

## **Improving The Object Of Fiduciary Guarantee According To Law Number 42 Of 1999 On Fiduciary Guarantee**

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### **ABSTRACT**

Fiduciary is the transfer of ownership rights of an object based on trust, where ownership right of the object is transferred remains under the control of the owner of the object. The subject of the research was how to bind the object of fiduciary guarantee according to Law Number 42 of 1999 on fiduciary? What are the consequences if the binding of fiduciary guarantee object is unfulfilled? This research was normative legal research which means that the objects are secondary data on library. The type of the research was descriptive. It can be concluded that the binding of fiduciary guarantee object according to Law Number 42 of 1999 on fiduciary guarantee is certificate of fiduciary guarantee as an evidence which is an authentic deed. It can be seen from the characteristics of certificate fiduciary guarantee, issued by an authorized official or public official who has authority for issuing certificate fiduciary guarantee in Fiduciary Registration Office under the supervision of the Ministry of Law and Human Rights. The consequences (the binding of fiduciary guarantee object is unfulfilled) are the default causes several legal consequences for debtors and creditors, especially for creditors who must loss. While for debtors, the legal consequence is the existence of a new status for which the debtor must responsible of. Fiduciary guarantee, mostly in form of movable objects, allows for a transfer of fiduciary guarantee; one example of the reason for the transfer is the debtor wants to transfer his credit to another creditor to seek for lower interest. Then, if a debtor has paid off the debt, it can cause the fiduciary guarantee to be canceled.

**Keywords:** binding, object guarantee, fiduciary.

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### **1. INTRODUCTION**

Insurance Institution as one of legal sectors which has received serious attention in Indonesian economic development where the development of economic and trade increases the need for credit. This requires guarantee for safety in releasing money. Increase of economic activities is in line with activities in the credit sector. Credit activities essentially involve account receivable-payable. The creditors lend the money to obtain profits in the form of interest. Likewise, the debtors with this credit capital can run their business.

The lending and borrowing relationship begin with an agreement between the borrower (debtor) and the lender (creditor). The agreement is regulated in Book III of the Civil Code. The agreement is open to anyone in accordance with one of its principles, namely the freedom of contracting, which means that everyone is free on any agreement as long as it does not contradict to the law, public order, and morals. The principle of freedom of contracting stated on Article 1338 paragraph (1) of the Civil Code. This provision states

that all approvals made legally apply as a law for those who constructs them.

In national treaty law, the principle of freedom of contracting in responsibly which keep balancing needs to be maintained, namely “personality development” to achieve prosperity and happiness in the outer and inner life in harmony and balance to the interests of society.<sup>[1]</sup>

The account receivable-payable agreement between debtors and creditors is stated in the credit agreement. According to Indonesian Civil Law, a credit agreement is “a form of loan and borrowing agreement. Therefore, this agreement is subject to the Civil Code provisions in Article 1754 to Article 1769 concerning loan agreements”.<sup>[2]</sup>

The definition of bank in Article 1 number 2 of Law Number 10 of 1998 concerning Amendment of Law Number 7 of 1992 concerning Banking which stated that a bank is a business entity that collects funds from the society in the form of deposits and distributes them to the public in the form of credit or other forms to improve the standard of living of the wider society.<sup>[3]</sup>

Bank in providing credit refers to Five “C” principles, namely Character, Capacity, Capital, Guarantee, and Condition of Economy.<sup>[4]</sup>

Hartono Hadisoeparto stated that collateral refers to something given to ensure creditor that debtor is able to fulfill an obligation that can be valued in money arising from an engagement.<sup>[5]</sup>

The functions of collateral in credit are as follows:

1. Giving the authority to the bank to get repayment from collateral if the debtor could not fulfill the agreement.

2. Ensuring the debtor to finance their business.

3. Reinforcing the debtor to fulfill the agreement, especially repayment in accordance to the agreement agreed by debtor and/ or third party who gives guarantee of not losing the assets pledged to the bank.<sup>[6]</sup>

Credit collateral will provide absolute legal guarantee to bank where the credit will be returned from the executing credit collateral. According to Rahmadi Usman, an ideal collateral is as follows:

1. Providing facility of obtaining credit of certain party;
2. Maintaining potential of credit applier to run their business;
3. Assuring to creditor; the collateral can be executed anytime to pay off the credit of debtor.<sup>[7]</sup>

Bank has frequently received credit collateral in form of fiduciary collateral. Based on the elaboration, the researcher intended to analyzed the binding of fiduciary guarantee object in accordance to Law Number 42 of 1999 on fiduciary guarantee on a research entitles “IMPROVING THE OBJECT OF FIDUCIARY GUARANTEE ACCORDING TO LAW NUMBER 42 OF 1999 ON FIDUCIARY GUARANTEE”.

The research question can be formulated as follows:

1. How to bind fiduciary guarantee object according to Law Number 42 of 1999 on fiduciary guarantee?
2. What are the consequences if the binding of fiduciary guarantee object is unfulfilled?

## 2. METHODS

This research was normative legal research analyzed secondary data merely. The type of this research was analytical comprehensive study on primary, secondary, and tertiary legal material. The results were elaborated systematically, clearly, in detail and complete as a scientific paper.

### LITERATURE REVIEW

#### *Definition and function of bank*

There are several definitions of bank. According to A. Abdurahman, bank is a financial institution providing several services; providing loans, circulating money, observing on currencies, storing valuable objects, and financing company businesses.<sup>[6]</sup>

Another definition was stated by O. P. Simurankir. Bank is a financial institution aiming at providing credit and services. The credit provided could be own capital or funds from third parties or by circulating payment instruments in the form of demand deposits.<sup>[9]</sup>

“Basically, banking is an axis in which the financial system rotates from a particular society. The living environment of society is usually in the form of a country but sometimes among countries due to the speed of information especially in globalization.”<sup>[10]</sup>

Bank is setting of a certain business conventionally which provides cash flow services. However, the definition of a bank according to financial and banking experts from developed countries states that bank is a profit-oriented financial institution.<sup>[11]</sup>

According to Prof. G. M. Verrynt Stuart, “bank is an agency aiming at satisfying credit needs, either by their own payment tools or money obtained from others,

or by circulating new instruments of exchange in the form of demand deposits.”<sup>[12]</sup>

According to A. Abdurahman, “bank is a type of financial institution providing various services, such as providing loans, circulating currencies, controlling currencies, storing valuable objects, financing companies’ businesses and others.”<sup>[13]</sup>

From this definition, the bank is a company engaged in finance, meaning that banking activities are always related to the financial sector. The first banking activity is to collect funds from the wider community, known in banking terms as funding activities. The definition of collecting funds is collecting or seeking by buying from the wider community. This can be done by banks by installing various strategies so that people want to invest their funds in the form of savings.

Bank is financial company which involves financing activities. The initial task of bank is collecting funds from the society as known as funding. Collecting funds refers to collect and seek through buying from society by implementing various strategies to assure people to invest in form of saving.<sup>[14]</sup>

In conventional principles, the profits of bank are obtained from the interest gap on deposits given to depositors with interest on loans or credits. The profit from the gap is recognized as spread based. If the gap causes loss on a bank, the deposit interest rate is greater than the credit interest rate, it is known as negative spread.<sup>[15]</sup>

Indonesia in era of Dutch East Indies had already owned numbers of banking institutions. The banks was categorized into two categories; banks managed by colonial government (Dutch) and banks which were not interfered. *De Javasche Bank NV, De*

*Algemene Volkscrediet Bank, De Postpaar Bank* are banks managed by colonial government (Dutch). Meanwhile, the banks which obtaining capital from British, Japanese, Chinese and Dutch themselves, as well as Indonesian were not interfered by colonial government (Dutch).<sup>[16]</sup>

#### *Definition and bank credit agreement*

##### *1. Definition of Credit*

The word credit comes from the Roman word “*credere*” which means “believe”. In Dutch, the term “*vertrouwen*”, in English “believe” or “trust or confidence”, means the same thing namely believe. Believing refers to mention a truth, keep the promises, and do the duties and obligation that were assigned.<sup>[17]</sup>

The definition of credit based on Law Number 10 of 1998 concerning on amendment of Law Number 7 of 1992 on banking Article 1 Number 11 has slightly changed. Credit is the provision of money or claim based on credit agreement between the bank and another party which requires the debtor to pay off the debt on a certain period of time with a predetermined interest rate.

According to Gatot Supramono, bank must practice 5C principles in creating ideal credit, namely:

1. Character
2. Capacity
3. Capital
4. Collateral
5. Condition of economy

The evaluation is prioritized on political, social, economic, cultural and other situations and conditions affecting economic conditions within a certain period of time. The economic condition referred to economic situation on country of the prospective debtor as well as the economy of the bank itself”.<sup>[18]</sup>

According to Kasmir, implementation of 7P principles is necessary besides 5C principles. 7P principles cover:

1. Personality
2. Party
3. Purpose
4. Prospect
5. Payment
6. Profitability
7. Protection

The goal is to protect business and collateral. The protection can be in form of guarantee of goods or persons or insurance coverage.<sup>[19]</sup>

According to Rachmadi Usman, bank must implement 3R principles besides 5C and 7P, namely:

1. Returns
2. Repayment
3. Risk Bearing Ability

Thus, collateral or object or credit insurance must be considered to cover risk.<sup>[20]</sup>

#### *Definition and types of collateral*

Hermansyah on the book entitle “*Hukum Perbankan Nasional Indonesia*” has classified collateral into two types, namely:

1. Personal Guarantee

Personal guarantee is third party who guarantee the debtor to fulfill the obligation.

2. Material guarantee

Material guarantee involves creditor and debtor; another case material guarantee involves creditor and third party who guarantees the debtor fulfills the obligation.

#### *Definition of Fiduciary*

Fiduciary comes from the Latin “*fides*” which means “belief”. Indeed, the construction of fiduciary is the legal relationship between the debtor providing the

fiduciary and the creditor receiving the fiduciary based on trust. The provider of fiduciary believes that the creditor of the fiduciary will return the ownership that has been transferred after the debtor has paid off the debt. The creditor believes that the fiduciary will not abuse the collateral under control and maintain the collateral.<sup>[22]</sup>

Promulgation of Law Number 42 of 1999 concerning fiduciary collateral and Law Number 16 of 1985 concerning car ownership, fiduciary is a term used for the transfer of ownership rights based on belief.

The legal bases for fiduciary collateral institution before the enactment of Law Number 42 of 1999 concerning Fiduciary collateral are as follows:

1. Arrest Hoogerechtshop on August 18<sup>th</sup>, 1932 T. 136 Number 311;
2. High Court Surabaya Decree on March 22<sup>nd</sup>, 1951 Number 158 / 150PDT; Supreme Court Decree on September 1<sup>st</sup>, 1971 Number Reg. 372K / SIP / 1970;
3. Development of Law Number 5 of 1992 Article 15 concerning Housing and Settlements;
4. Law Number 16 of 1985 concerning Flats;
5. Law Number 42 of 1999 concerning Fiduciary guarantee. This Law, point 4 and 5, will be valid as long as they are in accordance with Law of fiduciary guarantee.<sup>[23]</sup>

#### *Characteristics of Fiduciary Guarantee*

The characteristics of fiduciary guarantee as regulated on Law Number 42 of 1999 on fiduciary guarantee are as follows:

1. It is characterized as *accessoir*
2. It is characterized *droit de suite*
3. It provides preferent right

4. It guarantees existing or prospective debt
5. It guarantees more than one unit
6. It has executorial power
7. It has specialty and publicity bases
8. It contains the right to pay off debts.

### 3. RESULT AND DISCUSSION

#### 3.1. *The binding object of fiduciary guarantee according to Law Number 42 of 1999 on fiduciary*

Fiduciary guarantee is an *accessoir* agreement of a basic agreement that issues an obligation for the parties to fulfill an achievement according to Article 4 on Fiduciary Guarantee Law. As an *accessoir* agreement from fiduciary guarantee for nullifying law, if the debt is in the principal agreement which is the source of the fiduciary guarantee agreement or the debt guaranteed by fiduciary states explicitly the Fiduciary Guarantee is relief.

The relief of the fiduciary guarantee means that the fiduciary guarantee is invalid. Debt whose repayment is guaranteed by fiduciary guarantee in the form of [1] existing debt; [2] prospective debt has been promised in a certain amount; and [3] debt which can be determined the amount based on the principal agreement that creates the obligation to meet achievement.

If the debtor breaks the agreement; (a) disengagement on fiduciary guarantee by fiduciary recipient, (b) the destruction of fiduciary object as regulated on Law Number 42 of 1999 Article 25.

The right of creditor is to receive repayment from debtor. If default is occurred by debtor, the creditor could sell the object of fiduciary guarantee to repayment of debt.<sup>[25]</sup>

The consequences of the Fiduciary Guarantee could not cover the amount of debt are risks, consequences as a result of attitudes or actions. The creditor is finite-owner of the object or in another word, the creditor is as juridical owner of the object. Meanwhile, the fiduciary recipient (debtor) is the beneficial owner who enable to use the object because of a loan-use agreement between the creditor and the debtor in which the creditor lends to the debtor for utilizing. The creditor gives authority to the debtor to keep and utilize the object of fiduciary guarantee.

The object of fiduciary guarantee is merely as collateral since the value of object does nor cover the certain debt, therefore the creditor has finite-owner of the object. The full-owner of the object could make use and do anything to object such as selling, pawing, renting, or damaging the object.

In this case, creditor is merely the owner of the collateral. The transfer of ownership rights on fiduciary guarantees is only as collateral, not a full-transfer of ownership rights where the creditor becomes actual owner of the object.

If a party has not carried out the obligation (default), the object of fiduciary guarantee could be sold as the repayment of debt.<sup>[26]</sup>

The binding of fiduciary guarantee object according to Law Number 42 of 1999 on fiduciary guarantee is certificate of fiduciary guarantee as an evidence which is an authentic deed. It can be seen from the characteristics of certificate fiduciary guarantee, issued by an authorized official or public official who has authority for issuing certificate fiduciary guarantee in Fiduciary Registration Office under the supervision of the Ministry of Law and Human Rights.

The fiduciary guarantee certificate as an authentic deed commensurate with court decision which has permanent legal force. Therefore, truth cannot be denied unless the party who denies can prove what the fiduciary guarantee certificate is in reversed. Absolute evidentiary force is reinforcing element in the fiduciary guarantee certificate attached to other authentic deeds.<sup>[27]</sup>

### *3.2. The consequences if the binding of fiduciary guarantee object is unfulfilled*

As collateral of debt, objects as fiduciary guarantees must be registered to obtain legal certainty in accordance to Article 11 of the Fiduciary Security Law which requires objects as fiduciary guarantee to be registered at the Fiduciary Registration Office located in Indonesia. This obligation is also applied to object of the fiduciary guarantee outside the territory of the Republic of Indonesia. The object as fiduciary guarantee is registered at the domicile of the object, registration includes objects inside or outside the territory of the Republic of Indonesia. It aims at fulfilling the principle of publicity. In addition, the registration is important information for third parties that the object is collateral of debt.

Law Number 42 of 1999 concerning fiduciary guarantee and Government Regulation of Republic of Indonesia Number 86 of 2000 concerning fiduciary guarantee registration procedures and the registration fee of fiduciary guarantee deed are the bases of mechanism fiduciary registration. The descriptions are as follows:<sup>[28]</sup>

1. The initial stage is filling up form (form and content has determined by ministry decree) describing the requirement of fiduciary guarantee

registration and submitted by creditor himself or representative or proxy as recipient of fiduciary object or (written in Bahasa Indonesia) to Fiduciary Registration Office. This fiduciary guarantee registration statement will be submitted to the Minister of Law and Human Rights by the Fiduciary Registration Office. The requirements that must be completed in the registration form include:

- (1). Identity of provider and receiver of fiduciary.
  - (2). Date, number of fiduciary guarantee deed, name, and place of issuing fiduciary guarantee.
  - (3). Data of basic agreement of object as fiduciary guarantee.
  - (4). Description of object as fiduciary guarantee.
  - (5). Guarantee value.
  - (6). Object value of fiduciary guarantee.
  - (7). The application of registration is paid as determined by Government Regulation in non-tax revenue.
2. The registration application of fiduciary guarantee is examined by authorized official in Fiduciary Office. The additional documents are:
- (1). Copy of notarial deed (Fiduciary guarantee deed).
  - (2). Power of attorney given to representatives of creditors who delegate authority to register a fiduciary guarantee.
  - (3). Payment receipt of fiduciary guarantee.
3. Then, the fiduciary guarantee is recorded in fiduciary registration book

on the same date of receiving fiduciary guarantee registration form.

4. Finally, fiduciary guarantee certificate is issued on same day and date of inputting fiduciary guarantee registration.

The registration of fiduciary guarantee on fiduciary registration book is constitutive action issuing fiduciary guarantee. Further affirmation is noticeable in the provisions of Article 28 of Fiduciary Guarantee Law determining “if the same object becomes the object of the Fiduciary Guarantee more than 1 (one) Fiduciary Guarantee agreement, the creditor who registers it first is the fiduciary receiver.

Unregistering fiduciary guarantees is a violation often committed by creditors, although creditors know the rules regarding the obligation to register fiduciary guarantees in Article 11 paragraph (1) of the fiduciary guarantee law. The creditor does not register the fiduciary guarantee at the Fiduciary Registration Office and the creditor registers the fiduciary guarantee after the debtor is in default are common violations committed by creditors in the credit agreement using fiduciary guarantees.

Legal consequences of registering fiduciary guarantees after the debtor defaults are the fiduciary guarantee certificate issues and is valid at the date of application; the date is not at making the credit agreement, legal actions before issuing fiduciary guarantee certificate cannot be applied the regulations in the fiduciary law.

The consequences of registering fiduciary guarantee after debtor defaults referring to provision of Positive Law as follows: <sup>[30]</sup>

1. Article 14 paragraph (3) of Law Number 42 of 1999 concerning fiduciary stating that the fiduciary guarantee is issued on the same date as the date of recording in the Fiduciary Registration Book which is correlation to the title of this research is fiduciary guarantee certificate issues after fiduciary registration; after the debtor is in default.
  2. Article 15 paragraph (3) of Law Number 42 of 1999 concerning fiduciary stating that if the debtor is in default, the Fiduciary Recipient has the right to sell objects of the Fiduciary Guarantee at own authority.
  3. Article 4 paragraph (2) of Government Regulation of the Republic of Indonesia Number 86 of 2000 concerning Fiduciary Guarantee Registration Procedures and Fees for Making Fiduciary Security Deeds stating that the issuance of Fiduciary Guarantee Certificate and the referral to the applicant shall be on the same date as the registration date of applying fiduciary guarantee registration as referred to in paragraph (1).
  4. Article 3 of the Minister of Finance of the Republic of Indonesia Regulation Number 130 /PMK.010 / 2012 concerning Registration of Fiduciary Guarantee for Financing Companies financing consumer for vehicles with fiduciary guarantee charge determining that Financing Company is prohibited withdrawing fiduciary collateral in the form of vehicles if Fiduciary Registration Office has not yet issued a fiduciary guarantee certificate and delegated to the Financing Company.
  5. Article 4 of the Minister of Finance of the Republic of Indonesia Regulation Number 130 /PMK.010 / 2012 concerning Registration of Fiduciary Guarantee for Financing Companies financing consumer for vehicles with fiduciary guarantee charge determining withdrawal of fiduciary collateral in the form of vehicles must meet the provisions and requirements as regulated in Fiduciary Guarantee Law and has been agreed by the parties in agreement consumer vehicle financing agreement.
  6. Article 3 paragraph (6) Minister of Law and Human Rights of the Republic of Indonesia Regulation Number 10 of 2013 concerning Procedures for Electronic Fiduciary Registration determining that applicant should print the certificate signed electronically by authorized officer after the payment as referred to in paragraph (5). This is simplicity of electronic registration fiduciary guarantee by creditor; even though registration is after debtor defaults.
- According to researcher from the prior elaboration, Fiduciary Guarantee Certificate is valid, even though debtor has defaulted because;
1. Based on the provisions of Article 1868 of the Civil Code, the Fiduciary Guarantee Certificate is an authentic deed made by a public official in the executive sector and authorized for the matter being requested.
  2. Fiduciary Guarantee Certificate is a tool to execute debtors who are unable to pay off their debts.



The object as credit guarantee in credit agreement must be on binding as collateral of credit. The binding is implemented by issuing a fiduciary deed. The fiduciary deed is one of requirements in applying of fiduciary guarantee object. This process enables to issue certificate of fiduciary guarantee as proof of handling the object by creditor for executing the object if debtor defaults.

The consequences (the binding of fiduciary guarantee object is unfulfilled) are the default causes several legal consequences for debtors and creditors, especially for creditors who must loss. While for debtors, the legal consequence is the existence of a new status for which the debtor must responsible of. Fiduciary guarantee, mostly in form of movable objects, allows for a transfer of fiduciary guarantee; one example of the reason for the transfer is the debtor wants to transfer his credit to another creditor to seek for lower interest. Then, if a debtor has paid off the debt, it can cause the fiduciary guarantee to be canceled.

#### 4. CONCLUSION

##### 4.1. Conclusion

Based on the result of research, it can be concluded that:

1. The binding of fiduciary guarantee object according to Law Number 42 of 1999 on fiduciary guarantee is certificate of fiduciary guarantee as an evidence which is an authentic deed. It can be seen from the characteristics of fiduciary guarantee certificate, issued by an authorized official or public official who has authority for issuing fiduciary guarantee certificate in Fiduciary Registration Office under the

supervision of the Ministry of Law and Human Rights.

2. The consequences (the binding of fiduciary guarantee object is unfulfilled) are the default causes several legal consequences for debtors and creditors, especially for creditors who must loss. While for debtors, the legal consequence is the existence of a new status for which the debtor must responsible of. Fiduciary guarantee, mostly in form of movable objects, allows for a transfer of fiduciary guarantee; one example of the reason for the transfer is the debtor wants to transfer his credit to another creditor to seek for lower interest. Then, if a debtor has paid off the debt, it can cause the fiduciary guarantee to be canceled.

##### 4.2. Suggestion

Based on the conclusion, there are several suggestions provided, namely:

1. Receiver of fiduciary guarantee such as bank must obey procedure in binding of fiduciary guarantee between creditor and debtor.
2. The binding must be carried out in advance by debtor in providing fiduciary guarantee in positive willing, thus the agreement can be carried out as agreed.

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