

REFORMULATION OF FIDUCIARY GUARANTEE EXECUTION ARRANGEMENTS AS A LEGAL PROTECTION EFFORT FOR CREDITORS

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Abstract

This study aims to review; 1) How can a legal guarantee against a fiduciary security rights holder against the object of fiduciary security seized by the state be counted as a criminal payment of substitute money through a court decision in a criminal case?; 2) How is the reformulation of fiduciary guarantee execution arrangements as a legal protection measure for creditors?. The research method used is evaluative descriptive research. Evaluative research is basically centered on final recommendations that affirm that an object of evaluation can be maintained, improved, improved or even dismissed in line with the data obtained. The results showed that; 1 The recipient of fiduciary security is protected by law, even if the object that is the collateral for his receivables is seized for the state as payment of money in lieu of corruption because the object used as fiduciary security comes from a criminal act of corruption committed by the fiduciary guarantor. 2) In line with the principle of providing legal certainty, the Fiduciary Guarantee Act takes the principle of registration of fiduciary guarantees. The registration is expected to provide legal certainty to fiduciary guarantors (debtors) and fiduciary guarantee recipients (creditors), as well as to third parties concerned. Fiduciary guarantee is a form of engagement between creditors and debtors arising from the agreement

Keywords: Reformulation of Execution Arrangements, Fiduciary Assurance, Legal Protection Measures, Creditors.

INTRODUCTION

Background

Nowadays in the economic field, entrepreneurs are emerging who need large capital to start and develop their businesses. Taking credit is one way to obtain fresh capital or funds through banks or other financial service providers. In carrying out its banking function as a distributor of funds to the public, the bank actively conducts its business activities, including by providing credit to customers. Credit is one of the financial facilities, where the financial facility allows legal subjects to borrow money and return it back at a mutually agreed time.¹

Law Number 10 of 1998, defines credit as: "The provision of money or bills that can be likened to it, based on an agreement or loan agreement between the bank and other parties that requires the borrower to pay off its debt after a certain period of time with interest."²

Lending and borrowing is an activity that has been carried out for a long time by people who already know money as a means of payment. Lending and borrowing activities that occur in the general public are usually with the condition that they must submit collateral to the party who provides the loan. The debt guarantee can be in the form of goods / objects or individual

guarantees. Collateral has a very important function in economic activities, which must be fulfilled by customers if they want to get a capital loan.

Basically, credit can be given by anyone who has the ability. After the credit agreement is agreed by both parties, the obligation is born on the creditor, namely to provide the agreed money loan to the debtor, and the debtor's obligation is to pay the receivable at a predetermined time accompanied by the interest agreed by the parties. The credit that will be given by creditors certainly requires creditors to feel safe.

Therefore, for the sake of security, especially to ensure the repayment of the debt, a safety device is needed for creditors. One of the most basic forms of security in providing credit facilities is the object of guarantee. A good form of guarantee for the debtor is a form of guarantee that launches its business activities in daily life, while for creditors a guarantee that is said to be good is a guarantee that can provide a sense of security and legal certainty that the credit given to the debtor can be repaid at the agreed time.

A guarantee agreement can make the creditor safer, as referred to in article 1131 of the Civil Code (Civil Code) which formulates that "all property of the debtor, both against movable and immovable objects, both existing and new ones that will exist in the future, become dependents for someone's engagement"³

One of the most commonly used guarantees in Indonesia is the fiduciary guarantee. A fiduciary guarantee agreement is an agreement arising from a bank credit agreement (principal agreement). The provision of fiduciary guarantee is an agreement that is *accessoir* to a principal agreement as mentioned in the explanation to Article 6 letter (b) of Law Number 42 of 1999 concerning Fiduciary Guarantee, and must be made by a notarial deed called a fiduciary guarantee deed.⁴ Fiduciary guarantees are regulated in Law Number 42 of 1999 concerning Fiduciary Guarantees. Fiduciary is the transfer of a right of ownership of an object that can be used as an object of security on the basis of trust provided that the fiduciary object remains in the possession of the owner of the object. Usually this happens because the owner of the object needs a certain amount of money, and as collateral for the repayment of the debt, the debtor gives up in trust his ownership rights to a movable object.

On the one hand, the Fiduciary Act prohibits re-fiduciaries, but on the other hand the Fiduciary Law allows for re-fiduciaries of objects that are the object of the same guarantee. From the inconsistency of the two articles, it creates uncertainty in providing protection to other creditors. This is the background of the writing entitled "**Reformulation of Fiduciary Guarantee Execution Arrangements as an Effort for Legal Protection for Creditors**"

Problem Statement

1. How can a legal guarantee against a fiduciary security rights holder against the object of fiduciary security seized by the state be counted as a criminal payment of substitute money through a court decision in a criminal case?;
2. How is the reformulation of fiduciary guarantee execution arrangements as a legal protection measure for creditors?

Theoretical Framework

The main theory or *Grand Theory* that is the basis of the analysis knife in this study is the Theory of Banking Law. The definition of a bank according to Law No. 10 of 1998 concerning amendments to Law No. 7 of 1992 concerning banking is a business entity that collects funds from the public in the form of deposits and distributes them to the public in the form of credit and/or other forms in order to improve the standard of living of many people.⁵

And explained in Law Number 21 of 2008 which states that banks with conventional principles are banks that carry out their business activities conventionally whose activities provide services in payment traffic. In carrying out its activities, conventional commercial banks apply two methods, namely setting interest on selling prices and purchase prices on their products or known as spread based, and applying fees in other services known as fee based.⁶

Furthermore, *Middle Theory* in this study uses the Hierarchy Theory of Legislation. Hans Kelsen in the "General Theori of Law and State" translation of the general theory of law⁷ and state elaborated by Jimly Assihiddiqie⁸ under the title Hans Kelsen's theory of law among other things that legal analysis, which reveals the dynamic character of the system of norms and the functions of basic norms, also reveals a further peculiarity of law: law governs its own formation because one legal norm determines the way to create another legal norm, and also to some degree, determine the content of the other norms. Because, one legal norm is valid because it is made in a way determined by another legal norm, and this other legal norm is the basis for the validity of the first legal norm.

Legal protection is all efforts that can ensure legal certainty, so as to provide legal protection to the parties concerned or who take legal action.⁹ Legal protection is a protection given to legal subjects in the form of legal instruments both preventive and repressive, both written and unwritten. In other words, legal protection as an illustration of the function of law, namely the concept where law can provide justice, order, certainty, expediency and peace.¹⁰

Legal protection aims to integrate and coordinate various interests in society because in a traffic of interests, protection of certain interests can only be done by limiting various interests on the other hand. Legal interests are concerned with human rights and interests, so that the law has the highest authority to determine human interests that need to be regulated and protected. Legal protection is born from a legal provision and all legal regulations provided by the community which is basically an agreement of the community to regulate behavioral relations between members of the community and between individuals and the government that are considered to represent the interests of the community.¹¹

Legal protection for every Indonesian citizen without exception, can be found in the Constitution of the Republic of Indonesia Year 1945 (UUDNRI 1945), for that every product produced by the legislature must always be able to provide legal protection guarantees for everyone, even must be able to capture the aspirations of law and justice that develop in society. This can be seen from the provisions governing the existence of equal legal position for every citizen.¹²

RESEARCH METHODOLOGY

1. Types of Research

This study was prepared using an evaluative descriptive research type. Descriptive research, is a systematic, factual and accurate picture or painting of phenomena or relationships between the phenomena investigated. The approach used in the study is an evaluative approach, where the author intends to collect data on electronic certificates as evidence of land tenure. Evaluative research in its course is centered on final recommendations that affirm that an object of evaluation can be maintained, improved, improved or even dismissed in line with the data obtained. This research was carried out to obtain data and produce conclusions in the field¹³

2. Research Data Sources

Data sources in this study are divided into two parts, namely primary data sources and secondary data sources. A primary data source is a data source that directly provides data to the data collector; while secondary data sources are data sources obtained by reading, studying and understanding through other media sourced from literature, books, and documents"¹⁴.

The primary data sources in this study were interviews and observations. The results of interviews with informants that have been specified in the research plan have been carried out at the time of the study.

Secondary data sources are: from scientific journals and books to support the research process.

3. Data Collection Techniques

This data collection method with literature research or commonly called literature study, this method is carried out to obtain secondary data both in the form of primary legal material and secondary legal material. After the inventory, a review is carried out to make the essence of each regulation concerned. Data is collected by studying literature sources in the form of literature books, laws and regulations, and collecting existing data in the form of data that is directly related to the research conducted.¹⁵

4. Data Analysis

The research technique in this study is descriptive analytical, where the analysis is carried out critically. The data collected in this study will be analyzed descriptively with a *qualitative approach*, namely by providing a thorough and in-depth explanation and explanation (*holistic / verstelen*).¹⁶

RESEARCH RESULTS

Legal guarantees against holders of fiduciary guarantees against fiduciary guarantee objects seized by the state are counted as criminal payment of substitute money through court decisions in criminal cases

Article 1131 of the Civil Code states that all assets of a debtor, both in the form of movable and fixed objects, both existing and new ones that will exist in the future, become collateral for all

debt engagements. So based on the provisions in the article, there is actually a guarantee by a debtor to each of his creditors with all the debtor's wealth. However, the guarantee pattern formulated in Article 1131 of the Civil Code does not provide a strong position for creditors. The weakness of the creditor's position is given a solution by Article 1132 of the Civil Code, in which this article it is affirmed that:

"The property shall be common security for all who owe it; the revenue from the sale of such goods shall be divided according to the balance, that is, according to the size of their respective receivables, unless among the receivables there are valid reasons for precedence".

The provisions in Article 1132 of the Civil Code contain the principle that creditors will get equal repayment of receivables from debtors. However, this principle does not apply if among creditors there are valid reasons for precedence in obtaining repayment of receivables. The preferred position of creditors is obtained, among other things, if they have property rights.

Property rights are born when creditors support their debt receivables agreements with material agreements. This agreement is carried out by binding the property of the debtor. A material security agreement is an absolute right to a certain object that is used as an object of collateral for a time can be cashed for repayment or payment of debts if the debtor defaults.¹⁷

In connection with the principle of providing legal certainty, UUJF takes the principle of registration of fiduciary guarantees. The benefit of a fiduciary agreement in writing is that the creditor holding the fiduciary security in his or her interest will demand the easiest way to prove the delivery of the security to the debtor. The most important thing to anticipate the possibility of things happening beyond our desires. Without a valid deed it will be difficult for the creditor to prove his rights. With the deed will be able to include special promises between debtors and creditors that regulate the legal relationship between them. Such registration is expected to provide legal certainty to the fiduciary and beneficiary as well as to third parties, which is generally intended to provide a strong position for creditors and later after registration is intended to also bind third parties.¹⁸

Furthermore, the binding of fiduciary guarantees between debtors and creditors must be viewed as a good faith of creditors who do not know that the object of fiduciary guarantees was obtained by the debtor from unlawful acts by committing criminal acts of corruption. Therefore, creditors holding fiduciary guarantees in good faith must be protected by applicable law. However, if the debtor's action in binding fiduciary guarantees to creditors is indicated to be a bad faith to save his property obtained from the proceeds of crime, especially corruption from confiscation by the court, then the object that has been bound by the fiduciary guarantee may be confiscated by the investigator upon court determination because it is evidence of the proceeds of crime that must be secured by the party who Authorities.¹⁹

However, recipients of fiduciary guarantees still receive legal protection, including in the case of special laws such as the UUPTPK which requires the state to confiscate the object of fiduciary guarantee. Moreover, in the event of a seizure of fiduciary security objects by the state due to the fiduciary guarantee objects originating from criminal acts of corruption, the fiduciary guarantee agreement does not terminate by itself.

According to Article 25 paragraph (1) of the UUJF, there are only 3 things that cause fiduciary guarantees to be removed, namely:

- a. Write-off of fiduciary-secured debts;
- b. Waiver of Fiduciary Guarantee by Fiduciary Beneficiary; or
- c. Destruction of Objects that are the object of Fiduciary Guarantee.

Fiduciary security objects seized by the state cannot be interpreted as destroyed as stipulated in letter c above. The definition of destruction here is that there is no longer the form of objects. While in the event that the property is seized by the state, materially the property still exists, it's just that juridically it is no longer in the control of the recipient of fiduciary guarantees and can no longer be taken away from state power.²⁰

As for the form of legal protection for third parties, including fiduciary guarantee holders so that their rights can be maintained even though the objects used as objects of fiduciary guarantees are still seized for the state, the recipient of fiduciary guarantees can use civil procedural legal instruments which in the Criminal Procedure Code itself have provided a legal basis as stipulated in Article 98 of the Code of Criminal Procedure which reads:

- 1) If an act on which an indictment is based in a criminal proceeding by a district court causes harm to another person, the presiding judge of the hearing at that person's request may decide to combine the claim for damages into that criminal case.
- 2) The request referred to in paragraph (1) can only be submitted no later than before the public prosecutor files criminal charges. In the event that the public prosecutor is not present, the request is submitted no later than before the judge renders a verdict.

Based on the discussion above, it can be said that the recipient of fiduciary guarantees is protected by law, even though the objects that are collateral for his receivables are seized for the state as payment of money in lieu of corruption because the object used as fiduciary guarantee comes from corruption crimes committed by fiduciary guaranters. Legal protection for fiduciary guarantee holders is based on the provisions of Article 98 of the Criminal Procedure Code whose implementation is by filing a civil lawsuit against the party who harms them, not to the state, specifically in cases of criminal acts of corruption.²¹

Reformulation of Fiduciary Guarantee Execution Arrangements as a Legal Protection Effort for Creditors

The procedure for securing the execution of fiduciary guarantees is carried out in 3 (three) stages, which include:²²

a. Preparatory Stage

At the stage of preparation for execution security, it includes the preparation of plans which include making estimates of agreements and preparing execution security plans that contain the time of execution, the number of human resources, budget needs, equipment to be used, accommodation, security patterns, and how to act in the implementation of the execution. In

In addition to these stages, a coordination meeting was also held where the meeting material included an explanation of the legal status of fiduciary guarantees, conditions and nature of threats at the execution site and its surroundings, the number of National Police personnel who will be involved in the execution process, equipment injured, and an explanation of procedures for acting in the execution process. A coordination meeting must be held before the execution security process to be in line with the purpose of the promulgation of Perkap No. 8 of 2011, namely to carry out the execution of fiduciary guarantees in a safe, orderly, smooth and accountable manner.

b. Implementation stage

At the implementation stage, this execution security includes the preparation stage for the implementation and the implementation stage. The preparation stage for the implementation is carried out by checking the amount of real strength of security personnel and equipment, providing direction to personnel who will carry out execution security, explaining procedures for acting in the implementation of execution security, distribution of security personnel duties, and shifting troops. While the implementation stage is carried out as follows:

- 1) Appeal to parties who have no interest in leaving the execution site;
- 2) Maintain strict security when there is dialogue and negotiation between the execution executor and the executed;
- 3) Protect the execution executor and/or applicant, executed person and the public at the execution site;
- 4) Observe, supervise, and flag persons who attempt to obstruct or obstruct the execution process; and
- 5) Secure and supervise objects and/or items to be executed

c. Supervision and control stage

At the stage of supervision and control, this execution security includes the stages of preparation for implementation and the implementation stage. The preparation stage is carried out during the process of preparing security planning, preparing personnel and equipment, implementing execution security and consolidation. Activities carried out at the implementation stage are carried out directly and indirectly. Directly, it is carried out by the leadership element attached to the implementation of execution security, and indirectly, namely by monitoring / monitoring the entire series of execution security activities through communication or reporting means. At the stage of supervision and control, the execution security is carried out by the leadership authority in stages in accordance with the duties and responsibilities based on the security organizational structure.

The purpose of this supervision and control stage is to ensure that the security plan has been adjusted to the situation, conditions, and threats that will be faced, in addition to ensuring that the necessary personnel and equipment are ready and in accordance with the standards of security needs, preventing and protecting the behavior of personnel members who deviate

outside the procedure and / or exceed the limits of their authority and to ensure that security has been implemented according to the procedure and accountable. After the execution security process is completed, the National Police personnel through the field controller or the person in charge of security must make a written report and then the report is submitted to: Karoops with a copy to the Chief of Police for the Polda level and Kabagops with a copy to the Chief of Police, for the Police level.

In the case of carrying out a legal act, both parties between creditors and debtors need to be given legal protection so that both parties in carrying out legal actions do not feel disadvantaged by either party if in the future problems arise in the implementation of the legal act. The purpose of providing legal protection is so that both parties between creditors and debtors get legal certainty in carrying out a legal act.²³

In line with the principle of providing legal certainty, the Fiduciary Guarantee Act takes the principle of registering fiduciary guarantees. The registration is expected to provide legal certainty to fiduciary guarantors (debtors) and fiduciary guarantee recipients (creditors), as well as to third parties concerned. Fiduciary guarantee is a form of engagement between creditors and debtors arising from the agreement.²⁴

Fiduciary guarantee is a follow-up agreement to the main agreement which in this case is a loan and loan agreement. Fiduciary guarantee as debt security is carried out in three stages, namely the first stage, the obligator agreement, which is an agreement in the form of borrowing and borrowing money between creditors and debtors. The second stage, the material agreement, namely the transfer of property rights from the debtor to the creditor, is carried out by means of *constitutum possessorium*, namely the transfer of property rights as objects of fiduciary guarantee without physically surrendering the collateral. In the third stage, the stage of this loan use agreement is an agreement that the debtor can still physically control the object of the fiduciary guarantee.²⁵

Balanced legal protection between creditors and debtors has different forms. With the Fiduciary Guarantee Certificate, creditors have legal protection for ownership rights to the object of fiduciary guarantee including the execution if in the future the debtor cannot fulfill his performance (default). In addition, the debtor still has legal protection against objects that are the object of fiduciary guarantee if the creditor behaves arbitrarily and does not carry out the contents and provisions of the agreement that has been agreed between the two parties.²⁶

Based on this legal construction, it is not true if the Constitutional Court in its decision stated that Article 15 Paragraph (2) of Law No. 42 of 1999 concerning Fiduciary Guarantee as the norm that provides the executory title of Fiduciary Guarantee Certificate has a constitutional defect because it does not reflect the existence of balanced legal protection between the parties bound by the fiduciary agreement, in this case the fiduciary guarantor (debtor) and the recipient of fiduciary guarantee (creditor).

In the Constitutional Court Decision of the Republic of Indonesia Number 18/PUU-XVII/2019, the Constitutional Court described that the executory title only gives exclusive rights to creditors while debtors are denied the right to apply or get the opportunity to defend themselves

against alleged defaults and the opportunity to get proceeds from the sale of fiduciary guarantee objects. Creditors through the Fiduciary Guarantee Certificate have the right to directly execute the object of fiduciary guarantee if the debtor has been declared in default, but creditors cannot necessarily act arbitrarily because they are bound by the contents of the agreement that has been concluded between the two. One of them is about when and under what conditions the creditor can execute the object of fiduciary guarantee. These matters have been regulated in a fiduciary agreement which in its making has fulfilled a free agreement from the parties without any element of threat or coercion.²⁷

CONCLUSION

Based on the results of research and discussion, several things can be concluded as follows:

1. The recipient of fiduciary security is protected by law, even if the object that is collateral for his receivables is seized for the state as payment of money in lieu of corruption because the object used as fiduciary security comes from a criminal act of corruption committed by the fiduciary guarantor.
2. In line with the principle of providing legal certainty, the Fiduciary Guarantee Act takes the principle of registering fiduciary guarantees. The registration is expected to provide legal certainty to fiduciary guarantors (debtors) and fiduciary guarantee recipients (creditors), as well as to third parties concerned. Fiduciary guarantee is a form of engagement between creditors and debtors arising from the agreement.

Footnote

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