

## LEGAL PROTECTION FOR CREDITORS IN CREDIT AGREEMENTS WITH FIDUCIARY GUARANTEES

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### ABSTRACT

*Collateral has a very important role in an economic activity, especially in an agreement. Fiduciary is a guarantee that can be used as collateral in a credit agreement. This study aims to determine the legal protection of creditors in credit agreements with fiduciary guarantees as an effort to create legal certainty. This research is a type of normative legal research that is descriptive in nature. Sources of data used are primary data and secondary data. With data collection techniques through library research. Based on this research, the results show that in a credit agreement, collateral is the main factor and includes all other factors. An agreement with the imposition of a fiduciary guarantee is a type of material guarantee that includes physical evidence, where a fiduciary guarantee must be registered at the Fiduciary Registration Office. Based on the credit agreement as the principal agreement on an executorial fiduciary guarantee, the creditor has the right to execute the fiduciary guarantee given by the debtor to the creditor. This is one of the efforts to provide legal protection for creditors in credit agreements with fiduciary guarantees.*

**Keywords:** Agreement, Credit, Collateral, Fiduciary, Legal Protection.

### INTRODUCTION

Along with the development of the current era, economic development in Indonesia is also progressing quite rapidly. With the existence of economic development policies that are part of national development in the current industrial era, there are policies that are directed and centered on helping the community by channeling funds to the community in the form of credit. This is the government's effort to improve the standard of living of the community and is expected to realize social welfare, especially in terms of the economy.

Bank is a financial institution that owns and provides several services to the public, one of which is credit services. Described in Article 1 number 11 of Law Number 10 of 1998 concerning Banking regarding the definition of credit, namely "*Credit is the provision of money or bills that can be equated with it, based on a loan agreement or agreement between the bank and another party that requires the borrower to repay the debt after a certain period of time by giving interest.*

Credit services are one of the services provided by banks to support or increase business activities and help people who are unable to achieve or meet their needs with the funds they have. Based on the definition of credit services described in Article 1 number 11 of Law no. 10 of 1998 concerning Banking, it is clearly stated that the existence of credit services must be based on a loan agreement or agreement, this agreement activity can be called a Credit Agreement. In accordance with the provisions contained in the Banking Law, the provision of credit is guided by several factors which are a measure of the ability of the credit recipient to repay the loan, and the provision of credit cannot be separated from the guarantee principle. Collateral is everything that is received by the creditor and submitted by the debtor to guarantee a debt in the community.<sup>1</sup>

As with the element of trust and in accordance with the provisions of the Banking Act, lending is guided by several factors which are often referred to as the 5C factors, which include; Personality (*Character*), Ability (*Capacity*), Capital (*Capital*), Economic Conditions (*Condition of Economic*), and Guarantee (*Collateral*). These five conditions or factors are a measure of the ability of credit recipients or debtors to repay their credit loans.

In a credit agreement, collateral is wealth that can be bound as collateral for certainty of repayment at a later date, if the debtor does not pay off his debt. The collateral value contained in the credit agreement is generally greater than the credit amount. This is to provide legal certainty to creditors and is expected to be a reference for debtors to pay off their debts to the bank before the specified time period so that the debtor does not lose the assets he made as collateral in the credit agreement.

Regarding the existence of guarantees in credit agreements, Law Number 42 of 1999 concerning Fiduciary Guarantees (hereinafter referred to as the Fiduciary Guarantee Law) serves as the legal basis for binding movable objects, both tangible and intangible, and immovable objects, especially those cannot be encumbered with mortgage rights, being a form of collateral that can be used to guarantee legal certainty in credit agreements. It is stated in Article 1 point 1 of the Fiduciary Guarantee Law that, "*Fiduciary is the transfer of ownership rights to an object on the basis of trust provided that the object whose ownership rights are transferred remains in the possession of the owner of the object*". As the definition of the term fiduciary, namely *fiducie* which means trust, credit agreements are also based on several legal principles which are the basis of the existence of an agreement, namely: the principle of consensualism, the principle of freedom of contract, the principle of binding force, the principle of legal certainty, and the principle of good faith.

The issues that can be raised in this paper are how the credit agreement is used with the imposition of fiduciary guarantees and how the implementation of the credit agreement with fiduciary guarantees is an effort to protect the law against creditors if the debtor commits an act of *default*.

<sup>1</sup>M. Bahsan. 2002. *Assessment of Indonesian Banking Credit Guarantees*. Jakarta: Great Fortune. p. 148.

## RESEARCH METHODS

The approach method used is a research method with a normative doctrinal approach, because what is studied includes legal aspects, legal principles, and legal principles in credit agreements with fiduciary guarantees by using library data in the form of statutory regulations governing guarantees. fiduciary as primary legal material and other literature such as books, journals, and articles related to fiduciary guarantees as secondary legal material in this study.

## RESULTS AND DISCUSSION

### 1. Credit Agreement With Fiduciary Guarantee

The credit agreement is an important aspect of granting credit. A credit agreement is a bond between a creditor and a debtor whose contents include rules and or provisions relating to the rights and obligations of both parties in connection with the granting of credit or loans that have been mutually agreed upon. According to Sutarno, some credit agreements are controlled or similar to loan agreements as stipulated in the Civil Code, while others are subject to other regulations, namely banking laws.<sup>2</sup> That is explained in Article 1754 of the Civil Code that, "*Borrowing is an agreement by which one party gives to another party an amount of goods or money spent due to use, on condition that the latter party will return the same amount of the same type and condition as well.*"

According to the law, a credit agreement can be made orally or in writing, which is important for fulfilling the requirements of Article 1320 of the Civil Code.<sup>3</sup> However, along with economic development, credit agreements with the imposition of collateral are generally made in written form, which can be done in the form of private deed and or authentic deed. The credit agreement with the imposition of a fiduciary guarantee is carried out with an authentic deed, where the agreement is made before an authorized official, namely a Notary or Land Deed Making Officer (PPAT).

As with credit agreements that must comply with several legal principles and the requirements for a valid agreement in accordance with Article 1320 of the Civil Code, credit agreements with the imposition of fiduciary guarantees must also at least fulfill the elements of fiduciary guarantees, namely:

- 1) With the guarantee right;
- 2) The existence of objects, namely movable objects both tangible and intangible, as well as immovable objects, especially in buildings that cannot be burdened with Mortgage Rights;
- 3) The collateral object remains in the control of the fiduciary giver; and
- 4) Give priority to creditors.<sup>4</sup>

In fiduciary contained the word *fides* which means trust, where the debtor believes that the debtor owns the item only for collateral.<sup>5</sup> In a credit agreement with a fiduciary guarantee, there is a simpler mechanism or process for granting credit compared to bank loans with other guarantees such as mortgage rights. The credit granting mechanism only focuses on two mechanisms, namely the charging mechanism and the registration mechanism. This is because the fiduciary agreement is quite based on trust. The following is the mechanism for granting credit with a fiduciary guarantee:

#### 1) Fiduciary Guarantee Imposition

As explained in Article 5 paragraph (1) of Law Number 42 of 1999 concerning Fiduciary Guarantees that, "*Charge of Objects with Fiduciary Guarantees is made with a notarial deed in Indonesian and is a deed of Fiduciary Guarantee*". Fiduciary guarantees have *accessoir properties* as described in Article 4 of the Fiduciary Guarantee Law, where they follow the main agreement which creates an obligation for the parties to fulfill a performance.

The agreement in imposing fiduciary guarantees is marked by the granting of a Fiduciary Guarantee Deed. Where by granting the deed, the parties are bound by the agreement and have an obligation to fulfill the achievements as agreed upon. It is stated in Article 6 of the Fiduciary Guarantee Act regarding the Fiduciary Guarantee Deed that at least contains:

- a. Identity of the Fiduciary Giver and Recipient;
  - b. Main agreement data guaranteed by fiduciary;
  - c. Description of objects that are the object of fiduciary guarantees;
  - d. Guarantee value; and
  - e. The value of objects that are the object of fiduciary guarantees.
- #### 2) Determination of Debt that can be Collateralized with a Fiduciary Guarantee
- In accordance with the laws and regulations regarding Fiduciary Guarantees, after the agreement of the parties to enter into an agreement, then the determination of debts that can be guaranteed with a fiduciary guarantee is carried out before and by a Notary in accordance with the rules regarding the criteria and guarantee system. The process of determining this debt is important because not all objects can be pledged as collateral, especially movable objects.
- #### 3) Fiduciary Guarantee Registration
- A fiduciary registration application is made by the fiduciary recipient, proxy or representative in writing in Indonesian at the Fiduciary registration office, by attaching a fiduciary registration statement, which includes:
- a. Identity of the Fiduciary Giver and Recipient;
  - b. Place, number of fiduciary guarantee deed, name and position of the notary who made the fiduciary guarantee deed;

<sup>2</sup>Sutarno, 2003, *Legal Aspects of Credit at Banks*, Bandung: Alfabeta, p. 96.

<sup>3</sup>*Ibid.* p. 99.

<sup>4</sup>H. Salim. HS, 2004, *Development of Collateral Law in Indonesia*, Jakarta: PT RajaGrafindo Persada, p. 52.

<sup>5</sup>R. Subekti, 1982, *Fundamentals of Civil Law*, Jakarta: Intermasa, p. 9.

- c. The main agreement data guaranteed by the fiduciary, if the main agreement is a credit agreement, then the data is in the form of; Credit facilities, credit amount, credit term, credit purpose, interest, fees and costs as well as credit payments, and so forth as stated in the credit agreement.
- d. Description regarding the fiduciary collateral object, which includes: type, amount, number and date of ownership, location of storage of the collateral object, as well as the number and date of the deed of engagement. The description regarding the object of this guarantee includes the value of the object that is the object of the fiduciary guarantee; and
- e. Guarantee value.

Furthermore, the application for fiduciary registration is submitted to the Fiduciary Registration Office to be recorded in the fiduciary register book according to the date of receipt of the application for registration, and the registrant pays a fiduciary registration fee, the amount of which has been adjusted to the value of the guarantee. As proof that the credit agreement with the fiduciary guarantee has been registered, the Fiduciary Registration Office issues and submits the Fiduciary Guarantee Certificate to the Fiduciary Recipient or creditor.

As an effort to realize legal certainty in credit agreements with fiduciary guarantees, previously an examination was carried out in the form of control over the debtor's finances and objects to be used as collateral or guarantees. This is done based on the precautionary principle to avoid things that can harm either party. By taking into account the nature of the fiduciary guarantee as an *accessoir* agreement to a principal agreement, the fiduciary guarantee will be deleted if the debt originating from the principal agreement has been deleted.

## 2. Credit Agreements with Fiduciary Guarantees as Efforts to Protect Legal Against Creditors If the Debtor Defaults

Based on the understanding of the agreement which explains that an agreement is an act in which one person or more binds himself to one or more other people, it can be seen that the most important element in a credit agreement is trust. Sutan Remy Sjahdeini said that the relationship between the bank and the credit recipient has the nature of a trust relationship which imposes *fiduciary obligations* to the bank on its customers. From the notion of credit, the relationship between the bank and the debtor's customer is not just a mere contractual relationship, but also a relationship of trust. In business that is given or received in exchange for money, goods or services is trust. Because banks are only willing to provide credit to debtor customers on the basis of the belief that debtor customers are able and willing to repay the credit.<sup>6</sup>

In a credit agreement with a fiduciary guarantee, *collateral* is the main factor and includes all other factors. An agreement with the imposition of a fiduciary guarantee is a type of material guarantee that includes physical evidence, for example, a Motorized Vehicle Ownership Book (BPKB), certificates and other proof of ownership. In order to avoid falsification of proof of ownership, prior to binding it must be examined regarding the juridical status of the proof of ownership and the person who guarantees it.<sup>7</sup>

In addition to examining the authenticity of proof of ownership of the collateral object, as an effort to avoid other disputes, registration of fiduciary guarantees is carried out. As this has been regulated in Law Number 42 of 1999 concerning Fiduciary Guarantees in Articles 11 to Article 18 and Government Regulation Number 86 of 2000 concerning Procedures for Registration of Fiduciary Guarantees and Costs for Making Fiduciary Guarantee Deeds. Registration of fiduciary guarantees is carried out at the Fiduciary Registration Office, which is within the scope of work of the Ministry of Justice and Human Rights.

By providing definite provisions for creditors as fiduciary recipients, namely by having a Fiduciary Guarantee Deed which contains complete data related to fiduciary guarantees, it can indirectly provide strong legal protection for creditors as fiduciary recipients, especially in relation to the existence of bills which are guaranteed and the amount the collateral value determines how large the bill is. The purpose of registration of fiduciary guarantees is to provide legal certainty to interested parties and to give *preference rights* to fiduciary recipients over other creditors. This is because fiduciary guarantees give rights to fiduciary recipients to continue to control their objects which are objects of fiduciary guarantees based on trust. Or it can be concluded that the registration of fiduciary guarantees in the credit agreement is carried out in order to provide legal protection for creditors if the debtor commits an act of default or breaks a promise. With the existence of fiduciary registration as regulated in the Fiduciary Guarantee Law, it has fulfilled the principle of publicity which is one of the main principles of material guarantee law.

Legal protection and the interests of creditors in the Fiduciary Guarantee Act can be seen, among other things, in Article 17, that "*Fiduciary givers are prohibited from re-fiduciating objects that are objects of registered Fiduciary Guarantees*", then in Article 20, where it is stated that "*Fiduciaries continue to follow Objects that become the object of Fiduciary Collateral in the hands of whoever the object is, except for the transfer of said object, except for the transfer of inventory objects which become the object of Fiduciary Guarantee*". Other protection is also contained in Article 23 paragraph (2) that, "*Fiduciary givers are prohibited from transferring, pawning, or renting to other parties objects that are objects of fiduciary guarantees that are not supply objects, except with prior written approval from the fiduciary recipient.*"

Default is the failure to properly carry out achievements or obligations that have been imposed in an agreement. Default (negligence or negligence) of a debtor can be of 4 (four) types:<sup>8</sup>

- 1) Not doing what is capable of doing so;
- 2) Carry out what it promises, but not as promised;
- 3) Did what he promised but was too late;

<sup>6</sup> Sutan Remy Sjahdeini, 1993, *Freedom of Contract and Equal Protection for Parties to Bank Credit Agreements in Indonesia*, Jakarta: Indonesian Banker Institute, p. 175.

<sup>7</sup> Suharno, 2003, *Credit Analysis*, Bandung: Djambatan, p. 13.

<sup>8</sup> Subekti, 2004, *Agreement Law*, Jakarta: Intermasa, p. 45.

- 4) Doing something according to the agreement is not allowed to do.

In a credit agreement with a fiduciary guarantee, there are rights and obligations for each party, namely the creditor and the debtor. The rights of the debtor include that the debtor has the right to receive credit facilities after being mutually agreed upon, and has the right to continue to use the object of fiduciary guarantees. However, the debtor has many obligations where the debtor is required to pay costs including provision, administration, and other costs, the debtor is required to pay credit interest, credit installments, provide guarantees and bind credit guarantees with fiduciaries in a *notarized manner*, related to the object used as collateral, the debtor is obliged to maintain, insure, and is not allowed to bind collateral with other parties as long as the credit agreement is still valid. Meanwhile creditors have the right to receive fees, credit interest, credit installments, and receive guarantees or collateral as a *security factor* for credit facilities that have been given to debtors. And the creditor has an obligation to provide credit facilities in accordance with the agreement that has been agreed with the debtor, and return the object of fiduciary collateral if the agreement has ended.

Against the negligence or negligence of a debtor as a party who is obliged to do something, he is threatened with several sanctions or penalties. There are 4 (four) types of penalties or consequences for negligent debtors, namely:<sup>9</sup>

- 1) Paying for losses suffered by creditors or briefly called compensation;
- 2) Cancellation of the agreement or also called split of the agreement;
- 3) Risk switching;
- 4) Paying court costs, if it comes before a judge.

In the negligence committed by the debtor on a credit agreement with a fiduciary guarantee, it results in other obligations that must be fulfilled by the debtor as a legal responsibility. In a credit agreement, when the debtor does not fulfill the rights and obligations in accordance with what has been mutually agreed upon, and causes losses to the creditor, the debtor is negligent or does not fulfill the obligations as determined and mutually agreed upon in the agreement, or it can be said that the debtor is in default. Thus, as a consequence of the default, a legal responsibility arises for the implementation of the credit agreement.

In a credit agreement with a fiduciary guarantee, if there is an act of *default* committed by the debtor which results in a loss for the creditor, then apart from the consequences of additional costs in the form of fines, the creditor has the right to sell the collateral object through public auction or private sale based on an agreement based on executive power. credit agreement. With the sale of this collateral object, the debtor also has the right to receive the remainder of the sale of the collateral object if it has fulfilled its debt payment obligations.

Then it is explained in Article 24 of the Fiduciary Guarantee Law that, "*The Fiduciary Recipient is not responsible for the consequences of the actions or omissions of the Fiduciary Giver either arising from contractual relations or arising from unlawful acts in connection with the use and transfer of objects that are objects of Fiduciary Collateral*". In this article it is stated explicitly that the creditor as the fiduciary recipient is not responsible for any acts of negligence committed by the fiduciary giver or the debtor, so that the debtor is obliged to fulfill his legal responsibilities in full if it is known that the debtor has been negligent or has committed an act of *default*.

In essence, the intent and purpose of the fiduciary guarantee agreement in terms of legal protection for the creditor is to provide privileges or priority rights for him to repay the debtor's debt to the creditor as explained in Article 27 of the Fiduciary Guarantee Law. So overall, several things that can create legal protection for creditors as fiduciary recipients in credit agreements with fiduciary guarantees according to the Fiduciary Guarantee Law are:

- 1) The existence of a fiduciary guarantee registration institution to guarantee the interests of the fiduciary receiving party or creditor;
- 2) There is a prohibition on fiduciary givers or debtors to redistribute fiduciary collateral objects, and prohibitions that debtors are also prohibited from transferring, pawning or renting objects that are objects of fiduciary guarantees;
- 3) There is a provision that the fiduciary giver or debtor is obliged to surrender the fiduciary guarantee object, if the creditor wants to carry out the execution of the fiduciary guarantee object due to an act of *default* committed by the debtor.

## CONCLUSION

1. In a credit agreement with a fiduciary guarantee, there is a simpler mechanism or process for granting credit compared to bank loans with other guarantees such as mortgage rights. The credit granting mechanism only focuses on two mechanisms, namely the charging mechanism and the registration mechanism. This is because the fiduciary agreement is quite based on trust. However, as explained in Article 5 paragraph (1) of the Fiduciary Guarantee Law, the imposition of a fiduciary guarantee is made with a notary deed, and the fiduciary guarantee must be registered as an effort to realize legal certainty in a credit agreement with a fiduciary guarantee. Where this is done based on the precautionary principle to avoid things that can harm one of the parties, especially the creditor.
2. With the registration of fiduciary guarantees in credit agreements, it can provide protection for each party and can provide legal certainty to interested parties, and give *preference rights* to fiduciary recipients over other creditors. In negligence or acts of *default* committed by the debtor and causing losses to creditors on credit agreements with fiduciary guarantees, resulting in other obligations that must be fulfilled by the debtor as legal responsibility. Where the creditor is not responsible for acts of negligence caused by the debtor, then apart from the consequences of additional fees in the form of fines, the creditor has the right to sell the collateral object through public auctions or underhand sales based on the credit agreement agreed upon by the debtor beforehand.

<sup>9</sup> *Ibid.*

## REFERENCES

- Bahsan, M. (2022). *Penilaian Jaminan Kredit Perbankan Indonesia*. Jakarta: Rejeki Agung.
- Fuady, M. (2003). *Jaminan Fidusia Revisi Kedua*. Jakarta: PT Citra Aditya Bakti.
- Salim, H. (2004). *Perkembangan Hukum Jaminan di Indonesia*. Jakarta: PT Raja Grafindo Persada.
- Sjahdeini, S. R. (1993). *Kebebasan Berkontrak dan Perlindungan yang Seimbang Bagi Para Pihak dalam Perjanjian Kredit Bank di Indonesia*. Jakarta: Institut Bankir Indonesia.
- Subekti, R. (1999). *Jaminan-Jaminan Untuk Pemberian Kredit Menurut Hukum Indonesia*. Bandung: PT Citra Aditya Bakti.
- Subekti, R. (1982). *Pokok-Pokok Hukum Perdata*. Jakarta: Intermasa.
- Subekti. (2004). *Hukum Perjanjian*. Jakarta: Intermasa.
- Sutarno. (2003). *Aspek-Aspek Hukum Perkreditan Pada Bank*. Bandung: Alfabeta.
- Suharno. (2003). *Analisa Kredit*. Bandung: Djambatan.
- Tiong, O. H. (1984). *Fiducia Sebagai Jaminan Unsur-Unsur Perikatan*. Jakarta: Ghalia Indonesia.
- Yani, G. W. (2000). *Seri Hukum Bisnis: Jaminan Fidusia*. Jakarta: Rajawali Pers.
- Ahyani, S. (2011). Perlindungan Hukum Bagi Kreditur Melalui Perjanjian Jaminan Fidusia. *Jurnal Wawasan Hukum*, 24.
- Palapa, J. (2020). Penyelesaian Debitur Wanprestasi Dengan Jaminan Fidusia. *Jurnal Soljusticia*, 3.
- Paparang, F. (2014). Implementasi Jaminan Fidusia Dalam Pemberian Kredit di Indonesia. *Jurnal LPPM Bidang EkoSosBudKum*, 1.
- Winarno, J. (n.d.). Perlindungan Hukum Bagi Kreditur Pada Perjanjian Jaminan Fidusia. *Jurnal Independent Fakultas Hukum*.
- Kitab Undang-Undang Hukum Perdata  
Undang-Undang Nomor 10 Tahun 1998 tentang Perbankan  
Undang-Undang Nomor 42 Tahun 1999 tentang Jaminan Fidusia

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