

## LEGAL IMPLICATIONS DUE TO DEFAULT BY THE DEBTOR ON A CAR LOAN AGREEMENT WITH FIDUCIARY GUARANTEE

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### ABSTRACT

*The purpose of this study is to determine and analyze: 1) The legal position of the strength of a car loan agreement with a fiduciary guarantee for creditors and debtors at Bank Central Asia Semarang City 2) The juridical implications of default by the debtor on a car loan agreement with a fiduciary guarantee at Bank Central Asia Semarang city. The approach method used in discussing this research problem is a sociological juridical approach. The research specification used is descriptive analytical research. This type of data uses primary and secondary data. The data analysis method used in this research is qualitative data analysis. The results of the study concluded: 1) The legal position of the strength of the car loan agreement with fiduciary guarantees for creditors and debtors at Bank Central Asia Semarang City is included in the construction of an anonymous agreement (Innominaat), as far as the contents of the agreement have met the legal requirements of the agreement as stipulated in 1320 the Civil Code, the agreement has full binding power. This is based on the provisions in Article 1338 paragraph (1) of the Civil Code which states that an agreement made legally applies as the law that made it, the BCA Finance consumer financing agreement is in accordance with Presidential Regulation no. 9 of 2009 concerning Financing Institutions. The imposition of collateral in the car purchase agreement at BCA Finance uses a fiduciary guarantee as regulated in Act No. 42 of 1999 concerning Fiduciary Guarantees, namely in the form of transferring the ownership rights to the car or the Motor Vehicle Ownership Book (BPKB) from the debtor to a consumer finance company. 2) The juridical implication due to default by the debtor on a car loan agreement with a fiduciary guarantee at Bank Central Asia Semarang City is that the creditor does not get the fulfillment of his rights that should be obtained by the existence of the agreement. When the debtor defaults, the thing that will be done by the creditor to get the debt repaid is to sell the object that is guaranteed by the debtor. Another legal consequence of this default is that the Customer may be subject to Article 372 of the Criminal Code regarding embezzlement with a criminal offense imprisonment for a maximum of four years, then Article 36 of Act No. 42 of 1999 concerning Fiduciary Guarantees carries a maximum penalty of 2 years.*

Keywords: Agreement; Credit; Fiduciary; Guarantee.

### INTRODUCTION

Credit refers to a loan agreement between a bank, acting as the creditor, and another party, the debtor, who is obligated to repay the debt within a specified period, along with interest. A crucial factor in the provision of credit is the credit agreement itself. Without a signed credit agreement between the creditor and debtor, no credit relationship is established. Typically, the credit agreement is followed by a guarantee agreement, where the credit agreement serves as the primary or principal agreement, and the guarantee agreement functions as an ancillary or accessory agreement. This means that the existence and termination of the guarantee agreement are contingent upon the primary agreement.

Credit involves the provision of money or goods to another party at a specified time, accompanied by a guarantee. The legal term "guarantee" is derived from terms such as "security of law," "zakerheidsstelling," or "zakerheidsrechten." According to Salim HS, the law of guarantee encompasses the legal rules that govern the relationship between the provider and recipient of the guarantee in relation to the imposition of guarantees to obtain credit facilities. Essentially, the law of guarantee regulates the relationship between the guarantor (debtor) and the beneficiary of the guarantee (creditor) arising from the imposition of a debt (credit) secured by a guarantee (a specific object or individual).

In Indonesia, there are four types of material guarantees: pawn, mortgage, fiduciary, and pledge. The primary agreement in this context is the consumer financing agreement, from which additional or ancillary agreements, such as fiduciary guarantee agreements, emerge. A fiduciary guarantee agreement is a contract between the fiduciary giver and the fiduciary recipient, in which the fiduciary giver transfers an object of collateral to the fiduciary recipient based on trust, to secure a debt. Fiduciary givers are recipients of credit facilities from financial companies, while fiduciary recipients are typically the finance companies themselves. The collateral objects, often in the form of the vehicle's BPKB (Vehicle Registration Book), are retained by the fiduciary recipient until the fiduciary giver repays the debt. If the debtor defaults on the credit, as stipulated in the credit and fiduciary grant agreements, the creditor is entitled to execute the fiduciary guarantee.

Motor vehicle loans that are currently in great demand are car loans, because cars really support mobility. As a result, currently many financial and banking institutions offer vehicle financing through the credit system, one of which is Bank Central Asia (BCA) Semarang City. In practice, the implementation of car loan agreements at banks does not always run smoothly. Sometimes there are problems between the two parties. The problem that is most often encountered in the implementation of bank credit is the existence of defaults in the form of bad loans.

## RESEARCH METHODS

The research employs a sociological-juridical approach. The research specification is descriptive-analytical in nature. Both primary and secondary data are utilized in this study. The data analysis method applied is qualitative analysis.

## RESULTS AND DISCUSSION

### Legal Position Strength of Car Loan Agreement with Fiduciary Guarantee for Creditors and Debtors at Bank Central Asia Semarang City

At present, numerous leasing companies are partnering with banks to provide specialized loan products for motor vehicles, such as KKB BCA. The requirements for applying for KKB Car Financing at BCA Semarang are as follows:<sup>1</sup>

1. Indonesian citizens
2. Permanent Employee/Entrepreneur/Entrepreneur/Professional/Company
3. Minimum 2 years (permanent)
4. Minimum age 21 years or already married
5. Maximum age 64 years when the credit ends
6. Vehicles must be insured through KKB BCA
7. Comprehensive insurance for the first year and a minimum of TLO the following year (except TLO commercial vehicles during the credit period)
8. Payment via autodebit

Meanwhile, the required documents are:

1. Copy of Applicant's ID card
2. Photocopy of KTP of husband/wife, family card, marriage certificate/divorce
3. Photocopy of the customer's home ownership certificate/AJB
4. Photocopy of BCA Savings Account & Current Account for the last 3 months
5. Salary Slip for the last 1 month or Income Statement

The car purchase financing agreement at BCA Finance is governed by the general provisions of the agreement, adhering to the principle of contractual freedom, as stipulated in Article 1338, Paragraph (1) of the Civil Code. This article asserts that all agreements made legally are binding as law for those who enter into them, implying that the terms of an agreement can include any mutually accepted conditions, provided the agreement is entered into lawfully, in good faith, and does not contravene public order or morality. Regarding its nature, the consumer financing agreement with PT. BCA Finance is a unilateral standard contract, wherein the terms are determined by the consumer finance company.

The legal requirements for an agreement are outlined in the Civil Code. According to Article 1320 of the Civil Code, four conditions must be met for an agreement to be valid: the consent of the parties involved, the capacity to make an agreement, a specific subject matter, and a lawful cause.

A new agreement is considered valid if all the requirements outlined in Article 1320 of the Civil Code are met. From this, it is evident that certain factors can lead to the annulment of an agreement. When examined in detail, the conditions for the ability and consent to enter into an agreement are categorized as subjective conditions (conditions pertaining to the individual entering the agreement). If any of these subjective conditions are not met, the legal consequence can be the request for the agreement's cancellation. On the other hand, matters related to the subject matter and lawful cause fall under objective conditions (the objects of the agreement). If any of these objective conditions are unmet, the legal consequence is that the agreement becomes void. This means that the agreement is automatically nullified, effectively canceling it as if it never existed. These elements are critical when entering into any agreement.

In the case of the car loan agreement, the parties involved are PT. BCA Finance as the Creditor and the Consumers as the Debtors. According to Article 1 of the BCA Finance consumer financing agreement:

1. Taking into account the terms and conditions outlined in this agreement, the Creditor agrees to extend consumer financing facilities to the Debtor, specifying the amount, duration, interest rate, and other terms and conditions, along with all related attachments, documents, and agreements, which shall be referred to as the "Summary of Consumer Financing Facilities." These shall be considered an integral and inseparable part of this agreement.

<sup>1</sup> <https://www.bca.co.id/id/>, accessed on December 1, 2023

2. The terms and conditions set forth in this agreement shall be binding on the parties involved, provided they do not conflict with the provisions of this agreement.

This is in line with the provisions of Article 1320, paragraph (1) of the Civil Code, which governs the agreement between parties who are bound by it. An agreement has been reached between the parties, as evidenced by the signing of the BCA Finance Consumer Financing Agreement (PPK) by the Creditor and Debtor. By signing the clauses of this agreement, the parties become bound by it, and there will be rights and obligations that both parties must fulfill. Should one party fail to perform its obligations, legal consequences will follow.

The terms applicable to Debtors and Creditors are consistent with those outlined in Article 1320, paragraph (2), regarding the legal capacity of the parties to enter into an agreement. In this regard, Clause 4, paragraph (1) letter a of the BCA Finance Consumer Financing Agreement states:

1. The debtor submits a photocopy of documents that have been verified as true copies by the authorized official or agency. These documents include the debtor's identity card, family card, proof of Indonesian citizenship, marriage certificate, taxpayer identification number card, and any other documents considered necessary by the creditor, or their equivalent in a form and content accepted by the creditor.
2. According to Article 1330, paragraph (1) of the Indonesian Criminal Code, an individual who is incapable of entering into a contract is defined as someone who is not yet of legal age. Article 330 of the Criminal Code further specifies that an individual is not considered an adult until they reach 21 years of age and have never been married. In this context, the debtor meets the legal capacity requirements for entering into a consumer financing agreement, as evidenced by the possession of an identity card (KTP) or marriage certificate. In the case of the consumer finance company, PT. BCA Finance, this is substantiated by the company's deed of establishment, No. 38 dated April 10, 2015, drafted by FX Budi Santoso Isbandi, SH, and the accompanying decree.

The implementation of the consumer financing agreement at BCA Finance is a credit arrangement that involves the possibility of debtor negligence. To ensure the smooth and orderly payment of installments and to mitigate potential losses for the financing company, the agreement includes a guarantee. The guarantee in the BCA Finance consumer financing agreement takes the form of a fiduciary guarantee.

As stipulated in Article 1, paragraph (1) of Law No. 42 of 1999 regarding Fiduciary Guarantees, a fiduciary is defined as the transfer of ownership rights to an object based on trust, where the object remains under the control of its original owner. This transfer of ownership is exemplified by the submission of the vehicle's ownership certificate or the Motorized Vehicle Ownership Book (BPKB) from the debtor to the financing company or creditor. This is in line with the provision in Article 4, paragraph (1), letter b of the BCA Finance consumer financing agreement, which states: "Submit the original document of proof of ownership of the goods, along with all supporting or replacement documents in a form and content acceptable to the creditor."

Furthermore, in clause 7 of the BCA Finance consumer financing agreement, it is stated:

*In order to guarantee the payment of the entire amount of debt obligations in an orderly and orderly manner, the Debtor hereby promises and binds himself to deliver the goods or collateral by signing a Letter/Deed of Power of Attorney to impose a Fiduciary Guarantee or a Fiduciary Guarantee Deed in accordance with the provisions of Act No. 42 of 1999 concerning Collateral Fiduciary. Letter/Deed of Power of Attorney to Charge Fiduciary Guarantee or Deed of Fiduciary Guarantee is an integral and inseparable part of this agreement.*

The clause in Article 7 of the consumer financing agreement of BCA Finance outlines the requirements regarding the Power of Attorney to Charge Fiduciary Guarantees that must be fulfilled by the Debtor. Notaries play a crucial role in car loan agreements at BCA Semarang City, particularly in the creation of the Fiduciary Guarantee Deed. In Semarang, BCA requires that the assignment of objects secured by fiduciary guarantees be formalized through a notarial deed written in the Indonesian language. The purpose of using a notarial deed in the establishment of a fiduciary guarantee is to provide legal validity, serving as evidence for both debtors and creditors. The fiduciary guarantee deed must include, at a minimum, the following:

1. The identity of the fiduciary giver and recipient.
2. Fiduciary guaranteed principal agreement data.
3. A description of the object that is the object of a fiduciary guarantee.
4. Guarantee value.
5. The value of the object that is the object of the fiduciary guarantee.

The legal standing of a car loan agreement with fiduciary guarantees for creditors and debtors at Bank Central Asia (BCA) in Semarang City falls under the category of an anonymous agreement (Innominaat), provided that the terms of the agreement fulfill the legal requirements outlined in Article 1320 of the Civil Code. Such an agreement is legally binding. This is in line with the provisions of Article 1338 paragraph (1) of the Civil Code, which states that an agreement made legally applies as the law binding

the parties involved. The consumer financing agreement at BCA Finance adheres to Presidential Regulation No. 9 of 2009 concerning Financial Institutions.

The collateral requirement in the car purchase agreement at BCA Finance utilizes a fiduciary guarantee, as governed by Law No. 42 of 1999 on Fiduciary Guarantees. This involves the transfer of ownership rights to the car or the Motor Vehicle Ownership Book (BPKB) from the debtor to the consumer finance company. Essentially, this constitutes a transfer of ownership rights to an asset based on trust, with the provision that the asset, whose ownership rights are transferred, remains in the possession of its original owner.

In this arrangement, the car purchased through financing remains with the debtor, while the creditor holds the BPKB until the debtor completes monthly installment payments. Upon full repayment, the BPKB is returned to the debtor.

In the context of a legal state based on Pancasila and the 1945 Constitution, it is fitting that the state ensures legal certainty and protection, founded on the principles of truth and justice. To guarantee legal certainty, order, and protection, authentic written evidence is required for the legal conditions, events, or actions carried out within a legal transaction, such as the registration of fiduciary-secured assets. The demand for written evidence in the form of an authentic deed has grown in response to the increasing need for certainty, order, and legal protection. Consequently, it is essential that these matters be regulated by statutory provisions, which will serve as a framework and guide for business actors and the public who require financial support.

### **Juridical Implications Due to Default by the Debtor on a Car Loan Agreement with Fiduciary Guarantee at Bank Central Asia, Semarang City**

The problem that often causes juridical problems in the law of fiduciary guarantees is when the debtor providing the fiduciary guarantee does not carry out an obligation that should have been agreed upon. The debtor's negligence is evidence of a default. The definition of breach of contract, according to Subekti, is if the debtor does not do what he promised, it is said that he is in default, meaning that the debtor is negligent or negligent or breaks his promise, or violates the agreement, if he does or does something that is not allowed.<sup>2</sup> Meanwhile, according to M. Yahya Harahap, what is meant by default is the implementation of obligations that are not timely or carried out inappropriately. A debtor is mentioned and is in a state of default if he is negligent in carrying out the agreement so that he is late from the specified time schedule or in carrying out his performance not properly or properly.<sup>3</sup>

In principle, debtor defaults can be categorized in three ways, namely:

1. If the debtor does not pay the amount owed to the bank based on the credit agreement according to the specified time.
2. The fiduciary debtor is negligent in fulfilling his obligations to pay debts to the bank and it is sufficient only to prove it by the passage of time specified in the agreement without a warning letter from the bailiff.
3. Default is not regulated in the deed of fiduciary guarantee agreement but is sufficiently regulated in the main agreement.<sup>4</sup>

The creditor, in their role as the fiduciary recipient, holds preferential rights over other creditors. This means that if the debtor fails to fulfill their obligations or neglects to pay their debts, the creditor has the right to sell or execute the object of the fiduciary guarantee. Furthermore, the creditor holds the primary right to recover the debt from the proceeds of the collateral's execution. The legal implication arising from the debtor's default on a car loan agreement with fiduciary collateral at Bank Central Asia in Semarang is that the creditor does not receive the fulfillment of their rights as stipulated in the agreement. This occurs because the legal relationship between the debtor and the leasing company is grounded in a consumer financing agreement. Legally, the consequences of default in such an agreement are not straightforward, as the agreement represents a civil law bond between two or more parties, wherein one party is entitled to something, and the other party is obligated to fulfill the terms. Another legal consequence of default is that the debtor may be prosecuted under Article 372 of the Indonesian Penal Code for embezzlement, with a penalty of up to four years of imprisonment or a fine of up to nine hundred million rupiah. Additionally, under Article 36 of Law No. 42 of 1999 concerning Fiduciary Guarantees, the debtor may face a maximum sentence of two years imprisonment and a fine of up to fifty million rupiah. Meanwhile, the buyer may be subject to Article 480 of the Penal Code, facing a maximum imprisonment of four years for detention.

The measures used to determine whether a debtor has defaulted on a car loan at BCA Semarang include:

1. Non-payment of the financing debt installments with the lapse of 30 (thirty) days from the due date of the installments.
2. Pawned car
3. Over credit was carried out without the knowledge of BCA Semarang

<sup>2</sup>Subekti, (2007), *Kitab Undang-Undang Hukum Perdata*, Jakarta: Arga Printing, p. 1.

<sup>3</sup>M. Yahya Harahap, (1989), *Ruang Lingkup Permasalahan Eksekusi Bidang Perdata*, Jakarta: Gramedia, p. 60.

<sup>4</sup>H. Tan Kamelo, (2004), *Hukum Jaminan Fidusia yang Didambakan*, Alumni, Bandung, p. 198.

To settle the default, the debtor will first be summoned or given a SP (Warning Letter) by BCA Semarang. If within 3 months or 90 days the debtor is still unable to make payments, the case will be transferred to the PSO Division (Problem Solving Officer), which is the division for handling debtors who are late in carrying out obligations for 3 months and above. If the debtor in handling the PSO is unable to make payments, the unit in this case the motorcycle will be immediately secured by the PSO Division. If the PSO Division is unable to make a withdrawal, the withdrawal process will be carried out by the Debt Collector (DC) who incidentally is an external employee of the company (freelance).

Instead of using violent methods that have the potential to violate the criminal law, it is better for the leasing party to resolve the problem of bad credit / installments by using several methods. In the event of a dispute, there are several ways that can be used to resolve disputes that arise from both parties, namely in the following ways which are expected to prevent violence by debt collectors:

1. Peace or negotiation, the meaning of the word peace here is that between the creditor and the debtor or consumer, make a peace outside the court (non-litigation). The implementation of the peace depends on both parties so that there is an agreement from both parties so that this dispute does not proceed to court.
2. Court, if efforts to resolve the dispute through non-litigation efforts fail, the parties can file a lawsuit to the court.

Regarding the enforcement of fiduciary guarantees under the latest regulation, specifically the Constitutional Court Decision No. 2/PUU-XIX/2021, it is stated that the enforcement of fiduciary guarantees may be submitted to a district court by alternative creditors. This alternative is available when there is a default, but no agreement is reached, and the debtor does not voluntarily surrender the fiduciary-secured object. In such cases, the creditor is not permitted to carry out the execution independently; rather, they must request assistance from the district court to facilitate the enforcement.

This decision from the Constitutional Court is the most recent ruling in a case filed by Joshua Michael Djami, who petitioned for a judicial review of Article 15, Paragraph 2 of Act No. 42 of 1999 on Fiduciary Guarantees. The judicial review application followed the Constitutional Court's Decision No. 18/PUU-XVII/2019. In that 2019 ruling, there were multiple interpretations concerning the enforcement of fiduciary guarantees. However, in the recent decision (Constitutional Court Decision No. 2/PUU-XIX/2021, page 83, paragraph 3), it is explicitly stated that the enforcement of a fiduciary guarantee certificate through a district court is an alternative option, not an obligation. The Court further clarified that this option is only pursued if the debtor or another party objects to the confiscation process.

## CONCLUSION

The legal standing of a car loan agreement with fiduciary guarantees for creditors and debtors at Bank Central Asia in Semarang City falls under the category of an anonymous agreement (Innominaat), provided that the contents of the agreement meet the legal requirements set forth in Article 1320 of the Civil Code. In this case, the agreement holds full binding legal force. This is supported by Article 1338, paragraph (1) of the Civil Code, which asserts that an agreement legally made is considered binding as law for the parties involved. The BCA Finance consumer financing agreement aligns with Presidential Regulation No. 9 of 2009 concerning Financing Institutions.

The juridical implication of a default by the debtor on a car loan agreement with a fiduciary guarantee at Bank Central Asia Semarang City is that the creditor fails to obtain the rights they are entitled to under the agreement. Another legal consequence of such a default is that the customer could be prosecuted under Article 372 of the Criminal Code, related to embezzlement, and Article 36 of Law No. 42 of 1999 concerning Fiduciary Guarantees, which stipulates a maximum penalty of 2 years imprisonment and a fine of up to IDR 50 million. Additionally, the buyer may face charges under Article 480 of the Criminal Code for unlawful possession, with a maximum sentence of four years of imprisonment.

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