

Execution of Fiduciary Guarantees Post 2019 MK (Constitutional Court) Ruling

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ABSTRACT

Fiduciary guarantee is a language that is often used in Indonesian and also in Law No. 42 of 1999. Collateral is an asset owned by a borrower to be used as collateral or deposit for the loan he receives which is handed over to the lender. The transfer of an ownership right to an object with a sense of mutual trust on mutually agreed terms, namely to an object whose ownership rights are transferred remains under the control of the original owner of the object. Historically, fiduciary institutions have been established since Roman times. As history progressed, Roman law also developed until the emergence of pawning and mortgage institutions. This causes the role of fiduciary institutions as debt collateral to begin to diminish and their existence has also disappeared. This happened after the classical era under the leadership of Justianus.

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RESEARCH METHODS

As for the research methodology used in this journal, the author uses a normative legal research methodology which focuses on positive legal norms in the form of statutory regulations.

DISCUSSION

A. Definition of Fiduciary

Fiduciary, derived from the Latin word *fiducia* which means trust, refers to the transfer of property rights to objects on the basis of trust. According to UUJF Article 1, fiduciary is the transfer of ownership rights to an object, but under the control of the owner. Article 1 paragraph (2) UUJF states that fiduciary guarantees are rights to movable objects, including intangible ones, and especially buildings which cannot be guaranteed by mortgage rights in accordance with Law No. 4 1999 concerning Mortgage Rights. These objects remain in the ownership of the fiduciary as collateral for debt repayment. Fiduciary recipients have priority in debt repayment compared to other creditors.

From the above definition, we can understand that fiduciary guarantee is the granting of ownership rights with trust in the principal agreement, but the object remains under the control of the fiduciary.

B. Legal Basis for Fiduciary Guarantees

Based on statutory regulations which have been revised to keep up with the times, they have become the legal basis for the implementation of fiduciary law. In accordance with the rationale and reasons behind the decision, it has been stated that there are several considerations for enacting Law NO. 42 of 1999 concerning Fiduciary Guarantees, namely:

- a. The desire for the business world to obtain increasingly large and continuously growing financing must be in line with the adoption of strict and comprehensive legal provisions that manage guarantee institutions.
- b. The challenges faced by fiduciary institutions are still related to court decisions and have not been comprehensively covered in statutory regulations.
- c. that in order to further advance state development, guarantee legal certainty and fulfill legal requirements that can provide legal protection to stakeholders, therefore a comprehensive determination of fiduciary guarantees is needed and these guarantees must be registered with BAE.
- d. By considering these things, it is necessary to establish a Law on Fiduciary Guarantees.

Then, from the explanation of these considerations, it is explained that the objectives of implementing Law NO 42 of 1999 concerning Fiduciary Guarantees are:

- a. Accommodating community needs in regulating fiduciary guarantees to support business and provide legal clarity.
- b. Resolving problems for the parties involved, especially fiduciaries.

UU no. 42 of 1999 concerning Fiduciary Guarantees includes 8 chapters and 41 articles regulating:

- a. General provisions (Article 1)
This explains the definition of fiduciary, fiduciary guarantee, fiduciary giver, objects, receivables, fiduciary recipients, debts, debtors, creditors, and individuals.
- b. Scope (Article 2 to Article 3)
This law plays a role in an agreement with the aim of providing fiduciary collateral for an item.
- c. Matters regarding attachment, registration, transfer of rights, and cancellation of fiduciary guarantees (Articles 4 to 26 of Law No. 42 of 1999).
- d. Right of pre-emption (Articles 27 to 28 of Law No. 42 of 1999).
- e. Execution of fiduciary guarantees (Articles 29 to 34 of Law No. 42 of 1999).
- f. Matters regulated in criminal law (Articles 35 to 36 of Law No. 42 of 1999).
- g. Transitional provisions (Articles 37 to 38 of Law No. 42 of 1999).
- h. Closing provisions (Articles 39 to 41 of Law No. 42 of 1999).

The transitional provisions above regulate several aspects, namely:

- a. The burden on goods used as collateral must follow the fiduciary guarantee regulations prior to the enactment of this Law, as long as they do not conflict with this Law.
- b. A maximum of 60 days after the establishment of a representative registration office, all fiduciary guarantee contracts must be in line with this Law, except for the act of signing a guarantee deed.
- c. If no adjustments are made within the time period specified in paragraph b, the fiduciary guarantee in question is not a security right for ownership of goods as regulated in this regulation.

The final provision involves an order for the Government to establish a Fiduciary Registration Office at the provincial level within a year after this Law is enacted. According to RI Presidential Decree no. 139/2000, a Fiduciary Registration Office was established in each provincial capital under the auspices of the Regional Office of the Ministry of Justice and Human Rights. This office has the same responsibilities as the local Regional Office of the Department of Justice and Human Rights.

C. Object and Subject of Fiduciary Guarantee

Fiduciary objects include items that can be moved or not, whether real or not, especially buildings that cannot be guaranteed with mortgage rights in accordance with Law Number 4 of 1996 concerning Mortgage Rights.

Objects are anything tangible or not, movable or not, which can be owned or transferred without collateral or mortgage, such as motor vehicles, houses, land, etc.

D. Transfer of Fiduciary Collateral and Execution of Fiduciary Collateral

Articles 19-24 Law no. 42/1999 regulates the transfer of collateral. Transfer of rights to debts (cession) is the transfer of receivables through an authentic deed or private deed, including sales or rentals in business activities. Fiduciary recipients can transfer rights to new creditors, who are responsible for registering the transfer of fiduciary collateral at the Fiduciary Registration Office.

This transfer transfers all the rights and obligations of the old fiduciary recipient to the new fiduciary recipient, with notification provided by the fiduciary provider. The guaranteed object must remain in the owner's hands, because the fiduciary guarantee follows the object, no matter who holds it. Therefore, fiduciaries may not transfer, mortgage or rent to other parties.

Articles 29-34 Law no. 42/1999 regulates the execution of fiduciary guarantees, involving the confiscation and sale of objects guaranteed. Execution of fiduciary guarantees occurs when the fiduciary does not fulfill his obligations or achievements on time, even though he has been given a summons. There are three execution methods, namely:

- a. Carrying out executions by fiduciary recipients based on executorial titles, namely documents that allow confiscation and auction without the intervention of a judge;
- b. A public auction of fiduciary collateral objects is carried out by the fiduciary recipient to obtain repayment of receivables from the auction proceeds;
- c. Private sales are an agreement between the giver and the fiduciary to get the best price to bring profits to both parties.

CONCLUSION

Fiduciary guarantee is a form of legal protection given to lenders in the event of the transfer of ownership rights to an object, but the object remains under the control of the owner. In the context of Indonesian law, fiduciary guarantees are regulated by Law no. 42 of 1999. The definition, elements, legal basis, object and subject, imposition, registration, transfer and execution of fiduciary guarantees have been explained in detail in the text. This shows that fiduciary guarantees have an important role in balancing the interests of lenders and loan recipients, as well as providing legal clarity for all parties involved.

With the existence of comprehensive regulations regarding fiduciary guarantees, it is hoped that it can accommodate the needs of the community in supporting business and provide legal certainty. Apart from that, fiduciary guarantees are also expected to be able to resolve problems for parties involved in loan transactions. Thus, the conclusion is that fiduciary guarantees have a significant role in the Indonesian legal system in supporting business activities and providing legal certainty for economic actors.

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