

## EXECUTIVE IMPLEMENTATION BY DEBT COLLECTOR AGAINST FIDUSIAN OBJECT GUARANTEE

Nurmin K Martam<sup>1</sup>

### Abstract

Multi - finance institutions in Indonesia are better if the indicator is the number of consumer finance in Indonesia in the last few years. The growth of consumer financing can be seen from all the convenience given by the multi finance. The factor that dominates the forced withdrawal of Fiduciary Guarantee is the existence of problem loans. This problem is almost certainly experienced by any consumer financing institution. The problems discussed in this research are about how the implementation of execution of fiduciary guarantee in the settlement credit toward four wheels (car) The formulation of problems related to with the withdrawal of vehicles accompanied by violence that is: How about the collection of arrangement or confiscation of a motor vehicle that carried out by debt collector against a debtor non-performing loans, Do factors for the act of violence carried out by debt collector, How a settlement effort the act of violence carried out by debt collector in terms of the aspect of criminal law. This research is classified as the kind of research juridical normative , study legislation as criminal code and civil law, Regulation president of the Republic Indonesia No. 9 of 2009 about Funding Institution, the act of No. 42 of 1999 about Fiduciary Security, Minister of Finance Regulation No. 130/PMK.010/2012 about Registration Fiduciary for Financing Company, this research also is study case that is focus self intensively on an object particular and learn that as a case. Arrangement about the collection of vehicles stipulated in a financing with fiduciary security contained in the act of fiduciary security number 42 of 1999 And also minister of finance regulation No 130/PMK. 010/2012.

Keyword: debt collector, fiduciary guarantee

### A. Introduction

#### 1. Background

Today the Indonesian people are experiencing a planned change whose influence is very broad in both the economic and social fields. In other words, economic growth must be directed at increasing people's income and overcoming all forms of inequality in both the economic and social fields. Leasing is an agreement relating to financing activities in the form of the supply of goods by the lessor (renter) to be used or utilized by the lessee (tenant) in a certain period of time based on regular payments. In other words, leasing is essentially a lease agreement renting where the lessor (the lessor) hands over the goods for use by the lessee (the tenant). Therefore, leasing is also commonly referred to as a business lease agreement. The parties or subjects in the leasing agreement, generally between the company and the company, but in its development can also occur between the company and someone as the subject of personal finance.

The object of leasing can be in the form of movable goods such as motorized vehicles, and immovable property such as factory machinery, and others. Leasing is bound based on a standard agreement or a standard contract, according to Munir Fuady, a standard agreement is a written agreement made only by one party, often in the form of forms made by one of the parties, in this case when the agreement signed, generally the parties only fill in certain informative data with little or no changes in the clauses, where the other party in the agreement does not have the opportunity or only few opportunities to negotiate, change the clause made by one party, so that usually the standard agreement is very one-sided.

---

<sup>1</sup> Lecturer of Fakultas Hukum Universitas Gorontalo, Jalan Jendral Sudirman Nomor 6 Kota Gorontalo and Doctoral Law Student at Fakultas Hukum Universitas Muslim Indonesia, Jalan Urip Sumoharjo Nomor 225 Makassar 90232, Indonesia | 085343605429 | nmartam@yahoo.co.id.

The leasing agreement is bound by a fiduciary guarantee, fiduciary charges are carried out using an instrument called a fiduciary guarantee deed that must fulfill the requirements, namely in the form of a Notary Deed and registered with the authorized official. With this registration, fiduciary recipients have the right of preference, namely the right to take repayment of their receivables for the execution of objects that are objects of fiduciary collateral. The new right of preference is obtained when the fiduciary is registered in the Office of Fiduciary Registration and the said right is not deleted due to bankruptcy and or liquidation of the fiduciary giver. If the receivables are transferred to another party, the fiduciary who guarantees the debt is also transferred to the party receiving the fiduciary transfer. So if for whatever reason, the fiduciary object is transferred to someone else, then the fiduciary over the object is still valid and there are no obligations and responsibilities from the recipient of fiduciary consequences of mistakes (intentional or negligent) from the fiduciary, arising from the relationship contractual or due to illegal acts, in connection with the use and transfer of objects that are the object of the fiduciary guarantee.

Debtor or fiduciary giver if the injury is promised, the execution of objects that become objects of fiduciary guarantee according to the rules with the sale of fiduciary collateral object is carried out after 1 (one) month after written notice by the giver and fiduciary recipient to interested parties and announced in at least 2 (two) newspapers circulating in the area concerned. The fiduciary is obliged to submit objects that are objects of fiduciary collateral in the context of carrying out fiduciary guarantee execution. In the case of objects that are objects of fiduciary collateral consisting of trade objects or effects that can be sold in the market or on the market, the sale can be carried out in these places in accordance with the applicable laws and regulations. Funding institutions generally use the procedures for the agreement that includes the existence of fiduciary guarantees for objects of fiduciary collateral.

The leasing agreement is bound by a fiduciary guarantee, fiduciary charges are carried out using an instrument called a fiduciary guarantee deed that must fulfill the requirements, namely in the form of a Notary Deed and registered with the authorized official. With this registration, fiduciary recipients have the right of preference, namely the right to take repayment of their receivables for the execution of objects that are objects of fiduciary collateral. The new right of preference is obtained when the fiduciary is registered in the Office of Fiduciary Registration and the said right is not deleted due to bankruptcy and or liquidation of the fiduciary giver. If the receivables are transferred to another party, the fiduciary who guarantees the debt is also transferred to the party receiving the fiduciary transfer. So if for whatever reason, the fiduciary object is transferred to someone else, then the fiduciary over the object is still valid and there are no obligations and responsibilities from the recipient of fiduciary consequences of mistakes (intentional or negligent) from the fiduciary, arising from the relationship contractual or due to illegal acts, in connection with the use and transfer of objects that are the object of the fiduciary guarantee.

Debtor or fiduciary giver if the injury is promised, the execution of objects that become objects of fiduciary guarantee according to the rules with the sale of fiduciary collateral object is carried out after 1 (one) month after written notice by the giver and fiduciary recipient to interested parties and announced in at least 2 (two) newspapers circulating in the area concerned. The fiduciary is obliged to submit objects that are objects of fiduciary collateral in the context of carrying out fiduciary guarantee execution. In the case of

objects that are objects of fiduciary collateral consisting of trade objects or effects that can be sold in the market or on the market, the sale can be carried out in these places in accordance with the applicable laws and regulations. Funding institutions generally use the procedures for the agreement that includes the existence of fiduciary guarantees for objects of fiduciary collateral.

The execution process must be carried out by filing a civil suit with the District Court through normal procedural process until the court's decision is dropped. This is a procedural choice of formal law in order to maintain justice and enforcement of the material law it contains. The criminal threat stipulated in the Law of the Republic of Indonesia Number 42 of 1999 concerning Fiduciary Guarantees is as referred to in Article 35 and Article 36. Judging from the rampant cases that occur in the practice of a Leasing Institution, when there are debtors who are in arrears of payments up to several months, sometimes withdrawals are made. Not infrequently the withdrawal of the object of fiduciary collateral is carried out forcibly by the fiduciary recipient Debt Collector, although there are also some who are voluntary by the fiduciary giver. If the withdrawal is done involuntarily, then there will be new problems in criminal cases for fiduciary recipients, namely the seizure as referred to in Article 368 of the Criminal Code.

## **2. Problem Formulation**

The formulation of the problems examined in this study are:

1. How to Execute the Object of Fiduciary Assurance
2. What factors influence the execution of the object of fiduciary guarantee

## **3. Research methods**

The research method used in this study is a type of empirical normative research. Empirical normative law research is research on the application or implementation of normative legal provisions in action on any particular legal event that occurs in society. This research was conducted by examining secondary legal materials relating to research problems and relating them to their application in Gorontalo City as the object of research and Fiduciary System Installment Credit products (KREASI) as a discussion of research. This type of research is descriptive, namely research aimed at describing in a clear, detailed and systematic manner the provision of installments in the Fiduciary System Credit

The data used in this study is in the form of secondary data. Secondary data is data derived from legal regulations, documents and related literature in this study. Secondary data used in this study are sourced from primary legal material and secondary legal material.

## **B. Discussion**

### **1. Application of Law No. 42 of 1999 Related to Execution by the Debt Collector on Guaranteed Fiduciary Objects**

Initially fiduciary was based on jurisprudence, now fiduciary guarantees are regulated in separate laws. According to Mahadi "fiduciary" comes from Latin which means trust in someone or something, great hope. Also there is the word "fido" which is a verb which means to trust someone or something. Subekti explains the meaning of the word "fiduciary" is the trust that is given reciprocally by one party to another, that what comes out is shown as a transfer of property, only a guarantee for a debt.

Fiduciary is a term derived from Roman law, which has two meanings namely as a noun and adjective. As a noun, the term fiduciary means a person who is given the mandate to take care of the interests of a third party in good faith, full of caution, being cautious and forthright. People who are given trust are burdened with the obligation to do deeds for the benefit of others. As an adjective the term fiduciary shows an understanding of things related to trust. Or other words "can be trusted".

In Indonesian positive law, Article 1 number (1) of Law Number 42 of 1999 concerning Fiduciary Assurance is found to be a fiduciary understanding, namely: "Transfer of ownership rights to an object on the condition that the object whose ownership rights are transferred remains in the possession of the owner " The definition of transfer of ownership rights is the transfer of ownership rights from the fiduciary giver to the fiduciary recipient on the basis of trust, provided that the object which is the object remains in the hands of the fiduciary giver. So fiduciary is a way of transferring ownership rights from (debtor) based on the existence of a principal agreement (debt agreement) to the creditor, but only the juridical leveraging is granted and only owned by the creditor only (as collateral for debtors), the goods remain controlled by the debtor. The form of details of the *constitutum Prossessorium* (the surrender of ownership of objects without the surrender of physical objects at all), this fiduciary principle is carried out through a three-phase process, namely:

1. "Phase I: Phase obligatory agreement (*obligatoir overeenskomst*) Namely in the form of an agreement to borrow money with a fiduciary guarantee between the party giving fiduciary to the party receiving fiduciary.
2. Phase II: Phase of material agreement (*zakelijke overeenskomst*) Namely an agreement in the form of surrender of ownership rights of the debtor to the creditor, in this case carried out by surrender of ownership rights without surrender of physical property (*constitutum prossessorium*).
3. Phase III: Lending agreement phase In this case the object of the fiduciary object whose ownership has been transferred to the creditor is presented to the debtor, so that the object, after being bound with a fiduciary guarantee, is still physically controlled by the debtor ".

Fiduciary development can be seen from the birth of a fiduciary, fiduciary recognition in jurisprudence until the fiduciary guarantee is regulated in law. Initially, the fiduciary institution known in Roman law as *FidusiaCum Creditore* with its full name is *Contracta Fiducia Cum Creditore* which means the promise of trust made with creditors, said that the debtor will transfer ownership of an item to the creditor as collateral for the debt in agreement that the creditor will transfer the ownership back to the debtor if the debt has been paid in full. With this *fiducia cum creditore*, the authority held by the creditor will be greater, namely as the owner of the goods delivered as collateral. The debtor believes that the creditor will not abuse the authority given. Its strength is limited to moral trust alone and not a definite legal force. The debtor will not be able to do anything if the creditor does not want to return ownership rights to the goods delivered as collateral.

However, based on Article 1 paragraph (1) which reads as follows: "Fiduciary is the transfer of ownership rights on the basis of trust with the provision of the right to ownership transferred in the possession of the owner of the object." return fiduciary priority in syndicated credit and the reason also makes sense. In the framework of financing the

consortium, credit submission whose value is far below the value of submitting objects is very likely to do fiduciary repayment. Credit element syndication is:

**2. Syndicated loans of more than one financial institution in a syndicated facility.**

Syndicated loans are given based on the same terms and conditions for each syndicated participant, for example in the form of a credit agreement between all syndicated participants.

Published in one credit agreement deed between the debtor (commitment) and all syndicated participants.

1. Syndicated loans are administered by the same agent for all syndicated participants.
2. With the above reasons, it is actually necessary to do fiduciary. However, if the fiduciary is repated it will be replaced with the Fiduciary Guarantee Law itself. In the Fiduciary Guarantee Deed it is necessary to fill in the details of the identity of the fiduciary giver and recipient that can be changed which will bring criminal sanctions.
3. Especially for stock items, according to inappropriate habits, where the stock of goods has been bound with perfect fiduciary guarantee, but when there is an increase in the credit limit for the stock of goods, it is tied back with added value adjusted to the collateral value ratio apply by making a new fiduciary deed and re-registering with the approval of a new certificate. This will add to costs and bureaucracy in the legal field of fiduciary guarantees. Supposedly, the stock items do not need to be re-bonded, but only with the attachment changes (additional). Another disadvantage in terms of the restriction of fiduciary goods inventory is that the inventory is not guaranteed to other financial institutions (banks or non-banks)? This could happen because the registrant is the creditor as the recipient of the fiduciary guarantee, but the one who controls the inventory is the debtor. It is inefficient if creditors need to check the warehouse where the stock is stored.

**3. "Required" Registration and Phrase Strength in Registration of Fiduciary Guarantee Deed.**

Registration of deed Fiduciary guarantees carried out by fiduciary recipients or authorities or representatives. Based on Article 8 which reads as follows: "Fiduciary guarantees can be given to more than one Fiduciary Recipient or to the power of attorney or representative of the Fiduciary Recipient." The fiduciary recipient. It could be that the certificate registration office fiduciary guarantee does not make an assessment of the truth of the contents of this deed because they are only based on the data contained in the deed only. Article 11 is a crucial article in the registration of deed of fiduciary guarantee. One phrase is the word "must be registered". However, in practice Article 11 is often rejected. These mandatory words must be taken. It may be risked to challenge fines for anyone who does not obey it. In practice, often the creditor does not carry out the contents of the norm. This Fiduciary Guarantee Law should also regulate the maximum period of time when the Fiduciary Deed is registered and if it is not registered, the agreement is in accordance with the law.

In practice, recipients of fiduciary guarantees often only make standard requests that must be signed by the debtor. This letter is a Selling Power of Attorney that provides the debtor who is accepted and who does not ask the creditor who executes objects guaranteed by the fiduciary if the debtor defaults. In addition, the creditor also makes a Power of

Attorney to Register the Guarantee Item. Even though there is already a power of attorney, the creditor often does not register. This registration actually benefits both parties. For creditors, registration provides legal protection if the debtor sells/transfers ownership of the collateral object to another party. If already registered, the buyer/party will receive the status of the object (publicity principle). For the debtor, registration will protect him from arbitrary actions when the creditor will execute the collateral object. Debtors avoid rough methods by collectors.

The need for a criminal threat if it is not or late in registering a fiduciary deed is also because it will be detrimental to the country's finances, in terms of loss of potential state revenue from the non-tax sector. This is what many creditors and/or debtors have avoided so far, which is hard to pay for registration fees for fiduciary guarantees. Especially the credit of twenty million rupiah down. Usually the creditor relies more on statement letters whose standard format has been determined by the creditor (willingness of the debtor to sell collateral if default) if it is to execute the collateral. Because of the above facts, it is necessary to firm the law to make the word "obligatory" adhered to and not to give space as if it can choose to obey or not (depending on the situation).

The articles governing the parate executives in the fiduciary guarantee law are Article 15 paragraph (3) which reads: "If the debtor is injured, the Fiduciary Recipient has the right to sell objects that are objects of Fiduciary Assurance of his own power." "(1) If the debtor or Fiduciary is injured, the execution of objects that are objects of Fiduciary Assurance can be done by:

- a. implementation of the executorial title as stated in Article 15 paragraph (2) by Fiduciary Recipients;
- b. sale of objects that are objects of Fiduciary Assurance for the power of the recipient of the Fiduciary himself through a public auction and take payment of his receivables from the proceeds of sale;
- c. underhand sales carried out based on the agreement of the Fiduciary Giver and Recipient if in this way the highest price can be obtained that benefits the parties (2) The sale as referred to in paragraph (1) letter c shall be carried out after the 1 (one) month has passed since the written notification by the Fiduciary Giver and/or Recipient to interested parties and has been announced in at least 2 (two) newspapers circulating in the area concerned".

According to Subekti, Parate Executives are running themselves or taking their own rights, in the sense that they are without judicial mediation, which is intended for a collateral to sell the goods themselves. The agreement to impose a fiduciary guarantee is carried out by notary deed (Article 5 paragraph (1), the agreement must be made in the form of an authentic deed wherein the deed has an executorial title, meaning that the execution is carried out by the holder of the security right without going through assistance or court intervention.

In article 31, it is affirmed in Article 32 of the implementation of the Fiduciary Guarantee Act that the nature of the implementation must be authorized by the fiduciary guarantee provider or through public/court auctions. By eliminating licensing, this removes the executorial title itself. Supposedly, changing the execution parate is sufficiently regulated in this law without having to look at other laws and regulations because this Fiduciary Guarantee Law is a lex specialist in the legal field of fiduciary guarantees. Therefore, interrelated binding the law to the parties involved, then automatically there are also legal

implications that also participate for the parties making the agreement. In this case the loan agreement with land security also has implications if on this day one of the parties or in the sense of not doing what has been specified in the agreement, the results of this study use the right to submit another application for existing legal needs.

In line with the above, according to Arie S. Hutagalung, in the system of law in Indonesia, land that can be used as collateral since the enactment of the Basic Agrarian Law known as Mortgage Rights. Since April 9, 1996 Law No.4 of 1996 has been promulgated concerning the Right to Underwrite Land and Objects Related to Land (hereinafter referred to as "UUHT"). Therefore, as a result of the embodiment of the Mandate of the Agrarian Law (hereinafter referred to as "UUPA"), the UUHT has brought a fundamental overhaul of land law in general and provisions that permit licensing related to land rights in each of them.

In addition to carrying out the mandate of the LoGA, the background was UUHT also to meet the demands of development. With the increase in national development which is focused on the economic field, it is necessary to provide sufficiently large funds so that it requires an institution of guarantee rights over a strong land which one of its characteristics is easy and certain in the execution of the execution if the debtor defaults. For this reason UUHT has asserted that in the execution of the collateral for debt, a certificate Mortgage rights are substitutes for grosse deed mortgages that have since the enactment of the BAL was no longer issued.

- a) The right of the first-degree Underwriting Right holder to sell the Underwriting Right object on his own power through a public auction as referred to in Article 6 UUHT.
- b) Executorial Titles included in the Underwriting Rights certificate as referred to in Article 14 paragraph (2) of the UUHT, namely execution without court assistance. If the debtor is injured in the promise, the creditor has the right to sell the object of the Underwriting Right on his own power through a public auction according to the procedures specified in the legislation.

In addition, the sale of the Underwriting object can also be carried out under the agreement of the giver and the Underwriting Right Holder, if the highest price is obtained that can benefit all parties, after fulfilling certain conditions.

Article 6 UUHT: If the debtor is injured, the holder of the Underwriting Right has the right to sell the object of Underwriting Right through a public auction without requiring further approval from the Underwriter and then taking the repayment of the proceeds from the sale before the other creditors. The enactment of the above provisions provides advantages for the certificate of Underwriting Rights as a proof of the existence of an executorial right to the Underwriting Rights holder who has the same strength as a court decision that has permanent legal force and serves as a substitute for grosse deed mortgages on the right to soil. Grosse is a copy or (in the exception of) a quotation, by posting above (above the title of the contract) the following: "For The Justice Based On The Almighty God" and below it is given "given with the first Grosse" by mentioning the name of the Underwriter can sell object of Underwriting Right through a public auction based on his executorial title. This provision should provide certainty for creditors if the debtor is liable to promises by providing convenience for execution as stipulated in Article 224 HIR6. While according to Arie S. Hutagalung through the Executive Title as mentioned above, the

problem of the speed of time in executing guarantees should not be an obstacle anymore, but unfortunately, developments and changes in the law in the field of national land law are out of sync with the development of Civil Procedure Law, resulting in the distortion that is clearly seen in legal practice.

The principle of the judiciary which states that it must be done in a simple, fast and low-cost manner, seems to have been unable to be expected in the judicial practice that occurred in Indonesia.<sup>8</sup> However, the Court which should have been the last bastion of justice seekers (Justiciabelen) was unable to provide balanced legal protection. M. Yahya Harahap stated, the request to postpone seizure of the Underwriting Rights execution is a very serious problem, because for every execution there is often a request for a delay in execution. The reason for the delay is that there is something relevant but some are not, so it is very impressive that the reason is deliberately fabricated for the purpose of extending the process of execution. According to Ateng Wahyudi and Wahyudi Afandi, one of the causes of the difficulty in carrying out the verdict in the execution of Underwriting Rights was because of the frequent use of "Resistance" legal remedies from the Execution Respondent (Party Verzet) and parties outside the case (DerdenVerzet). With the considerations often raised, there is a sense of "dissatisfaction" with the court's decision. On the other hand, there is no consequence (sanction) for the defendant to file a resistance, so that before the winner of the case (the applicant for execution) enjoys his victory, various resistance efforts are carried out to be able to hamper the execution of seizure.

### **C. Conclusion**

Based on the executorial title, fiduciary guarantee rights holders can directly execute their rights to their collateral to take repayment of their receivables that are not deleted by bankruptcy and liquidation of the fiduciary giver. In bankruptcy, a supervisory judge is issued to issue provisions needed for bankrupt assets, and the curator who manages the assets of a bankrupt debtor can curb the freedom of the fiduciary guarantee rights holder to execute his guarantee. The fiduciary guarantee certificate with an executorial title has legal force against the object of guarantee in bankruptcy, this requires clarity regarding the position of the fiduciary holder's preference. The study was conducted to determine the executorial power of fiduciary guarantee certificates on objects of collateral in bankruptcy. the executive force of a fiduciary guarantee certificate has an executorial power that is equated with a court decision that has permanent legal force. Execution of fiduciary guarantees in the form of fiduciary executions with executorial titles. While the constraints on the execution of fiduciary guarantees are objects of fiduciary collateral not to be surrendered by the debtor; the object of fiduciary guarantee has been transferred to a third party; goods inventory/stock when executed no; the value of the object of fiduciary change; high auction costs and auction operations. The problem in judicial practice is that the fiduciary collateral is damaged or unknown; fiduciary objects are shared assets. In addition, there were also obstacles in the stages of bankruptcy by the curator.

### **References**

- Ali, Moch Chidin, et al. 1993. Definition of Elementary Laws of the Civil Agreement. Bandung: Mandar Forward.
- Badruzaman, Mariam Darus. 1980. Various Business Laws. Bandung: Alumni. \_\_\_\_\_ . 1987.
- Chapters on Creditverband, Pawn, and Fiducia. Bandung: Alumni. Dimiyati, Khudzaifah & Kelik Wardiyono. 2008



- Legal Research Methods. Surakarta: Law Faculty of Muhammadiyah University of Surakarta. Fuady, Munir 1995.
- Funding Law in Theory and Practice (Leasing, Factoring, Venture Capital, Consumer Financing, Credit Cards). Bandung: Citra Adhya Bakti. Harahap, Yahya. 1986.
- Agreement Legal Aspects. Bandung: PT Alumni. HS, Salim. 2004. Development of Guaranteed Law in Indonesia. Jakarta: PT Raja Grafindo Persada. \_\_\_\_\_. 2009
- LAW CONTRACT Theory and Contract Making Techniques. Jakarta: Sinar Grafika. J. Moleong, Lexy. 2006. Qualitative Research Methodology. Bandung: Teenager Rosdakarya Offset. Kamello, Tan. 2004.
- The Law of Fiduciary Assurance is a Desired Need. Bandung: P.T Alumni. Kashadi. 2000. Legal Guarantees. Semarang: UNDIP Law Faculty. Meliala, A. Qiram Syamsudin. 1986.
- Principles of the Law of the Agreement and Its Development. Yogyakarta: Liberty. Mertokusumo, RM. Soedikno. 1988