

LEGAL CONSEQUENCES OF UNREGISTERED FIDUCIARY GUARANTEE DEEDS ON THE AGREEMENTS VALIDITY

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Abstract

This study aims to examine the legal protection of creditors in fiduciary guarantee credit agreements. The method used is normative research. The results show that the provision of legal protection for creditors in the case of unregistered fiduciary credit guarantee agreements begins from the signing of the notarized fiduciary guarantee deed and is then confirmed through registration. Registration of fiduciary guarantees must uphold the principle of publicity and ensure legal certainty for creditors in recovering their debts. The details of the law on unregistered fiduciary guarantee deeds against the validity of the guarantee agreement are the invalidity of ownership of the promised goods. This is caused by notarial deeds that are not consistently documented at the fiduciary registration office or only rely on personal deeds, thus harming the executor of the deed and causing creditors to lose priority rights.

Keywords: Legal consequences; Fiduciary guarantee; Registration.

Abstrak

Penelitian ini bertujuan mengkaji perlindungan hukum bagi kreditur dalam perjanjian kredit jaminan fidusia. Metode yang digunakan adalah penelitian normatif. Hasil menunjukkan bahwa pemberian perlindungan hukum bagi kreditur dalam hal perjanjian kredit jaminan fidusia yang tidak terdaftar dimulai sejak ditandatanganinya akta jaminan fidusia yang diaktakan dan selanjutnya ditegaskan melalui pendaftaran. Pendaftaran jaminan fidusia harus menegakkan prinsip publisitas dan memastikan kepastian hukum bagi kreditur dalam pemulihan utang mereka. Konsekuensi hukum akta jaminan fidusia yang tidak terdaftar terhadap keabsahan perjanjian jaminan adalah tidak sahnya kepemilikan barang yang diperjanjikan. Hal ini disebabkan oleh akta notaris yang tidak konsisten terdokumentasi di kantor pendaftaran fidusia atau hanya mengandalkan akta-akta pribadi, sehingga merugikan pelaksana akta dan menyebabkan kreditur kehilangan hak prioritas.

Kata Kunci: Akibat hukum; Jaminan fidusia; Pendaftaran.

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INTRODUCTION

Jurisprudence acknowledges the fiduciary as an institution that provides guarantees. According to established legal precedent, a fiduciary relationship exists when one party (the debtor) transfers legal title to another party (the creditor), who then exercises physical control over the transferred property, with the understanding that the creditor will return the transferred title to the debtor upon the debtor's repayment of the debt. Creditors are required to return goods ownership rights to debtors within the specified time period or without breach of promise (contribution processium).

"Fiduciary is the transfer of ownership rights of an object based on trust with the provision that the object whose ownership rights are transferred remains in the possession of the owner of the object," reads Article 1 of Law Number 42 of 1999 Concerning Fiduciary Guarantee (hereinafter called the Fiduciary Guarantee Law). Before the Fiduciary Guarantee Law was passed, the collateral for a fiduciary guarantee could be anything that could be moved, such as items in stock, goods for sale, accounts receivable, machinery, and cars.

Legislation 42 of 1999 governs the subject of fiduciary guarantees. As a way to help with business activities and give interested parties legal certainty, the government has drafted this fiduciary guarantee law to address community needs regarding the regulation of fiduciary guarantees.¹

The Regulations pertaining to Fiduciary Guarantee are set out in Law 42 of 1999. The government has drafted this fiduciary guarantee law to address community concerns about the regulation of fiduciary guarantees, which can help with business activities and give interested parties legal certainty.²

Debt guarantees executed through fiduciary guarantees are now required to adhere to the rules laid out by the newly passed Fiduciary Guarantee Law. Among the many factors that went into its creation, this law addresses the following: first, the ever-increasing demand for capital in the corporate sector necessitates comprehensive and transparent legal safeguards to control guarantee institutions. Second, in order to form comprehensive provisions regarding fiduciary guarantees and have them registered at the fiduciary registration office, it is necessary to meet legal needs that can further spur national development, guarantee legal certainty, and be able to provide legal protection for interested parties. A Fiduciary Guarantee Law is considered essential in light of these two factors.

The initial owner (the fiduciary giver) must maintain possession of the transferred object in order for the term to be defined and limited in Article 1 of the Fiduciary Guarantee Law: a fiduciary transfer of ownership of an object is an act of trust. The arrangement is seen as based on trust because the collateral remains with the person who is legally obligated to pay it. Sri Soedewi Masjehun Sofwan argues that fiduciary institutions arose because legislation controlling pawn institutions is flawed, ignores societal needs, and is unable to keep up with society's fast development.³

In order to use fiduciary guarantees for business purposes, the institution providing the guarantees must grant fiduciaries control over the collateralized objects. Here, what is referred to as constitutum ownership, is the sole thing that changes hands; the item itself remains the same. Inventory, goods for sale, accounts receivable, machinery, and vehicles were the only tangible, movable property that could

¹ Fince Ferdelina Huru, "Legal Position of Unregistered Fiduciary Guarantee Deeds," *Journal of Legal Science Perspectives* (2017): 47.

² Tan Kamello, *Fiduciary Guarantee Law: A Desired Necessity* (Bandung: Alumni, 2014).

³ Sri Soedewi Masjehun Sofwan, *Several Problems in the Implementation of Guarantee Institutions, Especially Fiduciary Institutions, in Practice and Implementation in Indonesia* (Yogyakarta: Gadjah Mada University Press, 1977).

be deemed a fiduciary at first. Nevertheless, the Fiduciary Guarantee Law subsequently broadened this to encompass additional forms of collateral that were not previously controlled by positive law.

Field implementation of fiduciary agreements compounds the aforementioned problems; for example, some creditors simply make credit agreements, others make authentic deeds but don't register them with the fiduciary registration office. Furthermore, recipients of fiduciary assets often face additional costs as a result of negotiations, meaning that society lacks the legal certainty that fiduciary certificates claim to provide. Thus, a legal regulation is necessary to provide legal certainty as a type of protection, as creditors frequently incur losses in the field due to debtor defaults.

Customers can get consumer finance, leasing, and factoring from a wide variety of financial institutions and banks these days. In most cases, they will employ a fiduciary guarantee as part of an agreement procedure. In actuality, the consumer (then known as the debtor) requests and receives movable goods (like a motorcycle or industrial machine) from the lending institution. The debtor is obligated to transfer it to the creditor in a fiduciary capacity. Thus, the creditor assumes the role of fiduciary receiver, and the debtor, as owner of the goods, assumes the role of fiduciary giver. An easy way to implement fiduciary guarantees is for the party owning the goods or the debtor to offer financing to the party seeking credit. Then, a notarial deed is made and the parties agree to use fiduciary guarantees for the debtor's property. A fiduciary certificate is issued to the creditor, who is the designated recipient, and a duplicate is provided to the debtor. Similar to bank loans, the creditor or fiduciary beneficiary of a fiduciary guarantee certificate has the immediate right to direct execution, also known as *parate execution*.

In addition, not using a fiduciary guarantee certificate when making a fiduciary promise also carries with it complicated and potentially harmful legal ramifications. Creditors have the power to execute because it is seen as a unilateral action that can lead to creditors acting arbitrarily. It might also be due to the fact that funds allocated for fiduciary purposes are often insufficient in relation to the worth of the items. On the other hand, if the debtor has fulfilled some of the agreement's requirements, then the creditor can claim partial ownership of the rights over the goods. Furthermore, in the event that neither a public auction nor an official price appraisal body is consulted in the execution. You can sue for damages if this is classified as an Unlawful Act (PMH) according to Article 1365 of the Civil Code. Furthermore, the author argues that creditors' use of debt collectors or collectors themselves to engage in arbitrary actions can be seen as a violation of criminal law. The use of threats of confidence and coercion by the creditor is, therefore, considered a violation of Article 368 of the Criminal Code,⁴ This can happen when an executor's creditor seizes goods by force, even though it's known that the goods actually belong to someone else. However, it is also known that a creditor who wishes to execute but is not listed in the fiduciary office owns some of the goods.

Since execution is not a walk in the park, it necessitates legal assurances and the backing of legal authorities; consequently, other articles can be imposed as well. This highlights the critical need for fair legal protections for both creditors and debtors. Due to the validity or legality of the fiduciary guarantee agreement, the Fiduciary Guarantee Law will not catch the debtor's underhanded transfer of the fiduciary object.

Based on this, a problem identification can be obtained, which is how to provide creditors with the protection they need when dealing with an unregistered Fiduciary Guarantee Credit Agreement. Secondly, given the validity of the guarantee agreement, what are the legal ramifications of an unregistered fiduciary guarantee?

⁴ Muhammad Hilmi Akhsin and Anis Mashdurohatun, "Legal Consequences of Unregistered Fiduciary Guarantees According to Law No. 42 of 1999," *Jurnal Akta* 4, no. 3 (2017): 497.

METHOD

This type of research uses normative legal research.⁵ The approach used in analyzing in this research is a statutory approach, a case approach and a concept approach.⁶ The data sources used are primary data consisting of primary legal materials in the form of regulations related to land and customary land and customary law communities, then secondary legal materials in the form of journals, book papers related to customary land and tertiary legal materials in the form of dictionaries, legal encyclopedias. While the data analysis using legal theory in the form of legal certainty and the theory of property rights related to the existence of communal land. The results of the analysis of the data found will be formulated into a legal concept to answer the problems studied.

RESULT AND DISCUSSION

1. *Legal Protection for Creditors Due to Unregistered Fiduciary Collateral Credit Agreements*

One form of protection that legal subjects receive is guidance on how to best uphold and defend their rights and interests. If the unregistered goods that are the subject of the fiduciary guarantee are inventories,⁷ then the protection that the creditor will receive is in line with what is stated and guaranteed in the fiduciary guarantee certificate that the creditor holds, and this legal protection is associated with the interests of the creditor.

Gift givers, recipients, and third parties can all benefit from the legal certainty that comes with registration. The guarantee bond itself is what is registered when a fiduciary guarantee is made. Following the principle that all matters relating to the guarantee, including the objects related to the guarantee, will be recorded in the guarantee bond, this guarantee bond will be registered.

Instead of collateral objects being registered, the provisions of the Fiduciary Guarantee Law that pertain to fiduciary guarantees are intended to benefit the collateral bond document known as the fiduciary guarantee deed. While the "fiduciaire eigendomsoverdracht" registration system safeguards creditors from third parties by registering objects and fiduciary guarantee bonds for non-inventory collateral, it leaves business actors using fiduciary institutions bewildered.

The stated goal of registration actually causes confusion and ambiguity regarding what exactly ought to be registered, since all that is registered during the process is a notary's fiduciary guarantee. Article 11 of the Fiduciary Guarantee Law requires the registration of objects, but this has never been done, especially with regard to goods.

The registration function is crucial for all types of debt guarantees, including fiduciary guarantees. As a result, the Fiduciary Guarantee Law regulates this function by mandating that every fiduciary guarantee be registered with an authorized official. There are still unregistered fiduciary guarantee agreements in the banking environment, despite the critical importance of registering such agreements. It also happens in the context of financing institution fiduciary guarantee agreements. Legally, the creditor offering the fiduciary guarantee does not get important characteristics like *droit de suite* and preference rights because an unregistered fiduciary guarantee agreement does not create a substantial agreement for the fiduciary guarantee.

⁵ Sulistyowati Irianto & Shidarta, *Metode Penelitian Hukum Konstelasi Dan Refleksi* (Jakarta: Yayasan Obor Indonesia, 2009).

⁶ Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana Prenada Media Group, 2013).

⁷ Wirjono Prodjodikoro, *Principles of Contract Law* (Bandung: Bale Bandung, 1986).

If the debtor is unable to fulfill their obligations as a final settlement due to the failure of the rescue efforts, the collateral object for the provision of bad credit with fiduciary collateral is executed. Concerns about the practicality of fiduciary collateral registration persist. There is uncertainty because the Fiduciary Guarantee Law does not specify what needs to be registered. Even among legal experts, there are differing opinions on this matter. Some contend that the object itself is registered in addition to the fiduciary guarantee deed, while others maintain that only the latter is registered. After looking into the notary's guarantee deed, it becomes clear that the fiduciary guarantee deed and object are what are legally recorded.

Individuals in the general public use fiduciary guarantees to back modest loans with low-value collateral. If these items are registered, the registration fee will seem disproportionately high when weighed against the collateral's value. Also, keep in mind that registration locations are currently (and likely will remain) limited to major cities, so there's that added layer of inconvenience to think about. Legislators would do well to let those with a stake in the matter decide for themselves whether registration is required.

Constitution Fiduciary guarantees also provide convenience in carrying out execution through the parate execution institution. Article paragraph (1) of the Civil Code states: that :

“If the parties have not agreed otherwise, then the creditor has the right if the debtor or the pawnbroker defaults, after the given grace period has passed, or if no grace period has been determined, after a warning to pay has been given, to order the sale of the pawned goods in public according to local customs and under the generally applicable conditions, with the intention of taking payment of the amount of the debt along with interest and costs from the proceeds of the sale.”

Article 6 of the Mortgage Rights Law reads:

“If the debtor defaults, the first Mortgage Right holder has the right to sell the Mortgage Right object under his own authority through a public auction and to take payment of his receivables from the proceeds of the sale.”

Article 20, paragraph (1) of the Mortgage Rights Law stipulates: “In the event of debtor default, the first Mortgage Right holder may exercise the following rights: a. The authority to sell the object of the Mortgage Right as outlined in Article 6, or b. The executorial title specified in the Mortgage Certificate, as referenced in Article 14, paragraph (2) of Article 29 of the Fiduciary Guarantee Law, which states that if the debtor or Fiduciary Provider defaults, execution of the object subject to the Fiduciary Guarantee may proceed as follows.”:

- a. Execution of the executorial title by the Fiduciary Recipient;
- b. Sale of items subject to Fiduciary Guarantee under the authority of the Fiduciary Recipient via public auction, with the collection of receivables from the sale proceeds;
- c. Private sales are conducted based on an agreement between the grantor and grantee of the Fiduciary, provided this method yields the highest price advantageous to both parties.
- d. One method to safeguard the interests of Creditors (as Fiduciary Recipients) is to establish explicit provisions for Creditors. The regulation of comprehensive data required in the Fiduciary guarantee (Article 6 of the Fiduciary Guarantee Law) indirectly affords Creditors, as Fiduciary Recipients, significant leverage, particularly regarding the guaranteed bills and the guarantee value, which delineates the extent of the preferred creditor's claim. The legal protection and interests of creditors in the Fiduciary Guarantee Law are delineated in Article 20 of the Fiduciary

Guarantee Law. The fiduciary maintains oversight of the object subject to the fiduciary guarantee, regardless of its custodian, with the exception of the transfer of inventory objects that fall under the fiduciary guarantee. The provisions underscore that fiduciary guarantees possess a tangible nature and are subject to the principle of *droit de suite*, with the exception of the transfer of inventory items that are the subject of fiduciary guarantees.

Identical protection is also evident in Article 23, paragraph (2): “Fiduciary givers are forbidden from transferring, pawning, or renting objects covered by Fiduciary guarantees that are not inventory items, unless prior written consent is obtained from the Fiduciary Recipient.” The penalties for the aforementioned provisions are criminal, as delineated in Article 36 of the Fiduciary Guarantee Law: “A Fiduciary Provider who transfers, pledges, or leases an inventory item without prior written consent from the Fiduciary Recipient.” The act of executing the Fiduciary Guarantee, as delineated in Article 23 paragraph (2), without prior written consent from the Fiduciary Recipient, shall incur a penalty of up to 2 (two) years of imprisonment and a maximum fine of IDR 50,000,000 (fifty million rupiah). The fiduciary recipient is not liable for any actions or negligence of the fiduciary provider, as stipulated in Article 24 of the Fiduciary Guarantee Law: “The Fiduciary Recipient does not bear any liability for the consequences of the actions or negligence of the Fiduciary Provider, whether arising from a contractual relationship or from unlawful acts related to the use and transfer of objects subject to Fiduciary Guarantee.” The primary objective of the fiduciary guarantee agreement, regarding legal protection for creditors, is to confer privileges or priority rights to facilitate the repayment of debts owed by debtors (principle of *schuld and haftung*). Additional legal safeguards for priority rights to receivables are delineated in Article 27 of the Fiduciary Guarantee Law.

- 1) Fiduciary recipients have priority rights over other creditors.
- 2) The priority right as referred to in paragraph (1) is the right of the Fiduciary Recipient to take settlement of his receivables from the results of the execution of the Goods which are the object of the Fiduciary Guarantee.
- 3) The rights that are prioritized and the Fiduciary Recipient are not removed due to bankruptcy and/or liquidation of the Fiduciary Provider

Several indicators of legal protection for creditors (Fiduciary Recipients) under the Fiduciary Guarantee Law include the following:

- a. The establishment of a fiduciary guarantee registration institution serves to protect the interests of the fiduciary recipient;
- b. A prohibition exists against the fiduciary provider re-fiduciating the object of the fiduciary guarantee (Article 17);
- c. The fiduciary provider is restricted from transferring, mortgaging, or leasing the object (Article 23 Sub 2);
- d. The fiduciary provider is obligated to surrender the collateral if the creditor intends to execute the fiduciary collateral object;

Criminal provisions are a part of the Fiduciary Guarantee Law. While simultaneously satisfying the principle of publicity, the registration of a fiduciary guarantee gives other creditors certainty regarding the encumbered object. When it was recorded in the fiduciary registration ledger, the Fiduciary Guarantee came into existence. Although the Fiduciary Guarantee Law states that the domicile of the Fiduciary Giver is where fiduciary registration must take place, many applicants (Fiduciary Recipients) still choose to register fiduciary guarantees at the location of the object that needs them. This is why the Fiduciary Registration Office rejects so many applications for

registration; instead, the office that corresponds to the home of the Fiduciary Giver should be used for registration. It is not within the purview of the Fiduciary Registration Office to confirm that the information in the deed is accurate. The accuracy of the requested data and the thoroughness of the administration are solely determined by the Fiduciary Registration Office.

There will be a record of the fiduciary guarantee deed in the Fiduciary Registration Book and a certificate issued to the creditor upon registration of the fiduciary agreement deed. Given that anyone can visit the Fiduciary Registration Office, registering the fiduciary encumbrance deed will accomplish the following: it will create a fiduciary guarantee for the fiduciary giver; it will give priority rights to creditors; and it will provide certainty to other creditors regarding the object that has been burdened with the fiduciary guarantee. To update the information on the Fiduciary Guarantee Certificate, the beneficiary must apply for the change to be registered with the Fiduciary Registration Office. Following the fulfillment of all administrative obligations, the applicant (Fiduciary Recipient) will be issued one Fiduciary Guarantee Certificate and one Fiduciary Register Book to be kept at the Fiduciary Registration Office. That the Fiduciary Guarantee Certificate includes the words *irah-irah*, meaning "BY THE BASIS OF GOD ALMIGHTY," is something that creditors receiving fiduciary guarantees can really appreciate, according to Article 15 paragraph (1) of the Fiduciary Guarantee Law. Keep in mind that creditors cannot benefit from the legal protections afforded to them by fiduciary registration in the form of preferential payment of receivables unless the Fiduciary Registration Office has registered their fiduciary guarantee agreement.

2. Legal Consequences of Unregistered Fiduciary Guarantee Deeds on the Validity of Guarantee Agreements

The problem of legal certainty (*rechtszekerheid*) is one of the fundamental policies cited by the GBHN in connection to the evolution of the law. Legal certainty does not exist for any occurrence that has not been specifically addressed in a statute. Conversely, if the event in question has been officially recognized by the law, it can be said to possess legal certainty.

One sign of these issues is the legislative supervision of fiduciary duties. Among the many benefits enjoyed by members of legally bound fiduciary institutions is the facilitation of loan repayments without impeding the capacity of either the creditor or the borrower to do so. Article 11, number 1 of the Fiduciary Guarantee Law states that objects burdened with fiduciary guarantees must be registered. This will help clarify the meaning of the word "obligatory" in the provisions mentioned earlier. Given the lack of a clear statement in the Fiduciary Law declaring that an unregistered fiduciary is void, J. Satrio contends that the aforementioned provisions ought to be interpreted as necessitating the registration of the fiduciary guarantee object for the Fiduciary Law's provisions to be applicable. According to Article 37 number 3 of the Fiduciary Law, in order to benefit from the law, a fiduciary must be registered.

Instead of collateral objects being registered, the provisions of the Fiduciary Guarantee Law that pertain to fiduciary guarantees are intended to benefit the collateral bond document known as the fiduciary guarantee deed. While the "*fiduciaire eigendomsoverdracht*" registration system safeguards creditors from third parties by recording non-inventory collateral objects and fiduciary guarantee bonds, it can be confusing for business actors utilizing fiduciary institutions. A notary's fiduciary guarantee deed is the only thing that gets registered during the registration process, which leads to confusion and ambiguity regarding the actual purpose of the registration. Although the

registration of objects is stated in Article 11 of the Fiduciary Guarantee Law, it has never been implemented, particularly with regard to merchandise.

In actuality, this fiduciary legal entity is severely lacking due to the fact that it is not required to register. The lack of a registration requirement for a fiduciary guarantee makes it impossible for the guarantee to meet the element of publicity, making it difficult to regulate, and it also creates legal uncertainty. In reality, this can lead to undesirable outcomes like the creditor being unaware of the existence of two fiduciaries or the transfer of goods occurring behind their back, among other things.

Due to the critical nature of the registration function for all types of debt guarantees, including fiduciary guarantees, the Fiduciary Guarantee Law mandates that all fiduciary guarantees be registered with the appropriate official.

Credit practices in banking environments still involve unregistered fiduciary guarantee agreements, despite the critical importance of registration. Financing institution fiduciary guarantee agreements also contain this provision. Unregistered fiduciary guarantee agreements fail to establish a substantial agreement for the guarantee, which means that the creditor offering the guarantee does not acquire important legal characteristics like *droit de suite* and preference rights.

Without a fiduciary guarantee certificate, the legal ramifications of a fiduciary guarantee are complicated and potentially disastrous. Because they are seen as unilateral, creditors have the right to execute, which can lead to arbitrary actions from the creditor. Another possible explanation is that the funding for fiduciary objects is often insufficient compared to their actual value. On the other hand, if the debtor has fulfilled some of the agreement's requirements, then the creditor can claim partial ownership of the rights over the goods. Furthermore, in the event that neither a public auction nor an official price appraisal body is consulted in the execution. If a cause and effect relationship exists, then the wrongdoer's illegal actions are directly responsible for the victim's losses. Paying close attention to the description above, it becomes clear that a civil code article (Article 1365) must be satisfied in order for a compensation lawsuit to be filed based on unlawful acts.

Coercion and threats of confiscation by a creditor constitute the criminal act of "underhand execution of fiduciary objects" according to criminal law theory (Article 368 of the Criminal Code). According to this article:

- a. An individual faces a maximum prison term of nine months for extortion if, for the purpose of unlawfully benefiting themselves or another person, they coerce another person into giving something that rightfully belongs to them, creating a debt, or threatening to do so.
- b. This crime is subject to the provisions of paragraphs two, three, and four of Article 365.

This can happen when an executor's creditor seizes goods by force, even though it's known that the goods actually belong to someone else. However, it is also known that a creditor who wishes to execute but is not listed in the fiduciary office owns some of the goods. Since execution is not a walk in the park, it necessitates legal assurances and the backing of legal authorities; consequently, other articles can be imposed as well. This highlights the critical need for fair legal protections for both creditors and debtors.⁸

The debtor's underhanded transfer of the fiduciary object is immune from the reach of the Fiduciary Guarantee Law, as long as the underlying fiduciary guarantee agreement is:

⁸ Happy Trizna Wijaya, "Legal Consequences of Confiscation of Unregistered Fiduciary Collateral Objects," *Bonum Commune Business Law Journal* 3, no. 1 (2020): 51.

“Anyone who intentionally and unlawfully owns something which wholly or partly belongs to another person, but which is in his control not because of a crime, is threatened with embezzlement, with a maximum imprisonment of four years or a maximum fine of nine hundred rupiah.”

By creditors, but this could be a mistake because they could end up reporting each other. Since the goods in question belong to both the creditors and the debtors, a civil decision from the local district court is required to establish who exactly owns what percentage of the goods. It will be expensive and time-consuming to go through the legal system if this is done. So, not only does the business lose time and energy, but it also misses out on the profit margin it had hoped to achieve.

Because they lack the authority to legally execute them, financing institutions that fail to record fiduciary guarantees really lose out. Existing legal logic is incompatible with business problems that demand speed and outstanding customer service. Perhaps due to a lack of a coherent body of law or to the fact that it does not necessarily keep pace with technological advancements. Picture this: financing institutions make fiduciary agreements and transactions in the field relatively fast, but fiduciary guarantees must be made before a notary.

Executions on goods burdened with unregistered fiduciary guarantees are currently carried out by many financing institutions. Financial institutions have not experienced any problems with their operations thus far. This is supposedly due to the fact that consumers still have little leverage when negotiating with creditors, who own the funds. On top of that, most people still don't know much about the law. Business actors in the financial industry take advantage of this vulnerability through dishonest fiduciary guarantee practices, particularly in the banking and financing sectors.

Given the critical nature of the registration function for fiduciary debt guarantees, the Fiduciary Guarantee Law regulates this by mandating the registration of all fiduciary guarantees with an authorized official. A modern debt guarantee will have the publicity element fulfilled, among other things. Therefore, it is preferable if the debt guarantee is widely publicized, so that creditors and the general public can learn or have access to learn crucial details regarding the debt guarantee. Whenever the actual collateral items, like fiduciary guarantees, are not transferred to the creditors, the principle of publicity takes on more significance as a debt guarantee. So, one way the crucial principle of publicity is put into practice is through the requirement to register fiduciary guarantees with the authorized agency. It is expected that the parties will maintain vigilance when reaching agreements with this registration.

Article 11 of the Fiduciary Law states that:

- (1). “Objects burdened with fiduciary guarantees must registered
- (2). In the case where the object burdened with fiduciary guarantee is outside the territory of the Republic of Indonesia, the obligations as referred to in paragraph (1) remain in effect.”

In light of the foregoing, it follows that, regardless of the location of the objects, the duty to register them as being subject to fiduciary guarantees must be fulfilled. Among other things, the Considerations of the Fiduciary Guarantee Law state that the registration of the guarantee at the Fiduciary Guarantee Registration Office is necessary and that the Law on Fiduciary Guarantees is expected to give legal certainty and protection for all parties involved. There is a lack of clarity and

multi-interpretability in the use of the words "need, mandatory" that goes against the idea of legal certainty.⁹

Since there is no provision in the Fiduciary Guarantee Law that states that unregistered fiduciaries are invalid, the above provision is interpreted that in order for the provisions in the Fiduciary Guarantee Law to apply, the requirement must be met that the fiduciary guarantee object is registered. Fiduciaries who cannot enjoy the benefits of the provisions in the Fiduciary Guarantee Law.¹⁰

Even regular people will use fiduciary guarantees to back low-value loans with similarly low-value collateral. When such collateral items are registered, the registration fee will seem disproportionate to their value. Furthermore, the inconvenience needs to be considered as well, because the registration location is currently (or may be in the future) limited to major cities. It would be prudent for lawmakers to let those involved decide for themselves if registration is needed or not.

Legal certainty for the parties, priority rights, a fiduciary guarantee bond for creditors, and the fulfillment of the principle of publicity are all goals and purposes of registering a fiduciary guarantee. Not registering the object burdened with a fiduciary guarantee has various legal ramifications, which is bad for the parties involved.¹¹ Here are the losses that the parties have encountered

- a. Creditors face the following legal ramifications if fiduciary guarantees are not registered:
 - 1) Does not create fiduciary guarantees for the recipient fiduciary
 - 2) Creditors do not have the position of preferred creditors
 - 3) Does not have legal execution rights
 - 4) Does not meet the principle of publicity
 - 5) Re-fiduciary by debtor
- b. If debtors fail to register the goods that are the subject of fiduciary guarantees, they may face the following legal ramifications:
 - 1) Creditors may unilaterally exercise their right of execution, which can result in arbitrary actions
 - 2) Execution is not carried out through an official price assessment body or Public Auction Body.

The provisions of the Fiduciary Guarantee Law, particularly those that can benefit the parties involved, become inapplicable if the object burdened with the guarantee is not registered. But that doesn't imply the Fiduciary Guarantee agreement can't be valid if it isn't registered or made in a notarial deed. That's because according to the Civil Code, specifically Article 1320 paragraph (1) about the principles of binding oneself and their mutual agreement, Article 1320 paragraph (2) about the principle of equal position, and Article 1338 about the principle of Pacta Sunt Servanda, a non-notarial fiduciary agreement can still be valid if it meets all those requirements

⁹ Ni Wayan Tirtawati, "Implementation of Article 11 Paragraph (1) of the Law on Fiduciary Guarantees: Perspective of Credit Agreements with Fiduciary Guarantees at the Pawnshop Company," *Acta Comitatus* (2016): 295.

¹⁰ J. Satrio, *Law on Guarantee of Fiduciary Property Rights* (Bandung: Citra Aditya Bakti, 2002).

¹¹ Oey Hoey Tiong, *Fiducia as a Guarantee of the Elements of an Agreement* (Jakarta: Ghalia Indonesia, 1983).

CONCLUSION

Because it does not constitute a substantial agreement for the fiduciary guarantee, the creditor offering the guarantee does not acquire substantial features like *droit de suite* and preferential rights when a fiduciary guarantee agreement is not registered. A notarial Deed of Fiduciary Guarantee establishes the legal protections for creditors in a fiduciary guarantee agreement, and subsequent registration with the Fiduciary Registration Office to acquire a certificate of fiduciary guarantee further reinforces this protection. The principle of publicity, which ensures that creditors will receive their receivables from the debtor with legal certainty, is satisfied when the fiduciary guarantee is registered.

A notarial deed is not necessary for a fiduciary agreement to be valid; the absence of registration with the Fiduciary Registration Office will not have any effect on that. For the simple reason that any agreement can be legitimately executed and enforced so long as it satisfies the legal standards for such an agreement, is executed in good faith, and binds the parties to it.

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