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Land Charges in Fund Loan Agreements with Uncertified Land Guarantee is Linked to Law No. 42 of 1999 Concerning Fiduciary Guarantees

Wira Franciska
Faculty of Law, Jayabaya University, E-mail: wirafrans@yahoo.com

Abstract. *With the exit of Act Number 6 Year 1996 concerning Rights Responsibility of Land Ground Along with Objects related to Land Ground, Rights Responsibility is the single guarantee institute of land; ground. Object Rights Responsibility is obliged to enlist beforehand or have. Lower him ability of land owner debtor economics which is not yet certified, whereas certificate expense which is relatively costly, requires a guarantee institute which does not oblige guarantee object enlisted before hand. Fiduciary as guarantee institute expected to be able to overcome the problems. Fiduciary has gone into effect as guarantee institute of land; ground which not yet. This matter can be seen in Decision Appellate Court Number 3216/K/Perd/1984 28 July 1986 contending that land following house which in of unclear him of rights status of earning isn't it. This matter becomes a new problem which requires to look for soybean cake how legal consequences that happened when this moment there is an agreement of guarantee of fiduciary with land ground guarantee object which not yet.*

Keywords*: Fiduciary; Guarantee; Land; Warrant.*

1. INTRODUCTION

Economic development, as part of national development, is one of the efforts to achieve a just and prosperous society based on Pancasila and the 1945 Constitution (fourth amendment). In order to maintain and continue development, both the government and society, both individuals and legal entities, require large funds. Along with the increase in development activities, the need for funding also increases, most of which funds needed to meet these needs are obtained through borrowing and lending activities.[1]

Bank as an intermediary institution, in distributing Indonesian banking credit based on economic democracy using the principle of prudence. The implementation of the principle of prudence in providing credit is the principle that uses the 5C Analysis, namely capital, character, capacity condition of economic and collateral.

Bank in distributing credit requires a guarantee/collateral from the debtor to the bank. This is done to guarantee that the debt will be paid according to the

[1]General explanation of Law Number 42 of 1999 concerning Fiduciary

agreement and if the debtor breaks the promise, the object used as collateral can be sold by the bank to replace the unpaid debt.

Credit agreement as the principal agreement of debt is followed by an accessory agreement in the form of a guarantee agreement. Guarantees have a very important role in credit agreements. Healthy guarantees will have a good impact on the fulfillment of debtor obligations if one day the debtor defaults.

Land as an immovable object is an economic object that has high potential. In addition to being enjoyed directly, land can also guarantee the obligations of the owner of the object. Currently, when the national economy is sluggish, people are losing the profits that should be obtained from their businesses. Due to the lack of capital, entrepreneurs try to borrow funds from banks. To borrow money from a bank, collateral is needed to guarantee the repayment of the debt later. However, what often becomes an obstacle is that the collateral does not meet the requirements as collateral for bank credit. This is because each bank has its own policy in assessing collateral that is worthy of being used as collateral.

Based on the bank's experience so far, many lands that are used as credit collateral have ultimately become a problem for the bank in executing the land collateral. Even though the credit has been disbursed.

In practice, collateral is often a problem in a bank credit. In addition to the defaulted credit payments, the execution of collateral is also often delayed. Healthy credit distribution must be supported by healthy collateral (not problematic). Collateral is useful in overcoming the debtor's debt if in the future there is a default. In order for the collateral to have executory power and be preferential, the collateral must be agreed upon in a collateral institution.

Collateral objects can be movable and immovable objects. For collateral of movable objects, there are pawn institutions (pand) and fiduciary. While for collateral of immovable objects, it is guaranteed by mortgage and mortgage institutions.

Specifically for immovable objects in the form of land and buildings on it, the collateral institution is a mortgage right regulated in Law No. 4 of 1996 concerning Mortgage Rights on Land and Objects Related to Land (hereinafter referred to as UUHT). Article 4 paragraph (1), (2) and (3) of UUHT states that the object of mortgage rights is limited to land with ownership status, HGB, HGU, use rights on state land which according to applicable provisions must be registered and according to their nature can be transferred can also be burdened with Mortgage Rights. Then the use rights on land with ownership rights can also be an object of mortgage rights with the determination of Government Regulation. Land that is outside the scope of mortgage rights objects cannot be guaranteed with mortgage rights.

Fiduciary as a guarantee institution based on trust, the object of the guarantee remains with the debtor. The creditor only has the position of guarantee holder. This is intended to provide protection for the guarantee provider. The Fiduciary Guarantee Institution allows the Fiduciary providers to control the guaranteed objects, to carry out business activities financed by loans using Fiduciary Guarantees.

Initially, objects that became Fiduciary objects were limited to tangible movable property in the form of equipment. However, in subsequent developments, objects that became fiduciary objects also included intangible movable property, as well as immovable property.

Fiduciary with land objects is not regulated in Law No. 42 of 1999 concerning fiduciary guarantees (hereinafter referred to as UUJF). The Fiduciary Guarantee Law only regulates the object of the guarantee in the form of immovable objects, especially buildings. What is meant by the provisions of this Law is the burden on flats. The word "case" in the Fiduciary Guarantee Law does not mean that land cannot be the object. The practice of land guarantees with fiduciary is not in accordance with applicable provisions. This is because the UUHT itself is the only institution for guaranteeing land. Including land that has not been certified. Article 10 paragraph (2) of the UUHT states that if the Object of the Mortgage Right is in the form of land rights originating from the conversion of old rights that have met the requirements to be registered but the registration has not been carried out, the granting of the Mortgage Right is carried out together with the application for registration of the land rights in question.

The land that uncertified land cannot be directly guaranteed with a mortgage because it is still a legal basis, not proof of rights. *Girik* is one example of uncertified land that has a letter c land ownership basis, while many *girik* lands have quite high economic value. In order for uncertified land to be directly used as collateral at the bank, a solution is needed for this.

A certificate is strong evidence regarding the basis of ownership of a land right. Article 32 paragraph (1) of Government Regulation Number 24 of 1997 concerning Land Registration states that a certificate is a valid proof of rights as a strong means of proof regarding the physical data and legal data in accordance with the data contained in the measurement letter and the land rights book in question.

The obligation of land owners to register their land rights that have not been certified causes difficulties for land owners who do not have good economic capabilities, while they need loan funds with the land as collateral. The financial difficulties of land owners to be able to register their land require a legal solution so that uncertified land can be directly guaranteed without having to increase the status of its rights without reducing the anticipation of the guarantee.

PP No. 24 of 1997, every land must be registered. This aims to provide legal certainty to the land owner and orderly land administration. Currently, there are many lands that have economic value but have not been registered at the local land office. With the lack of land rights status requirements, banks are reluctant to use them as collateral. This is influenced by the principle of caution that banks have in providing credit.

Land encumbrances in mortgage rights are limited to registered (certified) land. Article 4 of the UUHT states that the objects of mortgage rights are: ownership rights, business use rights, building use rights, use rights over state land with a determination from the government. The land rights that can be used as mortgage rights are only a few rights mentioned in Article 16 paragraph (1) of the UUPA.

Meanwhile, apart from the land rights contained in the UUPA, customary land rights are also recognized. One of them is *girik* land that has not been certified.

The limited acceptance of mortgage objects makes debtors who have collateral in the form of uncertified land unable to pledge their land to the bank unless their rights have been increased. Meanwhile, debtors lack funds to increase their rights to uncertified land so that plans to borrow money from the bank fail. Banks as intermediary institutions gain profits, one of which is through the credit program. With the small amount of credit available to the bank, the bank's income will also decrease. This can weaken the national banking system, so a legal solution is needed so that uncertified land can be directly pledged without taking registration actions at the land office.

The existence of a fiduciary guarantee institution which is also a guarantee institution for immovable property, especially buildings on land, provides a discourse in providing a legal solution to the above problem. However, in the UUJF there is no clear regulation that uncertified land can be used as a fiduciary object. If uncertified land can be used as a fiduciary object, then at least it can provide an opportunity for the community to borrow money from the bank for their business interests by pledging the uncertified land they own.

Therefore, this study raises a number of issues discussed in this study, namely: first, How is the settlement of uncertified land guarantors in the event of bad credit?; second, What are the consequences of fiduciary agreements on uncertified land that have not been regulated in relation to the provisions of Law No. 4 of 1996 concerning Mortgage Rights on Land and Objects Related to Land?

2. RESEARCH METHODS

The research method used in this study is descriptive analytical, namely providing a comprehensive and systematic description of the fiduciary guarantee agreement on uncertified land using a normative legal approach method, with an emphasis on library research and field research, the results of which are analyzed using qualitative legal methods.

3. RESULT AND DISCUSSION

3.1. Uncertified Land Guarantee is Linked to Bad Credit

Credit provision is one type of bank business, namely by distributing funds collected from the community and redistributing them to the community in need of financial assistance. Credit distribution which is a government assistance program (in the form of liquidity credit from Bank Indonesia) includes in the form of Farmer Business Credit (KUT). Liquidity credit is a Bank Indonesia credit that is very profitable for the bank, because the interest is cheap and the credit period is relatively long.[2]

[2]Muchdarsyah Sinungan, (1991). *Uang dan Bank,* Rincka Cipta, p. 159.

Every credit distribution contains the risk of default. Bad credit is essentially part of the credit business itself, although the causal factors can vary both from the internal and external side of the bank or even a combination of both. From the internal side, it can be mentioned, among others, very weak verification of financial data and collateral, inaccurate credit analysis, premature credit disposition, poor credit monitoring, inappropriate credit schemes and others.

Regarding land rights guarantees, UUPA has mentioned a guarantee institution called *Hak Tanggungan*, which is stated in Article 51 of UUPA:

The mortgage rights that can be imposed on ownership rights, business use rights and building use rights as referred to in Articles 25, 33 and 39 are regulated by law.

General Explanation number 5 of UUHT mentions 2 (two) absolute elements of land rights that can be used as objects of Mortgage Rights, namely:

a. According to the applicable provisions, these rights must be registered in a public register, in this case at the Land Office. This element relates to the preferred position given to creditors holding mortgage rights over other creditors. For this reason, there must be a record of the mortgage right in the land book and certificate of title to the land it is burdened with, so that everyone can know about it (principle of publicity), and;

b. These rights by their nature must be transferable, so that if necessary they can be immediately realized to pay the debt whose repayment is guaranteed.

The land that not yet certified according to UUHT, APHT can be installed directly on the condition that the land in question is in the process of being certified. This is in accordance with Article 10 Paragraph (3), namely:

"If the object of the Mortgage Right is in the form of a land right originating from the conversion of an old right that has fulfilled the requirements for registration but the registration has not been carried out, the granting of the Mortgage Right is carried out simultaneously with the application for registration of the land rights in question."

The object of mortgage rights originating from converted land is land that has not been registered or has not been certified. Based on the results of the study, the burden of land that has not been certified must be preceded by the creation of a Power of Attorney to Burden Mortgage Rights (SKMHT). In this case, there is a lack of clarity regarding the object of mortgage rights in the form of land that has not been registered. When connected with bad credit, then the burden of uncertified land as collateral to the bank will have a negative impact because of the weak position of the collateral. The object of land collateral that has not been registered is still in the form of a legal basis, not a land right. This is certainly contrary to the nature of the object of the mortgage right mentioned in the UUHT. When it comes to the issue of making SKMHT, UUHT does not want creditors to let SKMHT not realize the encumbrance of their mortgage rights. This is evident from the provisions of Article 15 paragraphs (3) and (4) UUHT which provide restrictions regarding the

validity of SKMHT, with the consequence, according to paragraph (6), that SKMHT, is null and void if the SKMHT is not made followed by the making of a Deed of Granting Mortgage Rights. (APHT) within the time specified as intended in paragraph (3) or paragraph (4) of Article 15 UUHT. However, according to the explanation of Article 5 paragraph (6) UUHT, it is possible to create a new SKMHT if the old SKMHT has been canceled because its term has expired.[3]

Bank in providing credit using the five C's (character, capital, capacity, economic condition and collateral). The bank's confidence in the prospective debtor is first examined from all aspects, after the bank is sure that the prospective debtor will be able, then the credit is approved and a credit agreement is made.

As an effort to implement the principle of prudence, banks in considering the provision of credit in addition to being sure of the bona fides and business prospects and projects of prospective debtors must have other elements as preventive measures, namely that the collateral requested in addition to the principal collateral should also be requested for additional collateral in the form of material collateral or personal collateral. If only limited to principal collateral in the form of bona fides, business prospects or projects only if in the future something happens to the debtor or to the debtor's business, the principal collateral alone will not be able to solve the problem and it is rather difficult in terms of legal certainty for credit repayment.

A problem that often arises in credit agreements is the problem of breach of promise (default). Breach of promise in a credit agreement can be in the form of late payment of credit as agreed or can also be in the form of bad debt. There are always sanctions for late payment or bad debt as in the act of breach of promise. In banking practice, the sanction for late payment is in the form of having to pay interest on arrears (as a fine), while for bad debts, the legal sanction should be the execution of the collateral object or payment by a third party. However, in banking practice, if a bad debt occurs, the collateral object is not always executed because usually the bank makes efforts to save the credit in other ways before finally carrying out the execution. The execution of collateral in banking practice is the last resort to return the credit that has been distributed.

According to Bank Indonesia Circular Letter Number 26/14/BPPP dated May 29, 1993, credit provision is included in the definition of productive asset quality which is assessed based on its collectibility. Based on collectibility, credit can be classified into: Current credit, substandard credit, doubtful credit and bad credit. Substandard, doubtful and bad credit are problematic credit. Legally, the means of security for the implementation of debt or credit repayment is by having a guarantee in the form of material guarantee or personal guarantee. In this case, material guarantee is more useful and safer than using personal guarantee.

As explained above, legally, land that has not been certified can be used as an object of mortgage rights, and APHT can even be installed directly as long as the condition of the land is stated in the registration process at the land office. When connected with legal certainty, APHT installed on uncertified land even though it is

[3]Mariam Darus Badrulzaman, (2001). *Kompilasi Hukum Perikatan,* PT. Citra Aditya Bakti, Bandung, p. 48.

stated that the words are still being processed, its position is still considered weak because the land could fail to register and of course the APHT will also be canceled by law. This kind of thing can be one of the obstacles for the bank in executing the guarantee even though the APHT has been made, the land cannot legally be said to be an object of collateral, because the collateral object that can be installed with AHPT is essentially land that has been registered. As for land that is under administration, UUHT actually intends that the land will definitely become registered land. The existence of a guarantee of land that has not been certified which is collateral for a loan agreement at a bank, if the debtor's credit is in default, will have a negative impact.

The land that not registered or not certified, UUHT provides a way out by using a Power of Attorney to Install Mortgage Rights (SKMHT). Viewed from the legal system of collateral, the SKMHT institution is not a collateral right that provides strong legal protection for creditors.

The Supreme Court in its 1986 ruling determined that land and houses on it whose rights status are unclear can be burdened with fiduciary guarantees. In theory, this ruling is normative so that it can be taken over as a positive legal norm to replace the SKMHT institution listed in Article 15 paragraph (4) of the UUHT. Changes to legal norms to improve the UUJF will legally provide strong legal protection to creditors.

Generally, collateral in the form of land accepted by banks is certified land with the form of collateral agreement being a mortgage. The results of the study show that before the issuance of UUHT, binding of uncertified land was carried out using a power of attorney for sale or a collateral transfer agreement and granting of power of attorney.[4]Both forms of collateral binding, both the power of attorney for sale and the agreement for the transfer of collateral and the granting of power of attorney, are not a collateral institution that can provide legal protection for banks, but are only a form of collateral binding that applies in the respective bank environment. The legal consequences for creditors are only as concurrent creditors. This form of collateral binding is called a power of attorney or pseudo-collateral. After the issuance of the UUHT, banking circles no longer accept uncertified land as collateral, even though uncertified land is an object of collateral rights.

In theory, collateral in the form of uncertified land if there is a bad credit, it will fall into concurrent collateral. This will certainly have a bad effect on creditors or banks, where banks are no longer prioritized in paying off their receivables from the sale of uncertified land, but they must share with other creditors (if the debtor has more than one creditor). Some examples of uncertified land are land with a *girik* title, tax certificate or Letter C, all of which are not proof of land ownership, but are proof of tax payments for former customary land. It is said to be former customary land because since the UUPA came into effect, legally formal customary land no longer exists, and all customary land is automatically converted into land ownership based on the UUPA.

[4]The Agreement for the Submission of Collateral and Granting of Power of Attorney is a BNI Bank Product to resolve the problem of agreements on land whose rights status cannot or cannot yet be bound by a mortgage (now a mortgage right).

In today's practice, *girik*, tax certificates or Letter C can be used or can be considered as proof of land rights but can only be accepted as initial evidence of land ownership which must be proven again with other evidence. For this reason, research on the history of the land is usually required and other evidence is usually also required in the form of testimony from the Village Head where the land is located.[5] Thus, because it is very clear that *girik*, tax certificate or Letter C is not proof of ownership of land rights, then if the *girik* is permitted by banking law to be used as collateral or security, it will certainly be a problem. The bank will have difficulty in its position as a creditor, because the proof of tax payment has no material value so it will be difficult to sell or difficult to execute.

The provision of receiving collateral in the form of uncertified land is rather less good for the development of land certification which has become a UUPA program where all land must be registered (Article 19 UUPA). The community will feel less benefit from land certification if it turns out that uncertified land also gets a good assessment and is accepted as collateral by the bank. Although in practice only certain banks (BRI) can accept uncertified land as collateral in credit agreements. According to Djuhaendah Hassan, in order to be able to help the lower class in obtaining credit, it would be better if the rights to land that have not been certified (which are only proven by *girik*, tax certificates or Letter C and so on) are not allowed to be used as collateral, but, what is necessary if the land is to be used as collateral, a certificate should also be made at the same time and efforts should be made at low cost and a fast process (i.e. if the obstacle in certification is due to high costs and a complicated and long process) or the certification process is carried out while the credit is running.

Restructuring the certification process to be simpler, faster and cheaper, so that there are no obstacles in the land certification efforts is very necessary. This is very helpful for debtors and creditors, for debtors the certificate is proof of ownership of rights, while for creditors land certification is necessary in an effort to take preventive measures to guard against future delays in credit agreements so that the land that is pledged can be executed. In addition, the certification process which is a UUPA program can continue to run.

If there is a bad credit and the collateral is still in the form of land that has not been certified, then the path that can be taken by the creditor is to use the basis of the credit agreement and the collateral of the land that has not been certified has a concurrent position (shared with other creditors). If the collateral is not able to cover the payment of bank receivables, then the provisions of Article 1131 of the Civil Code apply, where all of the debtor's assets that have existed or will exist become collateral for the payment of his debt.

3.2. Uncertified Land as Collateral Object

Land in Indonesia according to PP Number 24 of 1997 must be registered. In the Bandung area, especially in the district area, there are still many uncertified lands

[5]Djuhaendah, Hassan, (1996). *Lembaga Jaminan Kebendaan Bagi Tanah dan Benda Lain yang Melekat pada Tanah dalam Konsepsi Penerapan Asas Pemisahan Horizontal,* PT. Citra Aditya Bakti, Bandung, p. 211.

that have quite high selling power. Currently, development is being carried out by various investors to build a business on the land. For the West Java area, especially in the highlands, many tourism businesses are being built. The land used is generally not certified. Investors do not hesitate to spend a lot of money to buy the land even though it is not certified. The situation as above requires future analysis, regarding the position of the land if the land is used as collateral to obtain credit facilities from a banking institution. Until now, there are around 4,800 hectares of land in Bandung City that do not have certificates or 30 percent of the total land area in Bandung City which is 16,000 hectares. On average, the land that has not been certified is hereditary land that has been owned by Bandung City residents for decades.

Head of the Bandung City Land Office, Tjahjo Widianto, said that the absence of certificates or proof of rights did not only occur on the land of the Bandung City Agriculture Service. Until now, only 70 percent of land in Bandung City has been certified,

Likewise, with Bandung city assets in the form of land, there are still some that are not yet certified. One of the assets of the Bandung City Government (Pemkot) that is not yet equipped with a certificate is the land and building of the Agriculture Office on Jl. Husein Sastranegara, Bandung. The office, according to the plan of the Bandung City Government, will be used as a center for selling vehicle spare parts.

The Land Office's role in complicating the administration of land certificates, which results in many lands without certificates. For example, by setting high fees or processes that are deliberately made complicated. Some of the costs that must be paid by land certificate applicants include a registration fee of IDR 25,000, while the cost of measuring land of 0-500 square meters is IDR 50,000. In addition, there is also a land inspection committee fee that has not been explained how much it is. Although there is no certificate yet, the status of the 2.8-hectare land currently still used by the Bandung City Agriculture Service is clearly owned by the Bandung City Government. This is known from the existence of a Dutch-language grant letter from the Dutch Government (Gemente) to the Indonesian Government, which is currently being translated by the Bandung City Housing Service.

There is land in Bandung City whose status is still unclear, namely 1.9 hectares of land. In fact, according to the plan, the land is included in the land that will be used as a vehicle spare parts sales center by the city government, in collaboration with PT Giri Jala Diwana.

The increasing development today will also increase the need for land, so that government authority is needed to determine land policies in the form of land control principles which are basically implementing the constitutional provisions of Article 33 paragraph (3) of the fourth amendment to the 1945 Constitution. The existence of the need, control and use of land in general including the interests of development which are felt to be increasing, will also increase the problems that arise in the land sector, because of that based on Presidential Decree Number 6 of 1988, the BPN (National Land Agency) has been formed which is the organizing and implementing body for land registration both systematically and sporadically.

Certificates as proof of rights are issued for the benefit of the relevant rights holder, in accordance with the physical data and legal data that have been registered in the land book. According to PP 24 of 1997, a certificate can be in the form of one document containing the required physical data and legal data, the form, content, method of filling in, and signing of the certificate will be determined by the minister. Certificates may only be submitted to the party whose name is listed in the relevant land book as the rights holder or another party authorized by him.

Talking about certificates, previously there was a lot of land that had not been certified, and even now there is still a lot of land that has not been registered by the owner. The lack of certification funds makes people generally reluctant to register their land. In fact, to be used as collateral, the land is still not certified. Banks as credit providers are of course also careful be careful in providing loans to the community with collateral in the form of uncertified land.

The provisions of Article 10 paragraph (3), the procedure for granting mortgage rights in the form of land rights originating from the conversion of old rights that have met the requirements for registration, but the registration has not been carried out, the granting of mortgage rights is carried out together with the application for registration of the land rights in question. From the explanation of Article 10 paragraph (3) of the UUHT, what is meant by "old rights" are land ownership rights that according to customary law already exist but the administrative process in the conversion has not been completed.

Currently, there is still a lot of land with old rights as referred to above. Article 10 paragraph (3) UUHT aims to provide an opportunity for grantors of mortgage rights whose land rights are still old rights as intended as long as the grant of mortgage rights is carried out simultaneously with the application for registration of rights to the land. Given this possibility. Holders of land rights that have not been certified may also have the opportunity to apply for credit. Apart from that, Article 10 paragraph (3) of the UUHT is also intended to encourage certification of land rights in general.

The provisions of Article 10 paragraph (3) are related to the provisions of Article 8 of Law No. 10 of 1998 in conjunction with Law No. 7 of 1992 concerning Banking, which in the explanation of the article states that *girik*, petuk and other similar land can be used as collateral. The matter stated in Article 8 of Law No. 10 of 1998 in conjunction with Law No. 7 of 1992 has invited many reactions, because *girik*, petuk and others are not proof of ownership rights to land, but merely proof of payment of tax on the land which must be paid by those who use the land. It is indeed often the case that the person whose name is listed on the *girik*, petuk and other similar land is also the owner of the land in addition to being a taxpayer for the use of the land. With the provisions of Article 10 paragraph (3) UUHT, land owners who are not yet certified but have *girik*, petuk and others of the same type and want credit from banking institutions, are given the opportunity to use their land as collateral to obtain credit with a mortgage guarantee. In addition to the Bandung area, in North Sumatra (formerly East Sumatra) there are also many lands that are not yet certified. One of the rights to this land is the Sultan's Grant lands.

Before Law No. 5 of 1960 concerning Basic Agrarian Regulations was enacted, there were two types of land rights in Indonesia, namely Indonesian land rights and Western land rights. Indonesian land rights are regulated according to customary law, both written and unwritten, where the land regulations were created by the Swapraja government and also by the Dutch which originally applied to Indonesians covering all land not regulated by Western Land Law.

Land Law Swapraja is the entire regulation on land that specifically applies in the Swapraja area. Example: Yogyakarta Sultanate; Surakarta; Cirebon and Deli. Where in the Swapraja area, land law was created by the Swapraja Government and partly by the Dutch. The Deli Sultanate is an area that has its own government including its own provisions on land using the Swapraja Land Law. The land regulations in the Deli Sultanate use land regulations in East Sumatra, which is why the Deli Sultanate is one of the Swapraja areas.

Lands in the Swapraja areas in East Sumatra is owned with the creation rights of the Swapraja Government. In the Deli Sultanate area, for example, there are lands known that are owned with what is called.[6]

a. Grant sultan, a kind of customary property right, given by the Swapraja Government, specifically for Swapraja subjects, registered at the office of the Swapraja Official.

b. Grant controleur, given by the Swapraja Government to non-Swaparaja subjects, registered at the Controleur's office (Dutch Pangreh Paraja Official);

c. Grant Deli Maatschappij, located in the city of Medan and given by Deli Maatschappij, a company that has a large tobacco plantation business and is also engaged in the field of Public Services and land, obtained a large area of land from the Deli Swapraja Government with a grant. The land was divided into plots and given to those in need by Deli Maatschappij also with a grant which is a "sub-grant", known as "grant D", an abbreviation of "grant Deli Maatschappij".

d. Concession rights, for large plantation companies, are granted by the Swapraja Government and registered at the Resident's office.

Based on Law No. 5 of 1960 concerning Agrarian Principles in Part Two concerning Conversion Provisions, Article 2 paragraph (1) states that:

"Rights over land that provide authority as or similar to the rights referred to in article 20 paragraph (1) as mentioned by the names below, which existed at the time this Law came into force, namely: agrarian rights, e*igendom, ownership, property, andarbeni, rights to druwe, rights to village druwe, grant sultan, landerijenbezitrecht, altijddurende, erfpacht,* business rights to former agricultural land and other rights under whatever name will be further confirmed by the Minister of Agrarian Affairs, since the enactment of the Law "This law becomes the ownership right as stated in article 20 paragraph (1), unless the owner does not meet the requirements as stated in article 21."

[6]Boedi Harsono, (1994). *Hukum Agraria Indonesia,* Djambatan, Edisi Revisi, Jakarta, p.54.

Looking at the provisions above, it can be concluded that after the enactment of Law No. 5 of 1960 concerning UUPA, then automatically, the land rights obtained from the Sultan's grant become ownership rights.

Currently, the Ministry of Cooperatives and Small and Medium Enterprises (KUKM) will continue to boost the financing program for micro and small financial institutions to continue distributing funds as a solution to capital problems for micro and small businesses throughout Indonesia.[7]

As we know, the problem of capital is a problem faced by most of our micro and small entrepreneurs, because the government pays special attention to this problem. The boost was carried out as a response to the President's early year speech which conveyed three important things that the government is doing and intends to do, namely efforts to eradicate poverty, build the national economy, and build national independence.

The President explained the various steps that have been taken and will be continued by the government in 2007 in an effort to reduce poverty and unemployment, including the provision of micro credit and revolving funds for cooperatives and SMEs in addition to other strategic steps.

Suryadharma Ali revealed that the steps for implementing the financing program for micro and small businesses that are currently being carried out and will continue to be boosted are through the productive financing program for micro business cooperatives (P3KUM), Women, Healthy and Prosperous Families (Perkasa), and guarantees.

For P3KUM and Perkasa, the implementation of which began in 2004 (P3KUM) and 2006 (Perkasa), the funds budgeted to achieve the financing target for 12 thousand microfinance institutions in 2008 amounted to IDR 1.2 trillion in the form of revolving funds.

He stated that the credit limit (ceiling) for the micro and small financial institution financing program is IDR 4,000,000 per micro business which is planned to continue to be increased to IDR 20,000,000 per micro business. "The good ones will be increased in capital so that they can provide services for micro businesses with even greater capital," he said.

He stated that both programs were implemented by the government to all sub-districts in Indonesia so that it is hoped that funds will be distributed to villages. Suryadharma Ali stated that with the distribution of funds to villages, there will be no more problems of job creation, unemployment and poverty, which means that people's welfare will increase. In addition, continued Suryadharma Ali, an inseparable part of the microfinance institution financing program is the problem of the absence of collateral. "So that currently micro and small entrepreneurs in rural areas still have difficulty accessing sources of financing due to the absence of collateral," he said.

[7] www.kapanlagi.com, downloaded July 12, 2007, 20:34

Suryadharma Ali further said the government is also conducting a land certification program to address the guarantee issue. "Many of our farmers, micro and small entrepreneurs, our communities have land but have not been certified because their land cannot be used as collateral to banks to borrow funds," he said.

3.3. Consequences of Fiduciary Agreements on Uncertified Land

Nowadays, people are in great need of capital to run their businesses. Banks are a place for people to obtain funds by providing collateral to the bank concerned. Land is one of the many objects that are pledged by the community. People whose land is not yet certified must first register their land so that it can be pledged. While generally people who have collateral for land that is not yet certified are the lower and middle classes. The lack of funds from the community makes it difficult to pledge their economically valuable land because the bank does not want to take the risk of problems that will arise in the future from the uncertified land.

Fiduciary as an institution based on the principle of trust has been applied to land or buildings that have not been certified. This is proven by the Supreme Court Decision No. 3216/K/Perd/1984 dated July 28, 1986 which stipulates that land and the house on it whose rights status is unclear can be fiduciary.

In the development of history, fiduciary guarantees that have been decided by judicial bodies, both District Courts, High Courts and Supreme Courts, that the problem of fiduciary guarantee objects for immovable objects has not been resolved and still has different opinions. Some court judges are of the view that fiduciary guarantees are only imposed on movable objects, while some judges are of the opinion that fiduciary guarantees can not only be placed on movable objects due to the influence of the development of economic needs and positive law. The first group of judges is called the conservative school of thought, while the second group is called the progressive school of thought. The progressive school of thought wants to see that fiduciary guarantee law can function to change the legal culture of society, especially those related to the provision of credit with fiduciary guarantees. In addition, if viewed theoretically with a positive legal system approach regarding fiduciary guarantee objects, judges should pay attention to the factors of realia, idealia and flexibility of fiduciary guarantee law. Doesn't the guarantee legal system continue to change and develop according to the dynamics of society? Does the guarantee legal system have to be rigid like a human being who is still in a picture? This is not the case, because the legal guarantee system has an open character that accepts influences from outside the system, so that the legal guarantee system remains alive, dynamic and agile and is able to accommodate the aspirations and needs of its community.

Especially land in North Sumatra, there are still many lands that have not been registered and this land meets the requirements to be used as credit collateral, namely it can be transferred and has economic value. The use of collateral that is appropriate and in accordance with the legal system of collateral is with the legal system of collateral, namely with the fiduciary guarantee institution. By involving the process of unregistered land, it means that it can help small and medium economic actors. So, collateral for uncertified land is not by using a power of attorney to sell, which does not have strong protection for creditors (banks). However, it is not clear

why banks still use power of attorney to sell. Therefore, it is no longer appropriate in the current era after the enactment of the UUJF to apply a power of attorney to sell for uncertified land collateral.

Tan Kamello said that the Supreme Court's decision should be taken over by the UUHT drafters to be used as a legal norm.[8] Doesn't the role of the Supreme Court have an important meaning in the formation of legal norms that aim to create legal certainty. Moreover, the legal principle states that *Res judicata pro veritate habetur* means that the judge's decision must be considered correct.[9]Here we see a legal contradiction between the Supreme Court's decision and the law makers.

In banking practice, there is generally no burden on uncertified land through a fiduciary guarantee institution. So what is the background to the Supreme Court issuing the decision as mentioned above? If the fiduciary agreement on uncertified land is linked to the provisions of the guarantee law in Indonesia, it is clear that this is contrary to the UUJF and UUHT.

Regarding the Supreme Court Decision No. 3216 K/SIP/1984 dated 28 July 1986, in the City of Bandung this is not used as a guideline that land that has not been certified cannot be used as collateral with a fiduciary guarantee institution.[10]Land that is not yet certified may not be attached to/bound by a fiduciary guarantee institution because UUJF Article 3 letter a states that UUJF does not apply to Mortgage Rights relating to land and buildings, as long as the applicable laws and regulations determine that guarantees for these objects must be registered. Regarding the obligation to register land, Article 19 paragraph (1) of UUPA states:

"To guarantee legal certainty, the Government carries out land registration throughout the territory of the Republic of Indonesia according to the provisions regulated by Government Regulation."

It is clear that all land throughout the territory of the Republic of Indonesia must be registered or become an object of land registration, so that land is not an object of fiduciary guarantee because it must be registered according to applicable legal provisions.

In contrast to the reality in Bandung City, the results of research conducted in Pekanbaru City found that there was a fiduciary agreement that had been registered at the Regional Office of the Department of Law and Human Rights of Riau Province with the Deed of Fiduciary Guarantee Granting dated July 27, 2006 No. 19 made before Nusyirwan Koto, SH MKn, Notary in Pekanbaru which was followed up with a Copy of the Fiduciary Register Book No. W4.1003.a HT.04.06 TH.2006/STD. In the Fiduciary Register Book, the collateral object is land with the basis of ownership of the Compensation Certificate (SKGR) which is land that has not been registered or has not been certified.

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[8]Tan Kamello, (2014). *Hukum Jaminan Fidusia, Suatu Kebutuhan Yang Didambakan.* Alumni, Bandung, p. 222.
[9]Sudikno Mertokusumo, (2003), *Mengenal Hukum Suatu Pengantar.* Liberty,Yogyakarta, p. 8.
[10]Results of Interview with Wahyuning Widayati, Regional Office of the Department of Law and Human Rights, West Java Province, August 23, 2007

When connected with the provisions contained in the UUHT, the use of a fiduciary guarantee institution for uncertified land in the above case is contrary to the UUHT. Because with the issuance of the UUHT, there is only one guarantee institution for land and objects on the land. The UUHT has clearly stated that unregistered land can be guaranteed and an APHT can be installed by stating that the collateral object is being processed at the land office at the APHT. Thus, such provisions have closed the possibility for unregistered land to be guaranteed by other guarantee institutions.

The occurrence of a fiduciary agreement on uncertified land in Pekanbaru City is based on the provisions of Article 1 number 1, Article 1 number 4, Article 38 of the UUJF. However, according to the author, these articles are not appropriate to be used as a basis because the object of the fiduciary guarantee has been very clear, especially after the issuance of the UUJF.

Between UUHT and UUJF if we look more deeply at the collateral objects that can be used by these two institutions, there is a touch point where UUHT and UUJF have collateral objects of immovable objects. This becomes a dilemma in the science of collateral law. UUHT's collateral objects are immovable objects in the form of land and/or other objects related to land, while in UUJF the collateral objects in the form of immovable objects that cannot be collateralized with mortgage rights can be bound by fiduciary.

The existence of fiduciary which is also a guarantee institution for immovable property is in addition to the mortgage right, two guarantee institutions that complement each other but are slightly contradictory. What if a fiduciary agreement is made on land that has not been certified?

If we look at the applicable laws and regulations, especially for land (UUHT), then the fiduciary agreement on land that has not been certified is null and void by law and will lose its executorial title. This is because land guarantees have been regulated by UUHT where the appropriate guarantee institution for this is a mortgage. Meanwhile, if we also look at the provisions in UUHT regarding the burden on land that has not been certified, it also has one weakness, namely how is the position of the executorial title of APHT if the land used as collateral has not completed its registration process when the debtor has defaulted. Can it still be said that the APHT has an executorial title? Of course not, because in Article 14 UUHT paragraph (2) it is stated:

"The Mortgage Certificate as referred to in paragraph (1) contains the words "FOR THE SAKE OF JUSTICE BASED ON THE ONE ALMIGHTY GOD"."

Thus, what makes the mortgage institution have an executorial title is the certificate of the mortgage. So before the collateral object has not been registered, the executorial title has not been attached to the land.

Liability and fiduciary both have the principle of publicity. There is a difference between the principle of publicity contained in the provisions of the UUHT and the provisions contained in the UUJF, UUHT views publicity as an obligation to register the object of collateral before the object is pledged and after the object is pledged. The meaning of before the object is pledged is that the land has been registered or

has been certified, while after the object is pledged means that the object is registered again in order to obtain its mortgage certificate. In contrast to the UUJF, the publicity in question is that the collateral object is only required to be registered after the fiduciary agreement is executed in order to obtain its fiduciary certificate.

Based on the practice of pledging uncertified land at several banks in the Bandung city area, there has never been an object of uncertified land collateral that has been pledged with a fiduciary guarantee institution. This is because UUHT has regulated this so that it is guaranteed with a mortgage right. Even further, the existence of fiduciary as a guarantee institution for flats has also been taken over by the provisions of UUHT. The provisions in question can be seen in Article 27 of UUHT which states:

"The provisions of this Law also apply to the encumbrance of security rights on Apartments and Ownership Rights on Apartment Units."

Fiduciary agreements on uncertified land until now have no regulations at all because it is clearly stated in the UUHT that uncertified land becomes the object of collateral. UUHT provides a way in 2 ways:

1. by directly creating an APHT by stating in the APHT that the land guarantee object is currently being processed;

2. by using the SKMHT institution as referred to in Article 15 paragraph (4) of the UUHT.

Regulations regarding guarantees for uncertified land are not possible at all by using fiduciary institutions. We can see this from the perspective of the applicable guarantee law. However, if we look at it from the perspective of legal force and legal protection given to creditors, both methods owned by UUHT, fiduciary guarantee institutions will provide strong legal force and protection for creditors.

As previously stated, the Supreme Court has issued a ruling that land and the house on it whose rights status is unclear can be fiduciary. Then what about the legal consequences arising from a fiduciary agreement on land that has not been certified?

Based on the valid conditions of an agreement as regulated in Article 1320 of the Civil Code, there are subjective and objective conditions. If the subjective conditions are violated, the agreement can be canceled by filing a lawsuit with the competent district court. Whereas if the objective conditions are violated, the agreement will be null and void by law and for its cancellation a decision from the local court is still required.

Fiduciary agreements on uncertified land when related to the provisions of Article 1320 of the Civil Code are in conflict with Article 1320 number 4, namely in conflict with a lawful cause. This means that the agreement violates the provisions on guaranteeing objects in the legal guarantee system in Indonesia where the object of guarantee on land is only possible with a non-fiduciary mortgage institution. Article

1337 of the Civil Code states that a prohibited cause is if it is prohibited by law, or if it is contrary to good morality or public order

Talking about land collateral, we cannot escape from the provisions contained in the UUHT as the only collateral institution for land and objects related to land. Fiduciary agreements for land that have not been certified will not receive legal protection as regulated in the UUHT. Legally, the existence of such agreements is not recognized by the state because it does not comply with the provisions of the applicable collateral law, where the UUHT has expressly stated that collateral objects in the form of land, both certified and uncertified, are burdened with mortgage rights. If there is a fiduciary agreement for land that has not been certified, then the agreement is null and void. Void by law because the agreement is contrary to applicable laws and regulations and does not comply with the principle of a closed system of property law.

The right of guarantee arises because of the existence of property rights. The existence of property rights in addition to providing enjoyment also provides guarantees. Based on the legal system of property in Indonesia, regarding property, it adheres to a closed principle where people cannot create property rights other than those stipulated in Book II of the Civil Code.

It is said in principle because in reality the legislators themselves have created new property rights in legislation outside the Civil Code, such as Credit Verband (S.1909-584 jo S. 1937-191) Oogstverband (S. 1886-57), Mortgage rights (Law No. 4 of 1996) and Fiduciary (Law No. 42 of 1999). In addition, practice and jurisprudence have also known the existence of a new legal institution, which has the characteristics of property rights, namely fiduciary before being regulated in law.

Thus, at most it can be said that based on the closed nature of Book II of the Civil Code, a person cannot promise property rights, except for rights granted by law or recognized in jurisprudence.[11]

Fiduciary guarantee agreements are now regulated by a law, namely UUJF, so the material guarantee agreement is legally valid. However, regarding what is the object in the guarantee institution if the fiduciary guarantee agreement is applied to land that has not been certified, it is not quite right, because in Article 1 number 2 of UUJF, the limitations of fiduciary guarantee objects have been given, namely movable objects, both tangible and intangible, and immovable objects, especially buildings that cannot be burdened with mortgage rights as referred to in Law No. 4 of 1996 concerning Mortgage Rights. Furthermore, Article 3 of UUJF states that:

"This law does not apply to:

a. Mortgage rights relating to land and buildings, as long as the applicable laws and regulations stipulate that collateral for these objects must be registered;
b. Mortgage on registered ships with a gross tonnage of 20 (twenty) M3 or more;
c. Mortgages on aircraft; and

[11]J. Satrio. (2002). *Hukum Jaminan Hak Jaminan Kendaraan Fiducia*. Bandung: Citra. Aditya, p.2.

d. Pawn."

Thus, fiduciary agreements on uncertified land will also not receive legal protection from the provisions contained in the UUJF because the UUJF itself does not regulate uncertified land as an object of fiduciary collateral. The existence of the Supreme Court decision No. 3216/K/Perd/1984 dated July 28, 1986 which stipulates that land and the house on it whose rights status is unclear can be fiduciated will not provide a position that the collateral rights receive protection from the UUJF. Jurisprudence is not included in the hierarchy of laws and regulations in Indonesia. Jurisprudence is only a source of law that is used as a reference for judges to decide a case, not a legal obligation that must be obeyed by subsequent judges. So the jurisprudence can be used by judges and can also be set aside.

Thus, a fiduciary agreement on land that has not been certified is null and void by law and does not receive legal protection from the provisions contained in the UUJF, in other words, the guarantee right is not preferential in nature but only provides concurrent status for the creditor.

According to Boedi Harsono, as a collateral right on land other than a mortgage, the imposition of *fiduciare eigendoms overdracht* (FEO) has been in effect since the Dutch East Indies era. Furthermore, it is said that, during the Dutch East Indies era, there were lands owned with rights that met the requirements to be used as collateral for credit, but could not be used as a mortgage, because the law did not designate them as mortgage objects. For example, the rights of the Sultan's Grant in East Sumatra. These rights meet the requirements to be used as credit collateral, because they have a value that can be calculated with money and can be transferred to another party by way of cession. Because it is not designated by law as a mortgage object, FEO is used.[12]

If we look at the provisions in the UUPA, it is clear that the UUPA only mentions one land guarantee institution, namely the mortgage institution that applies to land with ownership rights, business use rights, building use rights, namely land rights that are registered rights. The UUPA does not recognize other property guarantee institutions for land except mortgage rights. In addition, the UUPA only mentions and allows registered land rights that can be used as collateral objects and does not refer to other rights.

According to Djuhaendah Hassan (before the enactment of UUJF), because in practice the fiduciary guarantee institution is very popular and well-liked and applies well, then the fiduciary institution can be used for guaranteeing land rights that cannot be burdened with this mortgage. The fiduciary institution is also expected to replace the position of the kreditverband which receives land rights that have not been certified as a material guarantee institution for land. However, this guarantee of land rights that have not been certified should only apply during the transition period, namely the period during which certification is still ongoing or as long as not all land rights have certificates.[13]

[12]Boedi Harsono, Op.cit, p. 51.
[13]Djuhaendah Hassan, Op.cit. p. 366.

After the enactment of UUJF, it turned out that the makers of the fiduciary guarantee law did not pay attention to the existence of the Supreme Court decision No. 3216/K/Perd/1984 dated July 28, 1986 which stipulated that land and the house on it whose rights status were unclear could be fiduciated, which was also in line with the opinion given by Djuhaendah Hassan. Finally, the object of the guarantee in the form of land that had not been fully certified became the object of the mortgage guarantee. With the issuance of UUJF, it is increasingly clear what the legal consequences are for fiduciary agreements on land that has not been certified, such agreements are null and void because they do not comply with the provisions of the guarantee law applicable in Indonesia.

A fiduciary agreement on land that is void by law will also directly have a negative impact on creditors as holders of collateral rights if at some point a default occurs and the collateral will be executed. This will certainly take a long time, the price of the collateral will fall and the creditor will be positioned as a preferred creditor.

4. CONCLUSION

Uncertified land is not a healthy collateral object and provides legal protection for creditors, although uncertified land is an object of material collateral. Binding collateral in the form of uncertified land with APHT (stated that the land is in the process of certification) and SKMHT cannot provide full legal protection for creditors. Incomplete processing and problems with the collateral object will result in difficulties in executing the collateral object if a bad debt occurs and the creditor will only be positioned as a preferred creditor in the Fiduciary Guarantee Agreement for uncertified land which is contrary to applicable land law, although in practice such a thing is found. If a bad debt occurs, the legal basis for resolving the guarantee of uncertified land with a fiduciary institution is based on the agreement of the parties and the provisions of Law No. 42 of 1999 concerning Fiduciary Guarantees do not apply. In implementing the principle of prudence, banks as credit distributors should not accept collateral in the form of uncertified land. Binding APHT to uncertified land by including the land in the certificate processing process at the land office does not provide total protection for creditors/banks. It is better to register the collateral in the form of uncertified land first before being burdened with mortgage rights so that the preferential and executorial positions are truly attached to the collateral object. So that there is no doubt in implementing the mortgage institution as the only collateral institution for land (both certified and uncertified), there should be a statement stating that the existence of Supreme Court Decision No. 3216/K/Perd/1984 dated July 28, 1986 which stipulates that land and the house on it whose rights status are unclear can be fiduciary is no longer valid.

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