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"Comparative Law System of Procurement of Goods and Services around Countries in Asia, Australia and Europe"



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REGISTRATION FIDUCIARY GUARANTEE REALIZE LEGAL PROTECTION OF CREDITORS AND DEBTOR

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ABSTRACT

In Article 11 of the Law of Fiduciary determined that the object is in the territory of the Republic of Indonesia or outside the territory of the Republic of Indonesia. Bound by fiduciary shall be registered at the registration office fiduciary duties within the scope of the Department of Law and Human Rights. Fiduciary guarantee a follow-up agreement set out in the fiduciary deed as collateral for the repayment of certain money. This became the preferred fiduciary guarantee for creditors if the fiduciary is registered in Fiduciary Registration Office. This is because the preferred position is guaranteed for their registration. The imposition of fiduciary must be made by Deed in Indonesian and thus constitute a fiduciary warranty deed. Imposition by fiduciary guarantee are then required to be registered in Fiduciary Registration Office. The obligation is in terms of the binding fiduciary and fiduciary registration so that the object of the guarantee that has the power of binding and has the same executorial court decision.

Keywords: Fiduciary and Legal Protection.

A. Introduction

Fiduciary is one form of security institutions, which means the surrender of property rights in the trust. Trust provided directly by one party to another, the transfer of real property only as a guarantee only for a debt. With this assurance, security object remains on the debtor to the smooth running of business. Fiduciary insurance is regulated in Law Number 42 Year 1999 regarding Fiduciary (Law Fiduciary).

Article 1 paragraph 2 of Law Fiduciary states: Fiduciary security is security rights over moving objects both tangible and intangible and immovable in particular building can not be burdened with security rights as stipulated in Law No. 4 of 1996 on Mortgage that remain in control of the fiduciary giver as collateral for the repayment of certain debt, which gives precedence to the receiver position fiduciary to the other creditors.

Based on the Law fiduciary, fiduciary guarantee object consists of 2, namely:

1. Moving objects, both tangible and intangible.
2. The object is not moving, especially buildings that are not encumbered encumbrance.

The procedure for the imposition of fiduciary subject to the provisions of Article 4 to Article 10 of the Law of Fiduciary nature followup agreement (accessoir) of a principal agreement which creates obligations for the parties to meet an achievement. Fiduciary guarantee is made and forth in a notarial deed which has been standardized by the government.

In Article 11 of the Law of Fiduciary determined that the object is in the territory of the Republic of Indonesia or outside the territory of the Republic of Indonesia. Bound by fiduciary shall be registered at the registration office fiduciary duties within the scope of the Department of Law and Human Rights. Fiduciary guarantee a follow-up agreement set out in the fiduciary deed as collateral for the repayment of certain money. This became the preferred fiduciary guarantee for creditors if the fiduciary is registered in Fiduciary Registration Office. This is because the preferred position is guaranteed for their registration.

In a fiduciary guarantee registration there is a necessity to include objects that become the object of fiduciary. This is very important because it is exactly what objects can be sold for debt payments fiduciary. Object collateral should be understood as the right fiduciary is the right material attached to the object of fiduciary and will keep abreast of any object in the hands of the object is (*droit de suite*) for the fiduciary has not waived / strikethrough.

In an underwriting agreement, usually is between creditors and debtors agreed certain promises, which are generally intended to give a strong position for the creditors and will be registered after intended to also bind third parties. Therefore it can be interpreted herein that includes registration, both registration and bond collateral objects, then all the promises contained in the deed of fiduciary (which in Article 13 paragraph (2) b is recorded in the book list Fiduciary Registration Office) and bind third parties.

Interpret, that should be listed is the bail bond objects and gentlemen, would be very beneficial. Thus, bond guarantees and promises of fiduciary be registered and could therefore be the recipient of fiduciary, while legal protection against fiduciary recipient is given through appropriate agreements binding fiduciary third party.¹

The above description shows that the parties to the agreement fiduciary, both recipients of fiduciary and giver of fiduciary statutory fiduciary equally be given legal

¹ J Satrio, *Hukum Jaminan Hak Jaminan Kebendaan Fidusia*, Citra Aditya Bakti, Bandung, 2002, halaman 247

protection, for giving protection in the form of their right to use the object collateral and defaulting insurer fidak will cause objects guarantees by Law fiduciary is given preferential rights on loans, and the enactment of the principle of droit de suite on collateral objects, for the third party principle of publicity in the fiduciary agreement will provide information about objects difidusiakan.

However, according to Article 11 of Law Fiduciary explained that the fiduciary agreement by notarial deed is not enough, but must be registered, notarization is an authentic act and can be utorial deed, the fiduciary agreement notarial deed without registration confers preferential rights for the recipient of fiduciary.

Comprehensively fiduciary arrangements in Act Fiduciary give significant meaning and benefits of the development efforts of national law, it is also one embodiment of the answers to legal reform, especially the business world settle debts or bank credits which uses fiduciary. With the affirmation of construction in Law Fiduciary that objects become fiduciary remain in control of the debtor or guarantor is fiduciary, so that the debtor is not hindered in his efforts and use objects assurance, can create a business climate and a healthy trade and dynamic so that economic actors and businesses can grow and prosper without ignoring its obligations.

With the imposition of fiduciary registration of the principle of publicity are met and an assurance to the other creditors of the objects that have been saddled fiduciary. Fiduciary insurance born on the same date as the date of fiduciary on record in the Register of Fiduciary. Fiduciary registration is not only done for the holding of fiduciary, but also includes the change, diversion, and the abolishment of fiduciary. The fiduciary guarantee registration, in addition to providing legal certainty to the concerned also entitles the precedence (preferred) to the recipient of fiduciary against other creditors. Jamina registration procedure begins with a deed of fiduciary fiduciary notary then be registered in Fiduciary Registration Office.

Is an interesting subject for study titled Realizing Fiduciary Registration Legal Protection of Creditor and Debtor with normative juridical approach to analyze various regulations and legislation governing the fiduciary agreement and fiduciary.

B. Discussion

Fiduciary is a transfer of ownership of an object on the basis of trust with the provision that the object of the transferred ownership rights remain in the control of the

owner of the object

Fiduciary, according to his origin comes from the word *fides* means trust. In accordance with the meaning of this word, the legal relationship between the debtor (grantor fiduciary) and creditor (recipient of fiduciary) is a legal relationship based on trust.²

According to Tan Kamello, fiduciary has two senses ie as a noun and an adjective. As a noun, the term fiduciary has the sense of someone who was given the mandate to manage the interests of third parties in good faith, full rigor, caution and forthright. People who are given the confidence burdened with the obligation to do something for the benefit of others. As an adjective, the term fiduciary show understanding of matters related to trust (trust).³

Fiduciary objects are items of movable and immovable, tangible or intangible, except for security rights, mortgages ships, aircraft mortgages and liens. Fiduciary Act likened to a broom provisions of the universe, then the whole object, unless it has been designated as an object of encumbrance, mortgages and liens, the object being the object of a fiduciary.⁴

The registration function for a guaranteed debt including fiduciary insurance is very important for the community that was published Law Fiduciary in order to meet the legal needs that could spur national development and to ensure legal certainty and be able to provide legal protection for the parties concerned, in particular Article 11 of Constitution of fiduciary has been adopted on 30 September 1999 set by requiring object encumbered with a fiduciary for registration to the competent authority ie fiduciary registration office at the General Legal Services Division Regional office of the Ministry of Law and Human Rights in each provincial capital with an address for basing on fiduciary / debtor.

The principle of publicity as mentioned in the explanation of Article 11 of Law Fiduciary periu done because the giver fiduciary fiduciary conduct (Article 17 Fiduciary Act) and the fiduciary Recipients who qualify will be given a certificate as proof of ownership fiduciary rights over the material fiduciary collateral.

Registration so this must be done, because the registration of the provision of fiduciary mentioned in the Register of Fiduciary, the date of the registration is the date of birth of the right to security that are preceded or preferential rights means if the creditor has certified fiduciary is entitled to precedence over fiduciary debtor.

If the debtor owes money everywhere and receiver fiduciary lot, then the precedence

² Gunawan Widjaja dan Ahmad Yani, *Jaminan Fidusia*, Raja Grafindo Persada, Jakarta, 2000, halaman 118.

³ Tan Kamello, *Hukum Jaminan fidusia (Suatu Kebutuhan Yang Didambakan)*, Alumni, Bandung, 2006, halaman 40.

⁴ Tri Widyono, *Aspek Hukum Operasional Transaksi Produk Perbankan di Indonesia*, Ghalamania Indonesia, Bogor, 2006, halaman 269.

is registered fidusianya guarantee. If not registered, then it does not have the right to precedence, either in bankruptcy or liquidation. The rights that take precedence are calculated from the date of registration of objects into objects fiduciary in Fiduciary Registration Office (the explanation of Article 27 of the Law Fiduciary).

Therefore, also in recording the registration in the Register of Fiduciary perLu note the date and time of registration, as mentioned in the explanation of Article 5 (1) of the Act Fiduciary.

In Article 11 in conjunction with Article 13 in conjunction with Article 15 of U Law Fiduciary determines that objects (which exist in the territory of the Republic of Indonesia or outside the Republic of Indonesia) who are burdened with fiduciary shall be registered in the Registry Office Fiduciary for registration filed by the Receiver Fiduciary with the terms and conditions as mentioned in Article 13 and on the granting of the application for registration, then the recipient of fiduciary issue a certificate of fiduciary taking irah-irah Demi Justice by Almighty God that date together with the date of receipt of the application for registration of fiduciary (registration of titles). Recipients of fiduciary can be a person or a few people together (eg in loan granting consortium as mentioned in the explanation of Article 8), but the fiduciary re not allowed, meaning that the fiduciary should not be committed again object fiduciary for fiduciary other debt (Article 17 of Law Fiduciary).

For the first time in the history of Indonesian law, the obligation to register the fiduciary to the competent agencies. Obligations are based on Article 11 (1) of the Law of Fiduciary reads: Objects are burdened with fiduciary must be registered.

Etymologically as listed is the object, then the fiduciary guarantee registration system does not use the registration system theory in general, the system of registration of deeds (that are listed are legal actions / aktanya) or a system of registration of title (listed is right). However, when seen in Article 13 paragraph (2) of Law Fiduciary registration system adopted is actually a system of registration of title together with the registration system of mortgage in the Mortgage Law.

The absence of registration obligation is felt in practice as the shortcomings and weaknesses of the legal order of fiduciary because in addition to legal uncertainty, obsurnya registration obligation causing fiduciary does not meet the elements of publicity so difficult to control, can lead to things that are unhealthy practices such as the fiduciary twice / re-without the knowledge of the creditor, the fiduciary transfer of goods without the knowledge of the originator.

With the registration of fiduciary obligations is expected to provide legal certainty and in a fiduciary guarantee is a guarantee of material. With the registration of the position of the parties would be better protected, it is expected businesses and the general public can find out whether an object is burdened fiduciary or not.

Fiduciary registration is done on the following matters:

1. Objects of fiduciary security object residing in the country (Article 11 (1) of the Act Fiduciary);
2. Objects of fiduciary security object residing abroad (Article 11 (2) of the Act Fiduciary);
3. To change the contents of Fiduciary Certificates (Article 16 (1) of the Act Fiduciary).

This change does not perlu done by notarial deed but need to be notified to the parties.

Fiduciary guarantee must be registered, as stipulated in Article 11 of Law Fiduciary. With the existence of such registration, Law Fiduciary satisfy the principle of publicity which is one of the main principles of the law of collateral material. The provision is made in order that the objects were used as collateral object is really a debtor or grantor belongings fiduciary so that if there are others who want to claim the thing, he can find out through the announcement.

Registration for a bail bond which is valid in law in Indonesia is the bail bond registration on the listed objects. The definition of registration in the Law Fiduciary not guarantee object registration but registration bail bond. Fiduciary institution is a legal phenomenon which provide benefits to the wearer, especially to expedite loan repayment and do not undermine the potential of loan recipients.

The provisions of Article 11 of Law Fiduciary determine which bears fiduciary objects must be registered, in fact many are burdened fiduciary objects are not registered. This happens because there are weaknesses in the article where no sanctions if they are not registered, the registration time period fiduciary warranty deed also was not specified and there is no provision that says that if the bond is not registered then fiduciary fiduciary bond is illegitimate. Creditor / receiver fiduciary guarantee bonds that do not register can still basing their rights to agree the parties in the bail bond agreement, the common law and jurisprudence.

Breath primary fiduciary obligations to register at the Registration Office Fiduciary is a giver preferred at receiver fiduciary to another lender that is certain, absolute and complete, therefore fiduciary is known in civil law as would entitle the donor fiduciary to keep control of objects which became the object of fiduciary based on trust. This was followed by the registration system equipped to provide guarantees to the beneficiary a fiduciary. and parties who have an interest in the object / goods are real and definite,

concrete.⁵

Registration fiduciary grant precedence to the recipient of fiduciary against other creditors and the rights granted to creditors who had formerly given the deed of fiduciary who first register it. This is done to prevent the event of the same object into an object fiduciary for other creditors. Registration fiduciary has a very important meaning especially on collateral moving objects that are not listed remember it very difficult to prove who owns it. Because for these moving objects KUHPdt provisions of Article 1977, which provides that whoever controlled object moves him as the owner.

With the registration of the material rights arising from the imposition of fiduciary provide a legal protection for creditors who previously fiduciary institution is less enthused by the creditors.

With fiduciary guarantee registration to provide better legal protection for the parties concerned. Protection against creditors or beneficiaries of fiduciary by providing a sense of security to ensure the return of the money, guaranteeing settlement of the debtor's obligations at a predetermined time previously agreed between the creditor and the debtor.

Some of the principles espoused in the Law Fiduciary is:⁶

1. The principle of legal certainty;
2. The principle of publicity;
3. The principle of equal protection;
4. The principle of accommodating the needs of the practice;
5. The principle of authentic written;
6. The principle of giving a strong position to creditors.

One way to protect the interests of creditors (fiduciary receiver) is to provide conditions that will inevitably creditor rights. Regulation of complete data that must be contained in the deed of fiduciary (Article 6 of Law Fiduciary), indirectly provides a firm grip for the creditors as a recipient of a fiduciary, in particular regarding the bill which is guaranteed and the value of collateral, which determines how much the bill creditor preferred.

Kepentngan legal protection for creditors in the Law of Fiduciary can be seen in Article 20: Guarantee of fiduciary keep abreast of things that become the object of any fiduciary in hand the object is, except the transfer of the inventory objects that become the object of fiduciary. This provision confirms that the fiduciary has the material properties and

⁵ Ignatius Ridwan, *Hukum Jaminan Fidusia, Pedoman Praktis*, Penerbit Universitas Diponegoro, Semarang, 1999, halaman 21.

⁶ J. Satrio, *Op, Cit*, halaman 202.

apply to them the principle of *droit de suite*, except the transfer of the inventory objects that become the object of fiduciary.

Protection against creditors can also be seen in Article 23 paragraph (2): Giver of fiduciary may assign, pledge, or lease to another party objects that become the object of fiduciary that is not an object of supplies, except with the prior written consent and fiduciary receiver.

Article 24: The recipient of fiduciary does not bear liability for the acts or omissions giving good fiduciary arising from the contractual relationship or arising from unlawful acts in connection with the use and transfer of objects into objects fiduciary.

R. Soebekti found a breach of fiduciary transfer of objects on a third party can be punished as guilty of embezzlement. Similarly, because according to him, the debtor is not the owner anymore.⁷

According to the opinion Soepratignja less able to solve the problem completely, because transference does not remove its civil aspects. In accordance with the principle *nemo plus*, the debtor is not authorized to transfer the rights *eigendom* (full) on goods which become the object of a fiduciary. He just has a blank *eigendom* rights on these goods. Therefore he can only hand over the empty *eigendom* rights to others. But if he handed over the rights also *eigendom* (full) on these goods to third parties, so therefore this submission regarding moving stuff not on behalf of third parties acting in good faith should be protected. Creditors must bear the risk for not trustworthiness borrowers. On this then if the debtor does not mernenuhi obligation to preserve the goods fiduciary well or if he is abusing the trust given by the creditor to him, then he is obliged to replace the same item type and value or pay compensation to the creditors, with regard to reduced or voidance receivables collateral creditors.⁸

Sanctions against the above provisions is a criminal as referred to in Article 36 of Law Fiduciary: Any person deliberately falsified, changed, removed or in any way provide information in a confusing manner, that if it was discovered by one of the parties does not give birth to the agreement fiduciary shall be punished with imprisonment of a minimum of 1 (one) year and a maximum of five (5) years and a fine of at least Rp. 10.000.000.- (ten million rupiah) and Rp. 100.000.000.- (one hundred million rupiah).

For all the acts and omissions of providers of fiduciary, fiduciary recipient by the irresponsible negligence as referred to in Article 24 of Law Fiduciary. Recipients of fiduciary does not bear liability for the acts or omissions giving good fiduciary arising from the contractual relationship or arising from unlawful acts in connection with the use and transfer

⁷ R. Soebekti, *Jaminan Untuk Pemberian Kredit Menurut Hukum Indonesia*, Citra Aditya Bakti, Bandung, 1991, halaman 16.

⁸ Munir Fuadi, *Jaminan Fidusia*, Citra Aditya Bakti, Bandung, 2000, halaman 61.

of objects into objects fiduciary.

The purpose of the agreement in terms of fiduciary guarantee legal protection for creditors is to provide a privilege or right of precedence to him for repayment of the debtor's debts to it (principle Schuld and HAFTUNG). A debtor who has paid the debt creditors at the creditors of a higher order based on privilege that precede / preferred then the lender automatically without the need for further approval is considered directly replace the position and also all the privileges of creditors the higher level.⁹

Further, the legal protection of the right to claim the precedence can be seen in the provisions of Article 27 of the Law of Fiduciary:

- (1) The fiduciary has the right of precedence to other creditors.
- (2) The right to take precedence as referred to in paragraph (1) adalah rights fiduciary receiver to take over the receivables settlement proceeds from disposal of objects that become the object of fiduciary.
- (3) The rights that take precedence and the recipient does not remove because of their fiduciary bankruptcy or liquidation fiduciary giver.

The position of fiduciary creditors holder is a preferred creditor. As Mariam Darus Badruzaman: fiduciary owners have preferential rights. If the guarantor is bankrupt fiduciary, the fiduciary objects are not jatuh Budel into bankruptcy. The owner has the right to sell stamps fiduciary fiduciary for the repayment of its receivables.¹⁰ Sri Soedewi Masjchoen Sofwan: Agreement zakelijk fiduciary nature, and therefore will bear the legal consequences as well as mortgages and liens material rights in the event of bankruptcy.¹¹ Oey Hoey Tiong: fiduciary receiver as well as other material guarantee recipients have two main rights mendahulu rights and the right material.¹² R Subekti: fiduciary position is as right material that is a right which provides direct control over an object and apply to everyone, especially giving preference to one creditor over other creditors.¹³ Hamzah: fiduciary holder including creditors who have a strong position and the holders of the rights attached to the separatists.¹⁴

Overall then several things that can indicate the presence of legal protection against

⁹ *Ibid*, halaman 40.

¹⁰ Mariam Darus Badruzaman, *Mencari Kepastian Hukum Dalam Hukum Jaminan*, Blips Project, Jakarta, 1994, halaman 96.

¹¹ Sri Soedewi Masjchun Sofwan, *Beberapa Masalah Pelaksanaan Lembaga Jaminan Khususnya Fidusia Dalam Praktek dan Pelaksanaannya di Indonesia*, Alumni, Bandung, 1997, halaman 23.

¹² Oey Hoey Tiong, *Fidusia Sebagai Jaminan Unsur-unsur Perikatan*, Ghalia Indonesia, Jakarta, 1999, halaman 22.

¹³ R Subekti, *Jaminan Untuk Pemberian Kredit Menurut Hukum Indonesia*, Citra Aditya Bakti, Bandung, 1991, halaman 66.

¹⁴ Hamzah A. dan Senjun Manulang, *Lembaga Fidusia dan Penerapannya di Indonesia*, Indhiil-Co, Jakarta, 1997, halaman 56.

creditors (receiver fiduciary) Statutory Fiduciary among others:

1. The registration of fiduciary institutions, the other is to ensure the interests of the party receiving the fiduciary;
2. The existence of a fiduciary giver ban on re memfidusiakan object fiduciary (Article 17);
3. The rule that fiduciary giver is not allowed to transfer, mortgage or lease (Article 23 sub 2);
4. The rule idusia providers shall submit the guarantee object, if creditors want the object to execute a fiduciary;
5. The existence of criminal provisions in the Act Fiduciary.

The most important thing for the right credit guarantee for creditors is to provide convenience and authorized the sale of collateral given it and to carry out the execution in accordance with the intent and function of credit guarantee that, strictly without going through the event parate execution and without request the establishment of the court and can direct held by the creditor. Because in a fiduciary basically been the transfer of property rights.

Protection of the debtor can be affirmed that the fiduciary giver or the debtor remains acquire ownership rights to the object encumbered with a fiduciary in the real sense if it has been paid off debts, and to creditors not surrender property rights in the sense of buying and selling real example.

Legal protection of the debtor can be seen in several articles in Law Fiduciary, as follows:

Article 29:

- (1) If the debtor or grantor fiduciary breach, the execution of the objects that become the object of fiduciary can be done by:
 - a. Implementation executorial title referred to in Article 15 paragraph (2) the recipient of fiduciary;
 - b. The sale of objects which became the object of fiduciary on the fiduciary's own power receiver via a public auction and take the settlement receivables from the sale;
 - c. Underhand sales made under the agreement if the fiduciary giver and receiver in this way can be obtained the highest price that benefits the party..
- (2) The sale referred to in paragraph (1) c is done after the expiration of 1 (one) month since notified in writing by the giver or receiver fiduciary to the parties concerned and published in at least two (2) newspapers circulating in the area in question

Article 32 of Law Fiduciary: Every promise to carry out the execution of the objects that become the object of fiduciary manner contrary to the provisions referred to in Article 29 and Article 31 null and void.

Some provisions in the Act Fiduciary who can show that this legislation also provides legal protection to the debtor as grantor fiduciary, are:

1. The assertion (Article 4), which states that the fiduciary agreement is a follow-up / accesoir, it can indirectly provide protection for the rights of fiduciary giver (debtors) on the object guarantees, since the abolishment of the repayment of the principal agreement, then the fiduciary guarantee agreement automatically be deleted (Article 25). That means that the ownership of objects fiduciary itself back to the debtors (receiver fiduciary) to keep control of the pledged object in order to carry out business activities financed from the loan obtained by the use of the fiduciary guarantee.
2. Imposition of fiduciary through notary deed is also one form of attention of the legislators against the interests of the debtor (grantor fiduciary). Through the provision of advice and fiduciary deed readings before signing is one way to avoid reckless granting of guarantees;
3. The rule regarding the execution of collateral objects (Article 29) is an important protection for the rights of fiduciary giver, because with these provisions became clear that so far it is necessary to protect its interests as a creditor only;
4. The presence of the provision of Article 29 sub 1 c and Article 31 of Law Fiduciary increase the chances to get a good price for the guarantee object, which is very favorable fiduciary giver.

With the fiduciary, the need for credit with a guarantee of moving objects without releasing goods as collateral, so that the debtor can still wear the pledged goods.

In the explanation of the Law Fiduciary besides going to accommodate the needs of the practice that had been there, would also give legal certainty to the parties concerned with the conduct of registration obligation fiduciary forward when not registered will receive legal sanction in accordance with law apply.

In line with the principle of legal certainty, the Fiduciary Law takes the principle of fiduciary guarantee registration. Enrollment is expected to provide legal certainty to providers and recipients of fiduciary.

C. Conclusion

The imposition of fiduciary must be made by Deed in Indonesian. Imposition by the Mandatory fiduciary registered in Fiduciary Registration Office. The obligation is in terms of the binding fiduciary and fiduciary registration so that the object of the guarantee that has the power of binding and has the same executorial court decision.

Article 11 (1) of the Law of Fiduciary can be effective when there is awareness of businesses about the importance of registration of fiduciary where legal protection will arise with the registration and the absence of strict sanctions by imposing criminal penalties if they are not registered. Registration obligation fiduciary review of aspects of legal certainty will be achieved when the Law of Fiduciary enhanced first by including tough sanctions such as criminal penalties against objects that encumbered fiduciary who is not registered and the time period of registration once made the deed fiduciary in order to obtain legal certainty where it is obtained only through registration fiduciary with fiduciary Registration Office.

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