

## Legal Aspects of Charging Fiduciary Guarantees in Money Lending and Borrowing Cases

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### Article Info

#### Article history:

Received June 3, 2024  
Revised August 11, 2024  
Accepted September 24, 2024

#### Keywords:

Execution  
Fiduciary Guarantee  
Legal Aspects

### ABSTRACT

Lending and borrowing money has been a known practice in society for a long time, when money has become a commonly used means of transaction. Guarantee law is always related to economic law because growth in sectors such as industry, trade, companies, transportation, and others requires access to funds. Financial institutions, both banks and non-banks, provide funds for development, which require collateral for the return of the loaned funds. The question discussed in this research is How is the burden of fiduciary guarantees in cases of borrowing and borrowing money?

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### INTRODUCTION

Sustainable economic development to create a prosperous Indonesian society cannot be separated from economic activities. The role of the government as an economic entity is to ensure the welfare of its citizens. Since Indian citizens cannot be excluded from economic activities, whether small or large, the government must manage these economic activities effectively. Economic conditions force people to meet their daily needs, and many people prefer to seek loans or capital from banks or financial institutions because they feel safe and legally guaranteed for recipients of capital. State banks cannot make money from consumers. The other is a private bank, but this means it can be managed by a person who has the authority to conclude financial contracts between trustees and trustees. In addition, after the deposit agreement is made, the guarantor enters into a deposit agreement. Even though the sender has the obligation to deliver the promised goods, and has the right to return them to the sender at the specified time, the sender has rights and obligations that conflict with the rights and obligations of the trustee. Fiduciary guarantees are conventional products implemented to provide protection for creditors in particular. When the debtor defaults, the creditor can ask the debtor for compensation through the execution of the fiduciary guarantee. With fiduciary registration, execution of collateral can be carried out immediately without waiting for a court decision. This kind of condition makes it easier for financial institutions to collect compensation from the financing provided to customers.

Collateral is a traditional product implemented to protect creditors. If the creditor fails to pay the debt, the creditor can demand payment by fulfilling the fidelity guarantee. By using the surrender register, it is

possible to fulfill obligations without waiting for a court decision. This method makes it easier for financial institutions to get paid for the loans they offer to customers.

In collateral objects as guaranteed, fulfillment is always cashed in on the collateral objects and that becomes the right of the person giving the guarantee. Therefore, the item that can be used as collateral must be an object or a right that can be valued in money. Law Number 42 of 1999 concerning Fiduciary Guarantees, that: "Fiduciary guarantees are security rights over movable objects, both tangible and intangible and immovable objects, especially buildings which cannot be encumbered with mortgage rights," and has further explanation as stated in Law Number 42 of 1999 concerning Fiduciary Guarantees in Article 9 states: "Fiduciary guarantees can be given for one or more units or types of objects, including receivables, whether existing at the time the guarantee is given or obtained later." In collateral objects as guaranteed, fulfillment is always cashed in on the collateral objects and that becomes the right of the person giving the guarantee. Therefore, the item that can be used as collateral must be an object or a right that can be valued in money. Law Number 42 of 1999 concerning Fiduciary Guarantees, that: "Fiduciary guarantees are security rights over movable objects, both tangible and intangible and immovable objects, especially buildings which cannot be encumbered with mortgage rights," and has further explanation as stated in Law Number 42 of 1999 concerning Fiduciary Guarantees in Article 9 states: "Fiduciary guarantees can be given for one or more units or types of objects, including receivables, whether existing at the time the guarantee is given or obtained at a later date."

## RESEARCH METHODOLOGY

This research was conducted using a normative juridical methodology. The normative juridical referred to by the researcher wants to analyze legal problems related to the imposition of fiduciary guarantees by looking at legal norms and legal principles. The approach taken is the approach to statutory regulation No. 42 of 1999.

The aim of this research is to describe how fiduciary collateral is charged in lending and borrowing cases.

## RESULTS AND DISCUSSION

### 1. Definition and Characteristics of Fiduciary Guarantees

The word fiduciary comes from the Latin *fiducia* which according to the legal dictionary means trust. The term fiduciary in Indonesian means the transfer of property rights to a trust, in Dutch terminology it is also called *fiduciare egedom österrecht*. Fiduciary comes from the word *fieds* which means trust. Trust means that the guarantor believes that the transfer of ownership rights to him does not intend to make the creditor the owner of the object, and after payment of the basic trust agreement, the collateral will return to the property of the guarantor.

Marhainis uses the term "trust agreement" in his book *Civil Law on Trust Law*, namely *Fiduciair Egedom Overdracht*, abbreviated as *f.e.o*. The term *Fiduciair Egedom Overdracht (f.e.o)* appears in society, especially in the banking world, when customers ask for loans and use them as collateral in the form of goods, but not as collateral for goods. The property owner does not give it to the lender (bank), but it is still managed and used by the owner. So, in a trust, the right of lien has two elements because the lien is in the form of movable property, but apart from that there is an element of mortgage because the collateral does not move from debtor to debtor.

Regarding the meaning of Fiduciary Guarantee, it is also explained in article 1 paragraph (1 and 2) UUJF No. 42 of 1999 as follows:

- 1) States that Fiduciary is the transfer of ownership rights to an object based on trust, provided that the object whose ownership rights are transferred remains in the control of the owner of the object.
- 2) Declare that Fiduciary Guarantee is a security right for movable objects, both tangible and intangible, and immovable objects, especially buildings which cannot be encumbered with mortgage rights as intended in Law Number 4 of 1996 concerning Mortgage Rights which remain in the control of the giver. fiduciary, as collateral for the repayment of certain debts, which giving priority position to fiduciary recipients over other creditors.

Some of the legal bases that form the basis for the provision of Fiduciary Guarantees include the following:

1. Law Number 42 of 1999 concerning Fiduciary Guarantees;
2. Government Regulation Number 86 of 2000 concerning Procedures for Registration of Fiduciary Guarantees and Costs for Making Fiduciary Guarantee Deeds;
3. Government Regulation Number 87 of 2000 concerning Amendments to Government Regulation Number 26 of 1999 concerning Tariffs for Types of Non-Tax State Revenue Applicable to the Department of Law and Human Rights;

4. Decree of the President of the Republic of Indonesia Number 139 of 2000 concerning the Establishment of a Fiduciary Registration Office in Every Provincial Capital in the Territory of the Republic of Indonesia;
5. Decree of the Minister of Law and Human Rights of the Republic of Indonesia Number M.08-PR.07.01 of 2000 concerning the Opening of the Fiduciary Guarantee Registration Office;
6. Regulation of the Minister of Law and Human Rights of the Republic of Indonesia No. M. MH02.KU.02.02. Th. 2010 concerning Procedures for Management and Reporting of Non-Tax State Revenue for Legal Services Fees in the Notarial, Fiduciary and Citizenship Sectors at the Regional Office of the Ministry of Law and Human Rights.

The agreement that gives rise to Fiduciary has the following characteristics:

1. There is a relationship between the provider-guarantor and the guarantor.
2. Gives the borrower the right to request the transfer of loan collateral (construction retention).
3. Contracts for the provision of guarantees are complementary contracts. This means that a contract that requires another contract (main contract) is in the form of a debt contract or guarantee contract.
4. Supply contracts are classified as contracts with cancellation provisions. When the debt is repaid, the collateral is lost. Fifth, Fiduciary Engagements are classified as engagements that originate from an agreement, namely a Fiduciary Agreement. Sixth, supply contracts are contracts that are not specifically mentioned in the Convention. Therefore, this agreement is classified as an unnamed agreement (Onbepaalde Overeenkomst). Seventh, the trust contract is subject to the provisions of the General Contract Part contained in the Civil Code.

## 2. Legal Aspects of Imposing Fiduciary Guarantees

According to the Trust Guarantee Law Number 42 of 1999, the trust guarantee registration process begins with a trust guarantee deed made by a notary, which is then registered at the trust guarantee registration office. Registration of reliable collateral is carried out by submitting an application to the credit registration office, to which is attached an application for registration of reliable collateral solely as collateral for the repayment of debts which in the future do not belong to the recipient of the collateral. Therefore, any promise that authorizes the trustee to take over the property that is the fiduciary's guarantee, if the debtor breaks his promise, is invalid according to law. The elements of a trust clause are:

- a. Components of a trust from the trustee's perspective
- b. Trust components from the perspective of the trust recipient
- c. These elements remain under the control of the object owner
- d. Pre-emptive rights (preferential).

All contracts intended to encumber no object with fiduciary guarantees must expressly state that this Law on Guarantees does not apply:

- a. Obligations for land and buildings, applicable law stipulates that no collateral may be registered regarding these matters.
- b. Attachment to the aircraft.
- c. Soldiers

Collateral objects are divided into two types: material objects and formal objects. The main object of the recipe is the person. Formal object, namely the view of an object. The formal concept of collateral law refers to how legal entities can entrust collateral to banking or non-banking entities. The scope of guarantee law research includes general and specific guarantees. Exclusive licenses are generally divided into two types. First, personal guarantees are liability guarantees (joint and several) and bank guarantees resulting from a guarantee agreement between the creditor and a third party. Second, collateral is a (real) right to a certain thing which is used as collateral for the debt and can sometimes be used to pay the debtor's debt if the debtor defaults.

The financial agreement contains rules regarding the debtor's rights and obligations which must not be violated. Default committed by the debtor clearly means that the debtor does not have the right to request compensation based on the rules of the Civil Code article 1313. To avoid legal consequences, you must pay attention to contractual obligations. Apart from that, the trust deed is *zakelijk* in nature, which means that the rights (limited material rights) obtained by the trustee, the trust deed is not criminal in nature and is legal, gives the creditor full ownership rights, but only has power over the object that is created. what he obtained was pledged as collateral. If the debtor continues to fulfill his obligations, he can continue to control his goods and continue to protect his goods against third parties and creditors.

A trust agreement is required. This means that the rights of the trust recipient are property rights, although limited to those agreed in the contract. However, these restrictions are individual. The rights obtained

by the fiduciary holder are full and independent of the subject matter that he determines to decide how to carry out claims. Rights arising from the trust agreement is a personal right, the parties are free to determine when the debt is not owed to the debtor or creditor.

The guarantee of confidentiality is essentially an extension of the basic contract that binds the parties to a performance. :

- a. The nature of the primary contract dependency
- b. Its validity is interpreted only based on the validity of the main contract
- c. As a conditional contract.

The nature of *droit de suite* means that the trust guarantee continues to follow the subject of the trust guarantee, except in the case of the transfer of warehouse objects protected by additional collateral, and the trust security rights follow the objects held by the holder. subject: Guaranteeing legal certainty for creditors holding fiduciary guarantees regarding the proceeds from the sale of fiduciary guarantees to pay off their debts if the debtor providing the fiduciary guarantee does not fulfill his obligations.

The definition of rights exceeding other debts contained in the guarantor's guarantee, the guarantor's right to return the bill for project implementation costs is what is meant by the guarantor's guarantee. Because the objects that constitute fiduciary collateral are not in the bankruptcy trustee's assets, the principal rights of the trustee are not lost due to bankruptcy and/or dissolution. In addition, guarantees that have more than one deposit, such as encumbrances, pledges, encumbrances and encumbrances for other things, are subject to the concept of "*droit de preference*" and are valid from the date of registration at the registration office where the deposit is placed. This arrangement gave rise to the adage "first registered, first secured."

It is clarified that the determination of the main collateral that can be relied upon is an additional agreement to the main contract (estimate), from which arises the obligation for non-performance of the parties. Such as a military contract (promise), mortgage or mortgage. Appraiser contract following other contracts, namely debt and receivables contracts. One of the official stages of a fiduciary guarantee is the creation of a fiduciary guarantee object, namely on the same day as the debt and claims contract. guarantee agreement date of trust guarantee entered in the trust register book. A notarial deed is an authentic deed and has the most complete evidentiary power, so that a fiduciary guarantee is declared to the notary which is a fiduciary guarantee.

The trust agreement must be a notarial deed written in Indonesian. The accountant also determines the "covenants" and information that must be included in the bond deed. According to the Consolidation Law, the procedure for registering a binding bond begins with the drawing up of a binding deed by a notary. Then it is registered at the Supervisory Registrar's Office. Deposit registration is carried out by submitting an application to the Deposit Registration Office and attaching a deposit registration statement.

A fiduciary bond arises on the same day as it is recorded in the fiduciary register, not when the fiduciary bond is created with a notarized fiduciary bond. The purpose of registration is as follows:

- a. Bonds provide legal guarantees to interested parties, especially other creditors related to the assets guaranteed.
- b. Create a bond for the borrower (trustee). The trustee has control over the terms of the trust's fiduciary obligations, thereby giving creditors primary rights over other creditors.
- c. An Implementation of a public relations program.

The fiduciary bond agreement requires that the objects secured by the fiduciary bond must be registered. This means that the entity is bound and given a guarantee of trust after registration. Another problem is that if the fiduciary agreement is not registered, then the contract in which there is a fiduciary obligation is just a signed contract and does not have the right to manage the policy properly under the customer's control. Generally, the purpose of fiduciary security cannot be transferred to the trustee. The carrier is no longer has the right to transfer the goods. However, if the guarantor transfers inventory to protect the guarantor whose credit is guaranteed, the guarantor must replace the transferred inventory with similar goods. In this case the nature and value are the same. However, if the debtor breaks the promise, then the results of the transfer and claims arising from the transfer according to the law are as follows: Use the *SaveRequest* object instead. of redistributed objects. The process of stopping the transfer of inventory items as collateral if a default occurs is called the "liquidation" process.

The transfer of rights to debt secured by collateral guarantees the transfer of all rights and obligations of the depositor to the new debt in accordance with statutory regulations. However, in general, the recipient of the guarantee does not have the right to transfer the objects or proceeds of the guarantee. This is because the ownership of the object or the results of the object has been transferred by the trust. This is the concept of borrower-to-borrower commitment. Therefore, the borrower is the owner of the loan using the principle of collateral that has been provided and the rights have been transferred to the lender. There are certain

circumstances and the law states that the guarantee of correctness does not apply. . The reliability index was removed for the following reasons:

- 1) Release of rights to the guarantor's financial guarantee and cancellation of loans guaranteed by the guarantor
- 2) Exclusion of security-related assets and investor-guaranteed debt: Master contracts that create obligations to perform - current debts, future debts and their amounts can determine how long the work will take.

When the collateral is revoked, in the case of a debt secured by collateral, the ownership rights to the object of collateral are automatically returned to the trusted supplier, provided that the conditions for cancellation (ontbindende voorwaarde) are met. Hence, overdraft Retrospection of property rights used for purposes of a trust lien from the trustee to the trustee is not required. Supervision of revocation of trust bonds. Remove the guardian's lien record from the guardian's register at the guardian's registration office. An index cancellation report is generated before the index registration is cancelled. This shows that the Trustee Registration Office has removed the List of Trustees from the Trustee Register Book. The Registrar of Trustees will also issue a certificate stating that the Trustee Bond Certificate is no longer valid. On the same day that the administrator deletes the administrator's notebook, the Administrator's Registration Office cancels the relevant certificate.

If the borrower breaches the surrender guarantee contract, action may be taken against the subject of the surrender guarantee. In addition, creditors cannot transfer goods pledged as collateral.

- a. Based on claim rights. Fulfilling the objectives of trust guarantees can be achieved by adding trust guarantees or controlling trust guarantees. "Ira, is a trust bond which in its language is "for justice based on faith in God Almighty" which has the same power as a court decision through a public auction.
- b. and therefore the bond is paid. or the right to exercise its rights (exclusive exercise) by negotiating the goods guaranteed.
- c. Can be sold privately without legal intervention. Special purchases can be made if the following conditions are met:
  1. There is a contract between the provider and the administrator.
  2. If the highest price is achieved by selling individually, then both parties will make a profit. The Trustee and Trustee/Trustee must notify interested parties in writing.
  3. It will be published in at least two newspapers in your area. A Sale will take place one month after written notification.

## CONCLUSION

Fiduciary guarantees were initially only based on jurisprudence, but ultimately because of the need to create legal certainty in loans with collateral, Law no. 42 Yr. 1999 concerning Fiduciary Guarantees (UUJF). In fiduciary guarantees, the objects are immovable goods, in addition to immovable goods which cannot be mortgaged (Mortgage Rights - UUHT No. 4 of 1996). The agreement that gives rise to Fiduciary has the following characteristics:

- a. Between the Fiduciary giver and the Fiduciary recipient there is a contractual relationship, which gives the creditor the right to request the delivery of collateral from the debtor (constitutum possessorium).
- b. This agreement is an agreement to give something because the debtor hands over an item (constitutum possessorium)
- c. An agreement in the context of granting a Fiduciary is an accessory agreement, namely an agreement that accompanies another agreement (main agreement) in the form of a debt and receivables agreement.
- d. A Fiduciary Agreement is classified as an agreement with the conditions of being void, because if the debt is repaid, then the Fiduciary guarantee will be forfeited.
- e. Fiduciary engagements are classified as engagements that originate from an agreement, namely a Fiduciary agreement
- f. A Fiduciary Agreement is an agreement that is not specifically mentioned in the Civil Code. Therefore, this agreement is classified as an unnamed agreement (Onbenoem De Overeenkomst
- g. The Fiduciary Agreement remains subject to the provisions of the general part of the agreement contained in the Civil Code.

## Recommendations

It is hoped that changes to the fiduciary collateral object in the credit agreement should be carried out as perfectly as possible by following the applicable legal regulations. The parties, both debtors and creditors, should understand and implement as well as possible their respective rights and obligations and in resolving disputes, the parties, namely creditors and debtors, should choose arbitration court. This is to provide speedy justice and lower costs. This arbitration court can be used to resolve disputes in accordance with the Arbitration Law Number 30 of 1999.

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