

THE INHIBITING FACTORS ON LEGAL PROTECTION FOR RECIPIENTS OF FIDUCIARY WARRANTIES WITH INVENTORY GUARANTEED OBJECTS

Bambang Suprabowo
Anis Mashdurohatun
Eman Suparman

ABSTRACT

The purpose of this study is to examine and analyze the inhibiting factors of legal protection for recipients of fiduciary guarantees with objects of inventory guarantee goods. The method of approach used in this research is sociological jurisdiction, which used to examine issues related to factors that inhibit legal protection for recipients of fiduciary assurance. The results of the study found that "Fiduciary is the transfer of ownership of an object on the basis of trust provided that objects whose ownership rights are transferred remain in the possession of the possessor of the object". Objects that can be used as collateral with fiduciary are movable objects, which can be inventory items. Legal protection for creditors in the provision of business credit with the object of fiduciary inventory guaranteed goods, so far in the banking practice has not been maximized. The factors that inhibit the legal protection for the recipient of fiduciary guarantee with the object of collateral goods inventory is caused by the bad faith of the debtor and the existence of confidential norms in the prevailing laws and regulations.

Keywords: Inhibiting Factor, Legal Protection, Fiduciary Receiver, Inventory.

A. INTRODUCTION

In realizing the people's welfare, the economic aspect of the country becomes very important to be organized and strived. The economic aspect is very supportive of the progress of a nation. The economic aspect is one of the areas that should be prioritized in the nation's economic development, as set forth in Article 33 of the 1945 Constitution of the State of the Republic of Indonesia, which reads:

- (1) The economy is constituted as a joint effort based on the principle of kinship;
- (2) Production branches that are important to the state and which affect the livelihood of the people are controlled by the state;
- (3) Earth and water and natural resources contained therein shall be controlled by the state and used for the greatest prosperity of the people;
- (4) The national economy is organized on the basis of economic democracy based on the principles of togetherness, efficiency, justice, sustainability, environmental insight, independence and by maintaining a balance of progress and national economic unity;
- (5) Further provisions concerning the implementation of this article shall be governed by law.

In realizing the economic development¹ of a nation, it is needed a quite important means, namely funds. People will need funds for various purposes, especially to increase their business. The funds can be obtained through banking services, namely through credit provided by the bank or through the services of other financial institutions.²

Bank is a financial institution that can provide funds in the form of loans to the community for business development. Banks raise funds from people who are over-funded through their tools, namely demand deposits, savings deposits, and time deposits, and then the bank distributes the collected public funds in the form of credit to the community that for a while requires fund. Collateral or collateral is one thing which must be considered by the creditors in giving credit to the prospective debtor, in the form of goods submitted by the debtor to the bank as the creditor as collateral against the repayment of the credit it receives.

¹ Fiduciaries Need To Overcome The Tendency To Allocate Capital Based Solely On Historical Practices And Approach Sustainable Investing From A Forward-Looking, Risk Management And Value Creation Perspective. James Hawley, Keith Johnson, And Ed Waitzer, *Reclaiming Fiduciary Duty Balance*, Rotman International Journal Of Pension Management, Volume 4- Issue 2 Fall 2011, Page No.11

² Understanding Banks According To The Provisions Of Article 1 Number 2 Act Number 10 Of 1998 On Banking Is: "Business Entities That Collect Funds From The Public In The Form Of Savings And Channeled To The Community In Order To Improve The Standard Of Living Of Many People. This Means That In Daily Activities, Banks In General Always Try To Collect As Much As Possible From The Public In The Form Of Savings, And Then Manage The Funds To Be Channeled Back To The Community In The Form Of Credit Loans. "

In view of the importance of credit funding in the development process, it is appropriate that the giver and the recipient of the credit and other parties concerned shall be protected through a strong guarantee body in order to provide legal certainty to all interested parties in anticipation of risks to creditors will come. For such business can use banking services.

As stated by Sri Soedewi Masjchoen stating that³ "For the sake of the creditor's interest, the law provides a guarantee against all creditors and all debtors' property. The existence of a guarantee for the debtor is for the security of capital and legal certainty for the giver of capital, this is the importance of the guarantee institution. "

As it is known, currently, the implementation of the guarantee to obtain loans by creditors has been known law of guarantee for immovable and movable objects. The fiduciary guarantee institute as stipulated in Act Number 42 of 1999 on Fiduciary Security, was used as a guarantee institution for those who need funds, but does not own land as guarantee.

The birth of the fiduciary guarantee agency is motivated by the existence of the law (Civil Code) which regulates the pawn institution which in practice causes many difficulties and has no practical aspect in its implementation, this is caused by the goods which become the object of guarantee must be submitted to the creditor, so if the goods related to the means of livelihood such as vehicles used for transportation or tools that become a means of making a living, then the requirement of surrender of real object guarantee to the creditor party poses a big obstacle for the debtor.⁴

The emergence of fiduciary institutions can provide assurance to the creditor without the need to hand over the asset to the creditor becomes a helpful alternative for the community who need additional for business capital, especially among the lower middle class. The owner of the goods can still control and use the goods, but he is required to surrender his ownership rights to the item *constitutum possessorium* to the creditors.

Fiduciary was created not because the rule of law had governed it first, but because of the need for practice in business traffic which then forced to create a guarantee institution for moving objects that could bear a debt (credit), but the object of guarantee no need to be submitted to the creditors. Many people have difficulties when they have to bind their material rights with a mortgage guarantee, since the pledge has the obligation to surrender the real ownership of the object to the creditor, if the security object is related to the goods used for the livelihood, the binding process will make it difficult for the debtor to carry out his economic life.⁵

Fiduciary security is a solution for debtors who only have guaranteed goods in the form of goods that he uses his own good to run his livelihood or at least still need the goods in his control. In addition, to increase business capital, he must use the goods for credit guarantees⁶ to the bank. Guarantee institution is one form of legal protection for creditors if the debtor *wanprestasi*⁷ in paying off his credit debt. It is interesting to conduct in-depth study of the factors of fiduciary recipient's protection of the goods inventory guarantee object.

B. RESEARCHMETHODS

The approach method used in this research is sociological jurisdiction, it was used to examine the problems related to factors that inhibit the legal protection for creditors in granting business credit with the object of guarantee of inventory goods. This sociological juridical study is based on a sociological jurisprudence school. This study is based on normative legal science, it did not examine the norm system in rules of law, but observed the reactions and interactions that occur when the norm system works in society⁸. this study uses primary data and secondary data. By qualitative descriptive data analysis.

³ Sri Soedewi Masjchoen, *Hukum Jaminan Di Indonesia Pokok-Pokok Hukum Jaminan Dan Jaminan Perorangan*, Liberty, Yogyakarta, 2003, Page. 2.

⁴ D.Y. Witanto, *Hukum Jaminan Fidusia Dalam Perjanjian Pembiayaan Konsumen (Aspek Perikatan, Pendaftaran, Dan Eksekusi)*, Cetakan Kesatu, Mandar Maju, Bandung, 2015, Page. 78.

⁵ *Ibid.*, Page. 79-80.

Before Giving Credit Or Financing, Syari'ah Bank Should Conduct A Thorough Assessment Of The Character, Capability, Capital, Collateral, And Prospect Business Of The Debtor Customer. The Five Elements Are Often Called 5C. Anis Mashdurohaturun, Zaenal Arifin, Gunarto, *The Inconsistency Of Parate Execution Object Warranty Of Rights In Banking Credit Agreement In Indonesia*, International Journal Of Applied Business And Economic Research, Volume 15. Number 17.2017, Page No.268. ⁷ The Nature Of The Assesoir Agreement In An Agreement Will Be Waived If The Loan On The Principal Agreement On Which The Fiduciary Agreement Is Born Has Been Settled Or Paid. Due To The Law Of The Debtor Or Fiduciary Giver Of Wansprestasi (Indonesian's Term Of Not Fulfilling The Obligation), The Fiduciary Shall Obligate To Submit The Fiduciary Assurance Object In The Course Of Execution. The Execution May Be Executed By Executing The Title Executorial By The Fiduciary Recipient, Or Through The Parate Institution, The Sale Of Fiduciary Security Objects On His Own Power Through A Public Tender For The Repayment Of The Debtor's Loan. With The Need To Implement Risk Management With Risk Transfer To Third Parties. Anis Mashdurohaturun, Gunarto, Bambang Suprabowo, Sugiyanto, *In Effect Of Fiduciary Agreement Of Moving Object As A Guarantee Against Obligation-Violating Debtor*, International Journal Of Humanities And Social Science Research, Volume 3; Issue 7; July 2017; Page No. 39.

C. RESEARCH RESULT AND DISCUSSION

Globalization is a structural and cultural construction that ensures the operation of the integration of capital markets, goods and services throughout the world.⁹ According to Fitzgerald, the theory of legal protection aims to integrate and coordinate various interests in society because in a traffic interest, protection of certain interests can only be done by limiting the interests on the other hand. The legal interest takes care of human rights and interests, so the law has the highest authority to determine the human interest that needs to be regulated and protected. The protection of the law should look at the stages, namely the protection of the birth law from a legal provision and all the rules of law provided by the society which are basically the agreement of the community to regulate the behavioral relationship between the members of society and between individuals and the government which is considered to represent the interests of the community.¹⁰

Law is essentially an abstract thing, but in its manifestations it can be concrete. A new legal provision may be judged favorably if the consequences resulting from its application are the good, the greatest happiness and the diminished suffering.¹¹

According to Satjipto Rahardjo, law protects a person's interests by allocating a power to him to act in the interests of that. The allocation of this power is measured, in a sense, determined by its breadth and depth. Such power is called right. But not every power in society can be called a right, but only a certain power which is the reason for attachment of that right to a person.¹²

Here are some definitions of legal protection according to some experts, namely:

- a. Satjipto Raharjo;¹³ The legal protection provides guidance to human rights harmed by others and the protection is given to the public so that they may enjoy all the rights granted by law.
- b. Philipus M. Hadjon;¹⁴ The legal protection is the protection of prestige and dignity, as well as the recognition of human rights held by legal subjects under the legal provisions of abuse.
- c. C.S.T. Kansil; Legal protection is a variety of legal efforts which law enforcement agencies must provide to provide a sense of security, both mind- and-body and the threats and threats of any party.
- d. A. Muktie Fadjar. Legal protection is a narrowing of the meaning of protection, in this case only protection by law alone. The protection afforded by law, also relates to the existence of rights and duties, in this case which is owned by man as a legal subject in his interactions with his fellow human beings and his environment. As the subject of human law has the right and obligation to perform a legal action.

In granting credit to the public, the bank must be confident that the funds lent to the community in the form of the credit will be back on time and interest, and on terms mutually agreed upon by the respective bank and debtor in the credit agreement. From this agreement was born an engagement. In Article 1234 the Civil Code states that: "Engagement is intended to give something, to do something, or to do nothing". Thus, from the credit agreement between the creditors and the debtor, after the credit terms have been fulfilled by the debtor, the creditor will grant the credit, and the debtor must return the credit debt as mentioned in the agreement.

⁸ Mukti Fajar N.D. Dan Yulianto Achmad, *Dualisme Penelitian Hukum, Normatif Dan Empiris*, Pustaka Pelajar, Yogyakarta, 2010, Page. 47. ⁹ Anis Mashdurohatun & M.Ali Mansyur, *Legal Protectionon Industrial Product Desigin Wood Carved Of Small And Medium Enterprises (Smes) Furniturein Jepara Distric*, Proceedings The 2nd International Multidisciplinary Conference 2016 November 15th , 2016, Universitas Muhammadiyah Jakarta, Indonesia 933-943 ISBN 978-602-17688-9-1. 2016. Page.933

¹⁰ Satjipto Raharjo, *Ilmu Hukum*, Citra Aditya Bakti,Bandung, 2000, Page. 53 And Page 69. ¹¹ Lili Rasjidi Dan I. B. Wyasa Putra, *Hukum Sebagai Suatu Sistem*, Remaja Rosdakarya, Bandung, 1993, Page. 79.

¹² Satjipto Rahardjo, *Loc.Cit.* ¹³ *Ibid.*, Page. 54. ¹⁴ Max Mag, *Pengertian Perlindungan Hukum Menurut Para Ahli*, Sebagaimana Diakses Dalam <http://Tesisshukum.Com/Pengertian-Perlindungan-Hukum-Menurut-Para-Ahli/>, Pada Tanggal 5 Februari 2016, Waktu :11.17am.

Bank lending funds are very important in the development process, thus obtaining protection through a strong guarantee rights institution in order to provide legal certainty for all interested parties is as an effort to anticipate the risks for creditors in the future, one of which is the fiduciary guarantee agency.

The provisions of Article 1 Sub-Article 1 of Act Number 42 of 1999: "Fiduciary is the transfer of ownership of an object on the basis of trust provided that the object of which its right of ownership is transferred shall remain in the possession of the possessor of the object". Objects that can be used as collateral with fiduciary are movable objects. In addition, it can also be inventory items. As mentioned in the provisions of Article 20 through Article 23 of Act Number 42 of 1999, namely:

1. Article 20 of Act Number 42 of 1999 The fiduciary assurances still follow the object of the fiduciary assurances in the hands of whomever the object is located, except the transfer of the inventory object to the object of fiduciary collateral.

2. Article 21 of Act Number 42 of 1999

(1) The fiduciary may transfer the items of inventory which become the object of fiduciary guarantee in the manner and procedure commonly practiced in the trading business;

(2) The provisions referred to in paragraph (1) shall not apply, in the event of a fraudulent third party debtor and / or fraud injury;

(3) The objects which become the object of fiduciary security transferred as referred to in paragraph (1) shall be replaced by fiduciary givers with equivalent objects;

(4) In the event that the fiduciary donor has breach of contract, the result of the transfer and / or invoice arising from the transfer referred to in paragraph (1), by law shall become the object of replacement fiduciary warranty and the transferred fiduciary object of the fiduciary.

3. Article 22 of Act Number 42 of 1999

The purchaser of the object—the object is under the fiduciary asset—is free of charge, even if the buyer is aware of the fiduciary assurance, provided that the buyer has paid the sale price of the item at the market price.

4. Article 23 of Act Number 42 of 1999

(1) Without prejudice to the provisions referred to in Article 21, if the fiduciary receiver agrees that the fiduciary may use, combine, mix or transfer the goods or proceeds of objects which are the guaranteed object of fiduciary, or consent to billing or compromise receivable, such consent does not imply that the fiduciary receiver waives the fiduciary guarantee;

(2) The fiduciary is prohibited from transferring, pledging or leasing to any other party the object of guaranteed fiduciary which is not a stock of goods, except with the prior written consent of the fiduciary receiver.

The guarantee institution is a very important need for creditors or banks to minimize the risk of disbursing credit. The risk is the failure to pay the credit debt by the debtor or because the debtor defaults. Risk is set forth in Article 1237 of the Civil Code which states that: "On an engagement to deliver certain goods, the item is borne by the creditor since the contract is made. If the debtor fails to deliver the goods in question, then the goods since the engagement is done become his responsibility".

Credit risk granted with guarantee in the form of fiduciary inventory goods is due to the *wanprestasi* of debtors. It is further due to bad faiths of debtors using inventory goods without the knowledge of creditors, embezzling goods inventory, and weak supervision from the creditors.

For the debtor's *wanprestasi*, it is mentioned in Article 1238 of the Civil Code that: "The debtor is declared negligent by warrant, or by such deed, or based on the strength of his / her own engagement, that is, this engagement causes the debtor to be deemed negligent by the passage of time specified."

Guarantees as a means of protection for the security of creditors, namely the certainty of debt repayment debt or the implementation of an achievement by the debtor or by the guarantor of the debtor, if the debtor is unable to finish all the obligations related to the credit.

As the responsibility of the debtor due to default, to the inventory goods guaranteed by fiduciary, the debtor must replace it with an equivalent object and must be re-registered to the successor. As mentioned in Article 11 paragraph (1) of Act Number 42 of 1999 that: "Objects with fiduciary collateral shall be registered". It is mentioned also in Article 16 of Act Number 42 of 1999 that:

(1) In the event of any change in matters contained in the Fiduciary Guarantee Certificate as referred to in Article 14 paragraph (2), the fiduciary receiver shall apply for the registration of such amendment to the Fiduciary Registration Office;

(2) Fiduciary Registration Office on the same date as the date of receipt of the change request, recording the changes in the Fiduciary Register book and issuing Statement of Amendment which is an integral part and Fiduciary Guarantee Certificate

Legal protection for creditors in the provision of business credit with the object of fiduciary goods inventory guaranteed so far in the banking practice has not been maximized, which is caused in addition to bad faith of the debtor also the existence of conflict of norms in the prevailing laws and regulations.

Conflicts of norms that are vague in the articles of Act Number 42 of 1999 are described as follows:¹⁶

a. Norm Conflict; The conflict of norms can be found, such as, in the enactment of Article 2 of Act

Number 42 of 1999 which states as follows: "This law applies to any agreement that aims to burden objects with fiduciary security". With this facilitative norm, it is expected to provide greater legal certainty and be able to provide legal protection for interested parties, so that a comprehensive and comprehensive provision on fiduciary guarantee to sustain activities in the dynamic business world will be established.

However, Article 38 of Act Number 42 of 1999 actually regulates as follows: "To the extent not inconsistent with the provisions of this Law, all legislation concerning fiduciary shall remain valid until revoked, renewed or updated".

The conflict of norms here occurs because while Article 2 of Act Number 42 of 1999 facilitates any agreement that aims to burden objects with fiduciary guarantees. Meanwhile, the regulative norms are still in fact still recognize the existence of FEO who want replaced. There was a conflict between the facilitative norm and the regulative norm. FEO should be revoked and abolished because there is a strong legal basis to replace it. Meanwhile, the facilitating norms open the vast front door to be used by interested parties, the back door is also opened wide to avoid the rule of law that has been standardized, back to the rule that is only based in a recognized jurisprudence of its weak legal basis.

This is reinforced by the provisions of Article 37 paragraphs (1) to paragraph (3) of Act Number 42 of 1999. With this understanding, fiduciary beneficiaries who do not register their guarantee bonds can still register their rights under the agreement of the parties in the bonds of guarantee, customary law and jurisprudence.

The conflict of norms is also found in Article 15 paragraph (3) and Article 29 paragraph (1) letter a of Act Number 42 of 1999 which essentially regulate execution executed by creditors themselves, it is known as *parate executie*. It contrary to Article 29 paragraph (1) letter b, paragraph (1) subparagraph c and Article 31, it is affirmed in Article 32 of Act Number 42 of 1999 which essentially governs the execution shall be with the consent of the fiduciary giver or by a public auction or court fiat. The *Parate executie* aims to provide convenience to the fiduciary recipient creditors when the fiduciary lender is defaulted. The creditor may sell his/her fiduciary security object without intermediation, court approval.

Subekti believes that the *parate executie* is self-executing or taking his own right, in the sense that without a judge, it is aimed at a guarantee to further sell the item himself. While Tartib believes that the executions carried out alone by the holder of the guarantee rights (mortgage and mortgage) without through the help or intervention of the district court, but only on the basis of aid only state auction office.

In connection with the existence of the conflict of norms in the articles of Act Number 42 of 1999, it is important to know the existence of hierarchy of legislation as stipulated in Act Number 10 of 2004 regarding the Establishment of Laws and Regulations as amended by Act Number 12 of 2011. According to JW Harris, there are four legal principles in systematizing the rule of law according to the level. The principle of law in is exclusion, *subsumption*, derogation and non-contradictory principles. If there is a norm of conflicts between the higher rules and the lower orders governing the same material, then based on the *lex superiori derogat legi inferiori* principle, the higher rule of law has effect.

¹⁵ Herowati Poesoko, *Parate Executie Obyek Hak Tanggungan (Inkonsistensi, Konflik Norma Dan Kesesatan Penalaran Dalam UUHT)*,

Cetakan Kesatu, Laksbang Presssindo, Yogyakarta, 2007, Page. 185. ¹⁶ A.A. Andi Prajitno, *Hukum Fidusia, Problematika Yuridis Pemberlakuan Undang-Undang Nomor 42 Tahun 1999*, Edisi Pertama, Cetakan Pertama, Bayumedia Publishing, Malang, 2009, Page.169-173.

Normal conflicts may also occur between general rules and specific rules governing the same material. If so, then the special rules have to be based on the principle of *lex specialis derogat legi generali*.

Conflict norms can also occur if there is old legislation with new rules governing the same material. When new laws are enacted that do not abolish the old rules governing the same material while the two are in conflict with each other, then the new rules that have validity are based on the principle of *lex posteriori derogat legi priori*.

In Act Number 42 of 1999, a conflict of norms that can be disqualified under these three principles, but the norms in the articles of a common law which contradict each other or in one law contain conflicting articles, resulting in a conflict of norms that violates the principles of non-contradiction. J.W. Haris confirmed what is meant by the principle of non-contradiction which writes it as follows:

By non-contradiction is meant that principle in accordance with which legal science rejects the possibility of describing a legal system in such a way that one could affirm the existence of a duty, and also the non-existence of a duty, covering the same act-situation on the same occasion.

In Haris's legal theory, the errors of making the articles in a rule of law contradict each other, causing the conflict of norms to be avoided. Bruggink argues that a mutually faithful relationship (*tegenspraak*) in which in the logic of such a relationship the so-called contradiction relationship should not occur in a rule of law. It certainly does not get sufficient attention from law makers Act Number 42 of 1999.

b. The vague norm (*vage normen*).¹⁷ Unclear norms can be found in the arrangement of Article 11 paragraph (1) of Act

Number 42 of 1999 stipulating that: "Objects with guaranteed fiduciary shall be registered". Meanwhile, Article 12 Paragraph (1) is stipulated: "The registration of fiduciary guarantee as referred to in Article 11 paragraph (1) shall be conducted at the Fiduciary Registration Office". There is a blurring of the so-called "fiduciary" fiduciary registration, referred to in Article 11 paragraph (1) and registration of a fiduciary "guarantee" as referred to in Article 12 paragraph (1).

The blurred norm raises the question of whether the purpose of registration of a particular "thing" or the registration of a certain "guarantee". The blurring norm¹⁸ in practice will create legal uncertainty and even conflict of laws.

The intent of Act Number 42 of 1999 is not the registration of collateral objects, but the registration of the bond guarantee deed, known under the title of the fiduciary guarantee deed. It confuses business actors who utilize fiduciary institutions because the prevailing registration system in the known FEOs is the registration of objects and registration of bonds on registered objects. In practice, the registration of a fiduciary security bond on a non-inventory item provides protection to a creditor against a third party if the item is a registered object.

Article 17 of Act Number 42 of 1999 forbids the existence of a re-fiduciary. The purpose of re-fiduciary according to the Elucidation of Act Number 42 of 1999 is fiduciary repeated by the fiduciary give. Neither the debtor nor the third guarantor party is no longer has right on the object, since his ownership of the object has been transferred to the fiduciary recipient. In fact, property rights are not transferred, only a portion of ownership rights are transferred under Article 1 paragraph (1), and this may actually be refluxed to the same creditors as well as to different creditors as occurs on syndicated credits, in the context of credit financing, because the credit score is still below the value of the collateral.

¹⁷ *Ibid.*, Page. 173-175.

¹⁸ In The Contemporary Mainstream Configuration Of Most Legal Orders, A Given Norm Or Standard Of Behaviour Is Said To Be Binding Upon Legal Relations Between Subjects If That Norm Or Standard Can Be Validated By Virtue Of The Doctrine Of Sources Of That Legal Order. Jean d'Aspremont, The International Court Of Justice, The Whales, And The Blurring Of The Lines Between Sources And Interpretation, *European Journal Of International Law*, Volume 27, Issue 4, 1 November 2016, Pages 1027.

Provisions in Act Number 42 of 1999 may provide legal protection in the event of default by the fiduciary debtor, may be described as follows:¹⁹

- a. The registration of a security bond on an unlisted item is in fact insufficient to protect the interests of the creditor against a third party;
- b. In the case of a guaranteed is a stock or inventory, the position of the creditor is very weak because the collateral goods either amount, per-pin or the position or existence of the goods is difficult to detect, so the fulfillment of the principle of publicity is only a decorative fulfillment of a rule of law. Decorative enforcement actually has the potential to propose new legal problems that are undesirable by business actors and legislators (House of Representative RI), especially on fiduciary goods of inventory, agro commodities are regulated by Act Number 9 of 2006 concerning Warehouse Receipt System;
- c. From a practical point of view, the registration system in Act Number 42 of 1999 is temporarily useful only for large creditors with a high value guarantee. Debtors from the small and medium enterprise sector (SME) sector find it difficult to utilize the existence of this Law for the development of their business. The nature of the universality of the rule of law has become difficult to implement because only certain groups, especially the powerful businessmen, can take advantage of the existence of this Law;
- d. The existence of a fiduciary registration office in the provincial capital makes it very difficult for fiduciary registration, since not all provinces have adequate transportation facilities, so they do not provide any practical benefits. Especially for fiduciary givers who reside outside the territory of the Republic of Indonesia. Thus, the implementation of registration will incur no small cost, while the time used is also quite long. This does not support business conditions that have time philosophy is money (time is money);
- e. Fiduciary certificates of small value valued by middle and lower-level entrepreneurs and must be registered are in fact largely unregistered to the fiduciary registration office.

The description above is evidence of confusion in the regulation of norms in Act Number 42 of 1999 which is not placed on the principle of law on which the law is formulated to support the existence of such norms in the legislation. One of the reasons why many of the current rules have been made, including Act Number 42 of 1999, has a defect in the formation of norms because they are made in haste and do not permit adequate academic studies.

Some obstacles to the Fiduciary Law that must be addressed, among others, are as follows:

- a. Normative aspects²⁰ ; There is ambiguity or uncertainty in these Articles as follows:
- 1) The provision of Article 2 is contradictory to the provisions of Article 38, means that there is still a fiduciary object to be settled based on jurisprudence;
 - 2) The provisions of Article 11 paragraph (1) with Article 12 paragraph (1), there are differences of objects listed, not providing certainty about the object of guarantee to be registered, the object or the deed of fiduciary guarantee;
 - 3) The provision of Article 15 paragraph (3) is contradictory to the provisions of Article 32 which is an affirmation of Article 29 and Article 31;
 - 4) The provisions of Article 17 concerning the prohibition of re-fiduciary are unclear;
 - 5) No article determines the requirement and when registration should be implemented;
 - 6) If not registered, there is no legal sanction, only the deed is not as fiduciary.

¹⁹ A.A. Andi Prajitno, *Op.Cit.*, Page. 216-217.

²⁰ Hans Kelsen's Point Of Departure – He Was The Originator Of The Idea That The Law Should Be Kept Pure From Other Influences – Is That There Is A Basic Norm (Grundnorm) From Which All Other Norms Are Derived. Kelsen Believes That The Law Has To Be Studied In Isolation To Rid It From Other Connected Subject Matters Such As Psychology, Sociology, Ethics And Political Theory. Christa RAUTENBACH, *Thinking About Norms In Pluralistic Societies: Blurred Lines Between The "Legal" And The "Social" Of Pluralist Normative Orders*, Presses Universitaires D' Aix-Marseille, 2015.page.108

b. Technical aspects;

- 1) Rights and control over mutation of fiduciary objects, difficult to monitor/controlled;
- 2) Not all fiduciary objects have authentic ownership documents;
- 3) There is no cooperation or linkage with the authorized institution issuing proof of ownership and controlling mutation of fiduciary objects, especially for fiduciary goods outside the territory of Indonesia;
- 4) The extent of the territory of Indonesia is also an obstacle that requires the creation of fast and sophisticated information systems for fiduciary controls, to meet the principle of publicity optimally and to prevent the bad faith of third parties and at the same time protect the interests of creditors and debtors, especially if the domicile of fiduciary givers are abroad;
- 5) Funds for incremental costs incriminating debtors, even if-in the event of default, incur costs far greater than the value of the lawsuit, particularly small credit;
- 6) Implementation of the execution is difficult to be realized according to Act Number 42 of 1999, because it still has to ask for approval from the local court's court known as court fiat.

Given these constraints, many recipients of fiduciary or creditors do not want to use or comply with Act Number 42 of 1999 optimally, after the deed of fiduciary guarantee is not immediately followed by registering to the fiduciary registration office. It proves that Act Number 42 of 1999 is an invalid and ineffective positive law (effeminate), because the meaning of its chapters is unclear, even contradictory, which results in indecisiveness in its enforcement. It can be proved by the attitude of society that does not obey, society considers waste time, and procedure is too long, long and cost increase. At-things in the perspective of global competition, it will greatly affect the speed or smoothness of a business. Delay only leads to high cost economy, thus reducing the competitiveness of Indonesian entrepreneurs in the global market.

D. CONCLUSION

Inhibiting factors in legal protection for recipients of fiduciary warranties with objects of guarantee of inventory goods, it is due to bad faith of the debtor and the existence of the norms in the prevailing laws and regulations. Given these constraints, many recipients of fiduciary or creditors do not want to use or comply with Act Number 42 of 1999 optimally, after the deed of fiduciary guarantee is not immediately followed by registering to the fiduciary registration office.

REFERENCES

- A.A. Andi Prajitno, *Hukum Fidusia, Problematika Yuridis Pemberlakuan Undang- Undang Nomor 42 Tahun 1999*, Edisi Pertama, Cetakan Pertama, Bayumedia Publishing, Malang, 2009.
- Anis Mashdurohatun & M.Ali Mansyur, *Legal Protectionon Industrial Product Design Wood Carved Of Small And Medium Enterprises (Smes) Furniturein Jepara Distric*, Proceedings The 2nd International Multidisciplinary Conference 2016 November 15th , 2016, Universitas Muhammadiyah Jakarta, Indonesia 933-943 ISBN 978-602-17688-9-1. 2016.
- Anis Mashdurohatun , Zaenal Arifin, Gunarto, *The Inconsistency of Parate Execution Object Warranty of Rights in Banking Credit Agreement in Indonesia*, International Journal of Applied Business and Economic Research, Volume 15. Number 17.2017
- Anis Mashdurohatun, Gunarto, Bambang Suprabowo, Sugiyanto, *In Effect of fiduciary agreement of moving object as a guarantee against obligation-violating debtor*, International Journal of Humanities and Social Science Research, Volume 3; Issue 7; July 2017
- Christa RAUTENBACH, *Thinking About Norms In Pluralistic Societies: Blurred Lines Between The "Legal" And The "Social" Of Pluralist Normative Orders*, Presses Universitaires D' Aix-Marseille, 2015.
- D.Y. Witanto, *Hukum Jaminan Fidusia Dalam Perjanjian Pembiayaan Konsumen (Aspek Perikatan, Pendaftaran, dan Eksekusi)*, Cetakan Kesatu, Mandar Maju, Bandung, 2015.
- Herowati Poesoko, *Parate Executie Obyek Hak Tanggungan (Inkonsistensi, Konflik Norma dan Kesesatan Penalaran Dalam UUHT)*, Cetakan Kesatu, Laksbang Presssindo, Yogyakarta, 2007.
- James Hawley, Keith Johnson, and Ed Waitzer, *Reclaiming Fiduciary Duty Balance*, Rotman International Journal of Pension Management, Volume 4- Issue 2 Fall 2011.
- Jean d'Aspremont, The International Court of Justice, the Whales, and the Blurring of the Lines between Sources and

Interpretation, *European Journal of International Law*, Volume 27, Issue 4, 1 November 2016
Lili Rasjidi dan I. B. Wyasa Putra, *Hukum Sebagai Suatu Sistem*, Remaja Rosdakarya, Bandung, 1993.
Max Mag, *Pengertian Perlindungan Hukum Menurut Para Ahli*, sebagaimana diakses dalam <http://tesishukum.com/pengertian-perlindungan-hukum-menurut-para-ahli/>, pada tanggal 5 Februari 2016, waktu :11.17am.
Mukti Fajar N.D. dan Yulianto Achmad, *Dualisme Penelitian Hukum, Normatif dan Empiris*, Pustaka Pelajar, Yogyakarta, 2010.
Satijipto Raharjo, *Ilmu Hukum*, Citra Aditya Bakti, Bandung, 2000. Sri Soedewi Masjchoen, *Hukum Jaminan di Indonesia Pokok-pokok Hukum Jaminan dan Jaminan Perorangan*, Liberty, Yogyakarta, 2003. Act Number 10 of 1998
Act Number 42 of 1999

Bambang Suprabowo
Student of Doctoral Program in Law Science, UNISSULA

Anis Mashdurohatun
Email: anism@unissula.ac.id
Lecturer at Faculty of Law, UNISSULA

Eman Suparman
Email: eman_professor@yahoo.com
Lecturer at Faculty of Law Padjajaran University (Unpad)