fiduciary giver can be an individual or a corporation, whereas the term place of domicile usually refers to a company/association, while for individuals the term "residence/residence" is used. or "domicile". The question becomes, does the explanation of Article 11 apply only to corporations? Since there is no basis or guideline to support such establishment, we may conclude that fiduciary registration is carried out at the fiduciary registration office whose territory is his work includes the domicile/place of domicile of the fiduciary.

This provision is only important if later it turns out that registration offices are being held outside of those mentioned in Article 12 sub 2. The reasons why domiciles and fiduciary providers are chosen as a benchmark are not explained, even though fiduciary collateral objects can be in the form of permanent objects (Article 1 sub 2 of the Law Fiduciary) and in general when it comes to fixed objects, all matters relating to fixed objects stick to the place where the fixed objects are. Maybe according to the considerations of the legislators, with such a stipulation, the registration fee will be relatively cheaper and indirectly benefit the debtor/fiduciary giver.

The above mentioned only concerns the place where registration of fiduciary guarantees is carried out. Because in the fiduciary law there are no coercive general provisions governing the domicile of the fiduciary guarantee agreement, the general provisions regarding domicile apply and the notarial deed usually states the preferred domicile for the agreement in question and all the consequences arising from it.

9. Functions and Duties of the Fiduciary Registration Office

Based on the intent and purpose of registration, the Fiduciary Registration Office has the functions and duties of accepting applications for registration of fiduciary guarantees, announcing issues and submitting fiduciary guarantees to fiduciary recipients.

B. Legal Protection for Fiduciary Beneficiaries (Creditors) in Fiduciary Guarantee Practices

When discussing legal protection, it's important to first understand what it entails. Legal protection comprises two components: protection and law. Protection involves acts or things that offer safeguarding (McKinney de Royston, et al., 2021). Law, on the other hand, constitutes rules designed to secure the interests of all parties involved.

As per Wirjono Prodjodikoro's book, legal protection is an endeavor to offer security to legal entities, detailing what they can do to defend or safeguard their interests and rights. In the context of a creditor receiving a fiduciary for unregistered goods – for instance, inventory or stock of merchandise – the protection that the creditor will receive aligns with what has been mutually agreed upon and guaranteed as detailed in the fiduciary guarantee certificate held by the creditor.

This corresponds with the essence of fiduciary guarantee registration discussed earlier. The actual bond being registered is the guarantee bond. As previously described, the registration of this guarantee bond follows the principle that all matters pertaining to the guarantee, including the related objects, will be recorded within the guarantee bond.

Thus, for creditors or fiduciary recipients with fiduciary collateral consisting of unregistered items, there is no cause for concern. This is due to the fact that the system of collateral bond registration automatically includes all merchandise stocks (inventory) used as fiduciary objects in the fiduciary guarantee certificate. Hence, in the event of default by the fiduciary provider or debtor, the creditor only needs to execute all the merchandise as recorded. If there is nothing in accordance with what is recorded, the creditor can execute merchandise stocks equivalent to the pledged items, because what is assured is the collateral bond, not the item itself (Fauzanazila, & Putra, 2022).

Furthermore, for fiduciary collateral items in the form of merchandise stocks (inventory) that have been transferred by the fiduciary provider, if a default occurs by the fiduciary provider or debtor, then as per Article 21, paragraph (4) of the Fiduciary Law, the proceeds of the transfer and/or any arising claims will, by law, become replacement fiduciary items for the transferred fiduciary object.

As previously explained in the fiduciary guarantee registration procedure, in accordance with the requirements for registering fiduciary guarantees with the Fiduciary Registration Office as stipulated in Article 13, paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Guarantees, the registration statement as mentioned in paragraph (1) contains:

- a) Identification details of the Fiduciary Provider and Recipient;
- b) The date and number of the Fiduciary Guarantee Deed, including the name and domicile of the Notary who authenticated the Fiduciary Guarantee Deed;
- c) Data related to the main agreement secured by the fiduciary;
- d) A description of the items that are subject to the Fiduciary Guarantee;
- e) The value of the guarantee; and
- f) The monetary value of the items that are subject to the fiduciary guarantee.

From these prerequisites, it is evident that in the registered Fiduciary Guarantee, there is an annex that contains a description of the items subject to the Fiduciary Guarantee, as mandated by Article 13, paragraph (1), clause d of the Fiduciary Law. Thus, it becomes clear which items are guaranteed. In instances where the collateral consists of merchandise stock (inventory), the specifics of the merchandise stock will align with the merchandise stock list prepared by the fiduciary provider, which is included in the Statement of Registration of Fiduciary Guarantees.

The protection that is also given to fiduciary recipient creditors whose fiduciary collateral objects are in the form of stocks of merchandise by the Fiduciary Law is regulated in the requirements for registering fiduciary guarantees in the form of the obligation to state the value of goods or objects used as fiduciary guarantee objects (Putri, & Badriah, 2023). The protection provided by the inclusion of the value of goods or objects that are used as objects of fiduciary guarantees is that 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 fiduciary recipient, in this case the creditor, can sue the fiduciary giver.

This situation is very likely to occur because, as is known, the stock of merchandise does not always exist in accordance with what is recorded because as merchandise, it is possible that the goods have been traded according to their designation. So that the inclusion of the collateral value will greatly protect the interests of the creditor, because even if the items listed in the attachment or details about the object used as the object of the fiduciary guarantee are not in accordance with what is specified, the creditor can still execute the guarantee for the value of the collateralized item. Or in other words, changes that occur to the fiduciary guarantee object, in this case the stock of merchandise does not need to be registered every time there is an increase or decrease, because the creditor will refer to the collateral value of the guaranteed object.

The Fiduciary Guarantee Law also provides convenience in carrying out executions through the parate execution institution. The ease in carrying out this execution is not solely a monopoly on Fiduciary Guarantees, because in the case of mortgages, similar institutions are also known. Article paragraph (1) of the Civil Code states that: 7 "(1) If the parties have not agreed otherwise, then the creditor is entitled if the debtor or the pledger defaults, after the grace period given has passed, or if a grace period has not been determined, after a warning has been made to pay, order the pawn goods to be sold in public according to local customs and on the terms that are commonly applied, with the intention of collecting the amount owed together with interest and fees from the sales revenue."

Conclusion

In conclusion, the execution of legal protection for creditors in a fiduciary guarantee agreement originates from the creation of a notarized deed of fiduciary guarantee imposition, and it is reinforced through registration with the Fiduciary Registration Office to acquire a fiduciary guarantee certificate. By registering a fiduciary guarantee, the principle of publicity is satisfied, providing legal certainty to creditors in recovering their claims from debtors. The weaknesses in implementing legal protection for creditors in a fiduciary agreement are often seen in business practices where fiduciary collateral objects are formed by notarial deed but are not consistently registered at the Fiduciary Registration Office or are only prepared based on private deed, resulting in the loss of the deed's executory power and the creditor's preferential right.

This article should trigger discussions or spread awareness about the establishment of an executing institution for fiduciary guarantee agreements, and the importance of registering objects that are subject to fiduciary guarantees at the Fiduciary Registration Office to obtain a certificate and prevent debtor default. There needs to be increased legal awareness and socialization regarding the implementation of fiduciary principles to minimize the weaknesses found in the Fiduciary Guarantee Law within a fiduciary agreement, such as through the establishment of an agreement on fiduciary object supervision.

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