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Contractual Obligations in Financing with Fiduciary Security in Indonesia in the Context of Justice

T. Muhammad Ali Bahar[1], Tan Kamello[2], Suhaidi Suhadi[3], Saidin Saidin[4], Rio Hilmawan Bagas Trihasworo[5]

[1,2,3,4] Faculty of Law, Universitas Sumatera Utara, Medan, Indonesia
[5] Department of Business Administration, Coburg University of Applied Science, Coburg, Germany

Corresponding email: tmalibahar@gmail.com

Abstract *Financing with fiduciary security in Indonesia raises justice-related concerns. This study analyzes contractual obligations in this type of financing within the justice context. It reveals several key issues. Firstly, an imbalance of power exists between creditors and debtors, with creditors holding a stronger position in executing fiduciary security. Secondly, consumer protection and debtor rights remain inadequate, leading to injustice for financially vulnerable debtors who struggle to fulfill their payment obligations. Thirdly, dispute resolution tends to favor creditors, resulting in lengthy legal proceedings and high costs that hinder debtors from achieving justice. Additionally, the lack of public understanding and awareness about their rights in financing with fiduciary security further*

exacerbates the problem. These factors collectively contribute to injustice in financing with fiduciary security and call for improvements in the system to ensure fair treatment for all parties involved.

Keywords Contractual Obligation, Fiduciary Security, Justice, Payment

1. Introduction

A fiduciary guarantee is a form of guarantee for movable objects based on trust. The guarantee to the creditor that is submitted is the property right of the goods while the goods are physically still controlled by the debtor. The fiduciary giver believes that the fiduciary recipient wants to return the property rights to the goods that have been surrendered, after the debt has been paid. On the other hand, the fiduciary recipient believes that the fiduciary giver will not abuse the collateral that is in his power. This fiduciary guarantee agreement is an additional agreement that is intended to specifically support the previous agreement that has been agreed upon and which only has a relative nature. It is generally recognized that anything that has support is stronger than it was when it was unsupported.[1]

However, in financing agreements not all agreements made by finance companies (creditors) with consumers (debtors) are always attached to a fiduciary agreement or at least there is a clause that gives the power of attorney from the debtor to the creditor to place fiduciary guarantees, meaning that in practice in the field the creditor with the debtor not using a fiduciary guarantee institution or in other words there is no agreement regarding binding guarantees. In the financing agreement there is only one agreement, namely only the financing

[1] Moch Isnaini, *Hipotek Pesawat Udara di Indonesia,* (Surabaya: Darma Muda, 1996), pp. 36-37.

agreement without any additional agreements (*accessoirs*) such as binding guarantees.

The position of a creditor based solely on a financing agreement without any fiduciary attachment to the collateral object will make the creditor a creditor in general (*concruent*), that is, a creditor entitled to an equal distribution of the bankrupt debtor's assets after deducting priority rights (preference). This is very different, if the creditor has installed a fiduciary over the object of financing. With this fiduciary installation, it will make the creditor a preferred creditor who has special rights. As a preferred creditor, the creditor has special rights over the goods that are guaranteed to him, so that if at any time the debtor defaults, the creditor has the right to execute the object that is guaranteed to him.

Execution of collateral objects that are attached to financing agreements and fiduciary guarantee agreements is different from executing financing agreements that are not attached to fiduciary guarantee agreements. Seizures of execution of debtors whose default cannot be carried out are like confiscation of executions whose agreement is attached to a fiduciary guarantee agreement. Creditors in financing agreements that are not followed by a fiduciary guarantee agreement, to execute the object guaranteed in the agreement must go through a fiat court or the creditor must first file a lawsuit for default on the debtor accompanied by a request for confiscation (*conservatoir beslag*) of the object of the financing agreement.

Broadly speaking, the application for confiscation of collateral objects if the debtor defaults/defaults can be made orally or in writing. In writing, namely at the time of filing a complaint orally to the Panel/Registrar who then records it in the Minutes of Session/Certificate of notes on requests by the Plaintiff for collateral

confiscation.[2] With the granting of the confiscation determination and the existence of a court decision that grants the creditor's claim, only then can the execution of the collateral object that is in the creditor's power be carried out. Without taking this step, the unilateral confiscation and execution by the creditor is against the law. Even though in the financing agreement the creditor agreed unilaterally to carry out confiscation and execution if the debtor defaults/defaults. This is based on the HIR which determines that the confiscation must be carried out through the court.

In the event of debtor default, the implementation of statutory law mandates that the creditor must issue a formal statement of negligence to the debtor. This requirement is stipulated in Article 1238 of the Civil Code. [3] Therefore, when a debtor fails to make the required payment, it is necessary for the creditor or financing institution to formally notify the debtor, either by issuing a warning or demanding immediate payment within a specified timeframe.

However, Article 1238 of the Civil Code allows for the waiver of the obligation to provide a formal statement of default or warning if it is expressly stated in the agreement. In such cases, default by the debtor can be proven solely by the passage of time for installment payments without the need for a formal statement of default or written warning from the creditor. This provision takes into account that Article 1238 of the Civil Code is a regulatory provision (*regelend recht*) and not coercive in nature.

As a result of a default on the part of the debtor who is bound by a financing agreement and a fiduciary guarantee agreement, the creditor has the right to take back the object of the agreement which

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[2] R. Soeparmono, *Masalah Sita Jaminan (Conservatoir Beslag) dalam Hukum Acara Perdata,* (Bandung: Mandar Maju, 1997), pp. 22-23.

[3] Article 1238 BW: *The debtor is declared negligent by means of a warrant, or by a similar deed, or based on the strength of the agreement itself, that is, if this agreement results in the debtor being deemed negligent after the allotted time has passed*.

is under the debtor's control. If taking the object of the fiduciary guarantee agreement does not get resistance from the debtor, then no problem arises. However, problems will arise if the debtor fights against the execution of the collateral object for the goods. In this case, the creditor does not have coercive power to force the debtor to hand over the goods that are the object of the agreement other than by asking law enforcement agencies to carry out the execution. If the creditor unilaterally takes the object of the agreement without assistance from law enforcement agencies.

In addition to forced executions without the assistance of legal officials, it is not uncommon in the field to sell collateral objects without a public auction or in the case of private sales of fiduciary collateral objects without an agreement with the fiduciary giver. This is clearly contrary to the provisions of Article 29 UUJF which requires the sale of fiduciary collateral objects must go through a public auction or if sold privately must be agreed upon by the fiduciary giver.

Resistance from a defaulted debtor can not only occur in financing agreements that are not attached to a fiduciary guarantee agreement, but also often occurs in financing agreements that have been attached to a fiduciary guarantee agreement and have been made by notarial deed and registered at the registration agency to issue a fiduciary certificate. The debtor's resistance to the financing institution occurred when the fiduciary collateral object was confiscated to be executed because the debtor did not make the installment payments as agreed (default). This is an obstacle for creditors to execute fiduciary guarantees, for example:

1. Decision Number 468/Pdt.Sus-BPSK/2016/PN.MDN, Consumer Financing Agreement Number: 20-076-15-05103 Dated July 31 2015, and Fiduciary Guarantee Certificate Number:

W2.00174568.AH.05.01 dated August 19 2015 , between PT. Oto Finance Summit (Applicant) with Surya Ervida (Respondent).

2. Decision Number 57/Pdt.Sus-BPSK/2017/PN.Mdn, Consumer Financing Agreement Number: 403101201426, Dated 30 August 2012, and Fiduciary Guarantee Deed No. 59 dated February 6 2017, between PT. CIMB Niaga Auto Finance Medan Branch (Petitioner) *vs*. Bekti Prayoga (Respondent).

Resistance or objections of consumers/debtors after the confiscation of fiduciary collateral objects by financing institutions/creditors through arbitration at the Consumer Dispute Settlement Agency (*hereinafter as* BPSK). The BPSK decision cancels the confiscation (for execution) of the fiduciary guarantee. The basis for the objection used by the debtor is that the financing institution withdraws or takes fiduciary collateral items that are not accompanied by valid documents according to applicable regulations and court rulings/decisions (execution), is an unlawful act and is contrary to:

1. Regulation of the Head of the National Police of the Republic of Indonesia Number 8 of 2011 concerning Safeguarding the Execution of Fiduciary Guarantees.
2. Contrary to V HIR starting from Article 195 concerning Implementing the Decision or Part V RBg which starts from Article 200 concerning Carrying out the Decision.
3. Contrary to the Administrative and Technical Guidelines for General Civil and Special Civil Courts, Book II, 2007 Edition, Supreme Court of the Republic of Indonesia, Jakarta 2008 concerning Procedures and Procedures for Executing Fiduciary Guarantees.
4. Contrary to Law Number 42 of 1999 concerning Fiduciary Guarantees, namely: Article 29, Article 31, and Article 32.

With this BPSK Decision, the financing institution/creditor must submit an objection to the BPSK decision to the Court so that it can execute it. The court canceled the BPSK decision because according to the judge the BPSK decision was outside the authority in this case, with legal considerations:

1. The Financing Agreement is a determining document and binding law between the parties which has expressly determined and chosen the Court Jurisdiction which remains and does not change at the Registrar's Office of the District Court in the event of a dispute. Based on Article 1338 of the Civil Code: all agreements made in accordance with the law apply as laws for those who make them (paragraph 1). An agreement cannot be withdrawn other than by agreement of both parties, or for reasons determined by law. Agreement must be executed in good faith (paragraph 2).
2. The mistake of interpreting Article 45 of Law Number 8 of 1999 concerning Consumer Protection, namely: Consumer dispute resolution can be reached through a court or out of court based on the voluntary choice of the parties to the dispute. Based on the provisions above, the settlement of disputes through BPSK is not inferential but is given freedom to the choice of the two parties to the dispute whether to pursue it through court or out of court.

It is understandable that in an agreement it is not impossible for a violation to occur. Likewise with consumer financing agreements with fiduciary guarantees. The Fiduciary Guarantee Act has actually strictly and in detail regulated the procedures for implementing the registration of fiduciary guarantees, but in practice, various forms of law violations occur. Law violations are committed either by the creditor (fiduciary recipient) or by the debtor (fiduciary giver).

The violations that are often committed by creditors are generally creditors not registering fiduciary collateral objects at the Fiduciary Registration Office. In addition, another form of legal violation that is quite fatal is the existence of fiduciary registration which is carried out when the debtor defaults / defaults. When the debtor begins to default, the new finance company registers a fiduciary guarantee object in order to fulfill the requirements to carry out execution of a fiduciary guarantee object. The trigger for the action of this financing institution is because the Fiduciary Guarantee Act does not stipulate provisions regarding the expiration of fiduciary guarantee registration so that the Fiduciary Registration Office has no reason to reject an application for fiduciary registration whose credit/financing agreement has been signed for a long time. Although there are no rules regarding the expiration date for registration of fiduciary guarantees, Article 14 sub-3 of the Fiduciary Guarantee Law stipulates that fiduciary guarantees are born on the same date as the date of registration of fiduciary guarantees as recorded in the Fiduciary Registration Book. Therefore, if there was a credit agreement made several years ago but the registration of the fiduciary guarantee was only carried out later, the fiduciary guarantee will take effect when it is registered, not when the credit agreement is signed or when the notarial deed is signed.

The consequence is that legal events that occurred before the registration of the fiduciary guarantee did not apply the provisions of the Fiduciary Guarantee Law. If there was a credit agreement made several years ago but the registration of the fiduciary guarantee was only done later, then the fiduciary guarantee takes effect when it is registered, not when the credit agreement is signed or when the notarial deed is signed. The consequence is that legal events that occurred before the registration of the fiduciary guarantee did not apply the provisions of the Fiduciary Guarantee Law. If there was a

credit agreement made several years ago but the registration of the fiduciary guarantee was only done later, then the fiduciary guarantee takes effect when it is registered, not when the credit agreement is signed or when the notarial deed is signed. The consequence is that legal events that occurred before the registration of the fiduciary guarantee did not apply the provisions of the Fiduciary Guarantee Law.[4]

Furthermore, the problem in the fiduciary guarantee agreement is related to the object of the fiduciary guarantee. The binding of movable object guarantees or fiduciary guarantees has been regulated in UUJF, however, the unclear object of fiduciary guarantees remains a legal issue. Regarding the object of fiduciary guarantees, the UUJF does not expressly state which objects can be used as collateral for debt with the imposition of fiduciary guarantees. UUJF only determines the scope of application of the law, which is based on the provisions of Article 1 point 2 UUJF that:

> Fiduciary Guarantee is a guarantee right over movable objects both tangible and intangible and immovable objects, especially buildings that cannot be encumbered with mortgage rights as referred to in Law Number 4 of 1996 concerning Mortgage Rights which remain in the control of the Fiduciary Giver, as collateral for repayment of certain debts, which gives a priority position to Fiduciary Recipients over other creditors.

Thus, it can be understood that the objects of fiduciary guarantees are movable and immovable objects. The intended immovable object is a building that cannot be burdened with a

[4] Purwanto Purwanto. "Beberapa Permasalahan Perjanjian Pembiayaan Konsumen dengan Jaminan Fidusia." *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional* 1, No. 2 (2012): 199-214. http://dx.doi.org/10.33331/rechtsvinding.v1i2.97

Mortgage Right, namely a building on land belonging to another person. However, it is still a question whether buildings that cannot be encumbered with mortgage rights are immovable objects.

The ambiguity of the concept regarding the object of fiduciary guarantees can be seen from the time the fiduciary was born, until the regulation of fiduciary guarantees in a law. Initially, the fiduciary institution was known in Roman law under the name fiduciary cum creditor. In the fiduciary cum creditor agreement, the debtor's goods are left in the possession of the creditor. At that time, objects that became fiduciary cum creditor objects could be movable or immovable property. Even though the goods were handed over to the creditor by the debtor, the creditor cannot act freely. The purpose of the transfer of ownership of goods is to provide guarantees to the creditor for the obedience of the debtor. If the debtor has fulfilled his obligations, the creditor returns the collateral to the debtor.

If one pays attention to the provisions of UUJF, there is no clarity and certainty regarding the object of fiduciary guarantees. This problem lies in the weakness of the guarantee law arrangement which is partial. According to Mariam Darus, the reform of the guarantee law is partially dangerous. This level of danger is found in some guarantee laws such as the UUHT and UUJF, which are not in one system. Furthermore, Mariam Darus said that applications that are not related to each other will make the system complicated, difficult to understand and eventually people will abandon it. The problem of unclear fiduciary guarantee objects from a systemic point of view is due to the fact that the national object law system has not yet been formed as the parent of guarantee law. As a result, there is no synchrony with the laws governing fiduciary guarantees. The problem is, to the legal system to which fiduciary guarantees must be subject. Is it the object law system according to the Civil Code or customary law or a combination of the two without forgetting the

influence of the Anglo-Saxon system.[5]This is even more important if it is related to the principle of horizontal separation and the principle of vertical accession. Mahadi argued that customary law is one of the components in the preparation of national private law. Property law is a sub-system of the national civil law system. Therefore, the preparation of property law must pay attention to the principles of customary law. The importance of the issue of objects in technical juridical terms is related to the elucidation of Article 3 and Article 1 number 4 UUJF.[6] A good security law system is a guarantee law that regulates legal principles and norms that do not overlap with one another. The legal principle in fiduciary guarantees must work in harmony with the legal principles in other areas of material guarantee law. The unsynchronized arrangement of legal principles in fiduciary guarantees with other material guarantees will make it difficult to enforce the fiduciary guarantee law.[7] The research aims to investigate

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[5] Anglo Saxon is an island maritime nation located in Europe. This term can be simplified, Anglo-Saxon are countries that include Great Britain and other countries in the British Isles. Anglo Saxons are countries with a distinctive culture and different socio-cultural history with countries in other mainland Western Europe which are called continental. Great Britain, Ireland, the United States of America and Australia are countries that are referred to as Anglo-Saxons. *See*, "Anglo Saxon", https://en.wikipedia.org/wiki/Anglo-Saxon, accessed March 2016.

[6] Explanation of Article 3 UUFJ that: Based on this provision, buildings on land belonging to other people which cannot be encumbered with mortgage rights based on Law Number 4 of 1996 concerning Mortgage rights, can be used as objects of Fiduciary Guarantees. Article 1 point 4: "Objects are anything that can be owned and transferred, whether tangible or intangible, registered or unregistered, movable or immovable that cannot be encumbered with mortgages or mortgages.

[7] *See* Sri Mulyani, "Rekonstruksi Pemikiran Yuridis Integral dalam Pembaharuan Sistem Hukum Jaminan Fidusia Berpilar Pancasila." *Jurnal Ilmiah Hukum dan Dinamika Masyarakat* 7, No. 2 (2016); Muhammad Yasir, "Aspek Hukum Jaminan Fidusia." *SALAM: Jurnal Sosial dan Budaya Syar-i* 3, No. 1 (2016): 75-92. https://doi.org/10.15408/sjsbs.v3i1.3307; Tan Kamello, *Hukum Jaminan Fidusia Suatu Kebutuhan yang Didambakan*. (Bandung: Penerbit Alumni, 2022); M. Jamil, "Fiduciary Security Arrangements and Issues in Indonesia." *Journal of Human Rights, Culture and Legal System* 1, No. 2 (2021): 109-119. https://doi.org/10.53955/jhcls.v1i2.1

and elucidate the implementation of financing engagement with fiduciary guarantees in finance companies.

2. Method

This study is categorized as prescriptive research, as defined by Soerjono Soekanto. Prescriptive research aims to provide recommendations on how to address specific problems. In this case, the study focuses on the issue of financing engagement with fiduciary guarantees. The research will employ a combined normative juridical and empirical juridical approach, which involves analyzing the relevant legal framework, particularly Law Number 42 of 1999 concerning Fiduciary Guarantees, as well as examining real-world data to assess the practical implementation of fiduciary guarantees.

The research was conducted in three regencies/cities in North Sumatra, specifically Medan City, Binjai City, and Langkat Regency. These locations were chosen because they are currently experiencing economic development, particularly in the field of motor vehicle financing, which makes it possible to gather relevant data for the study. As of August 2018, there were a total of 119 finance company office networks in Medan City, 23 in Binjai City, and 11 in Langkat Regency. These numbers indicate the presence of a significant number of finance institutions in the three regencies/cities, making them suitable areas for conducting the research.

The target population of this study consisted of all cases of financing agreements with fiduciary guarantees at financing institutions located in three districts/cities: Medan, Binjai, and Langkat. To ensure a manageable sample size, two financing institutions were selected from each district/city, resulting in a total of six financing institutions as the target population. The sample selection was conducted using purposive sampling, where three

cases of financing agreements were chosen from each financing institution for the years 2016 and 2017. This sampling approach yielded a total sample size of 18 cases involving financing with movable property collateral. Purposive sampling was employed to ensure that the selected cases were relevant to the research objective, specifically focusing on financing agreements with fiduciary guarantees. [8]

3. Result and Discussion

A. Implementation of Agreements on Financing with Fiduciary Guarantees in Financing Companies

In practice, consumer financing is currently in great demand by consumers. This is based on the reasons that the application process/procedure to obtain financing is very easy and there is no need for collateral for goods other than the goods concerned to be used as collateral objects whose binding is carried out in a fiduciary manner. The encumbrance or bonding of goods which are the object of consumer financing is carried out by making an additional agreement, namely the agreement for the provision of fiduciary guarantees which follows the main agreement, namely the consumer financing agreement.

Basically, in implementing consumer financing agreements in Indonesia, not only one type of agreement is made by the parties, but also various other types of agreements are made. The main agreement is a consumer financing agreement, and from this financing agreement, additional agreements or other accessoir agreements are born, such as fiduciary guarantee agreements.[9] When examined in

[8] Soerjono Soekanto, *Pengantar Penelitian Hukum,* (Jakarta: UI Press, 1986), pp. 196-197.
[9] Salim HS, *Perkembangan Hukum Kontrak di Luar KUP Perdata*, p. 135.

practice, each financial institution has a type of additional agreement that applies to one another. But one thing is certain, in each additional agreement there is generally an agreement to provide a fiduciary guarantee, as has been the practice so far by finance companies. The additional agreements include: 1) agreements to provide fiduciary guarantees, and 2) agreements by the debtor/power of attorney to place fiduciary guarantees.

Fiduciary Guarantee Agreement

A fiduciary grant agreement is an agreement made between a fiduciary giver and a fiduciary recipient, in which the fiduciary giver surrenders collateral objects based on trust to the fiduciary recipient, to guarantee a debt. Fiduciary givers are recipients of credit facilities from financing institutions while fiduciary recipients are finance companies. Usually, what is submitted by the fiduciary provider is in the form of BPKB of motorized vehicles (goods) which are the object of the consumer financing agreement. This BPKB is held by the Fiduciary recipient until the Fiduciary giver can pay off his debts.[10]

The fiduciary guarantee agreement is made with a notary deed in Indonesian which is a fiduciary guarantee deed (Article 5 paragraph (1) UUJF). In line with the provisions regarding mortgages and mortgages, the fiduciary guarantee deed must be made with an authentic deed (notarial deed). The official authorized to draw up the deed is a notary appointed by law.

An authentic deed is a deed in the form determined by law, made by or before public officials who have the power to be occupied where the deed is made (Article 1868 of the Civil Code). While R. Supomo gives the introduction of an authentic deed as follows: An

[10] Salim HS., p. 136

authentic deed is a letter made by or in front of a public official who has the authority to make the letter, with the intention of making the letter as evidence.[11]While the deed under the hand is a letter signed and loaded with the intention of being used as evidence of a legal action.[12]

The provisions of Article 1870 of the Civil Code state that a notarial deed is an authentic deed that has perfect evidentiary power about what is contained in it between the parties and their heirs, or substitutes for their rights. This is what causes the UUJF to stipulate that a fiduciary agreement must be made with a notarial deed.[13]

Another reason why the fiduciary guarantee deed must be drawn up with an authentic deed (notarial deed) is considering that the object of the fiduciary guarantee is not only movable property that has been registered, but in general is movable property that is not registered, it is only natural that the form of the authentic deed is considered the most acceptable. guarantee legal certainty regarding the object of fiduciary guarantees.

To provide legal certainty, Article 11 UUJF requires objects burdened with fiduciary guarantees to be registered at the Fiduciary Registration Office. This obligation even remains valid even though the object burdened with a fiduciary guarantee is outside the territory of the Republic of Indonesia.

Fiduciary is the transfer of ownership rights of an object on the basis of trust provided that the object whose ownership is transferred remains in the control of the object owner. From the understanding according to the law, it can be concluded that fiduciary or the transfer of property rights in trust.

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[11] R. Supomo, *Hukum Acara Perdata Pengadilan Negeri,* (Jakarta: Pradnya Paramita, 1980), pp. 76-77

[12] Supomo.

[13] Gunawan Widjaja and Ahmad Yani, *Jaminan Fidusia,* (Jakarta: PT. Raja Graβindo Persada, 2000), p. 136.

Fiduciary is a form of guarantee for movable objects based on trust. The guarantee to the creditor that is submitted is the property right of the goods while the goods are physically still controlled by the debtor. The fiduciary giver believes that the fiduciary recipient wants to return the property rights to the goods that have been surrendered, after the debt has been paid. On the other hand, the fiduciary recipient believes that the fiduciary giver will not abuse the collateral that is in his power.

This fiduciary guarantee agreement is an additional agreement that is intended to specifically support the previous agreement that has been agreed upon and which only has a relative nature. It is generally recognized that anything that has support is stronger than it was when it was unsupported.[14]

Thus, the legal relationship between the fiduciary giving debtor and the fiduciary receiving creditor is a legal relationship based on trust. Fiduciary, as with other forms of guarantee, is *accessoir* in nature, so it follows the principal agreement that already exists between the creditor and the debtor, namely the financing agreement.

The position of the guarantee agreement which is constructed as an *accessoir* agreement guarantees the strength of the guarantee institution for the security of financing by creditors. Fiduciary as an *accessoir* agreement has consequences like other *accessoir* agreements, namely:

a. Existence depends on the principal agreement
b. The write-off depends on the principal agreement
c. If the principal agreement is cancelled, then the *accessoir* agreement is also cancelled.
d. change with the change in the principal agreement

[14] Isnaini, *Hipotek Pesawat Udara di Indonesia*, p. 36.

e. if the principal switch because *cessie, subrogation* then it also switches without any special surrender.[15]

The encumbrance of objects with fiduciary guarantees is made with a notarial deed in Indonesian which is a fiduciary guarantee deed. In the fiduciary guarantee deed, in addition to including the day, date and time the contract was made, at least the fiduciary deed contains:

a. The identity of the fiduciary giver and recipient. The identity includes full name, religion, place of residence or domicile, and date of birth, gender, marital status and occupation;
b. Data on principal agreements (financing agreements) guaranteed by fiduciaries, namely regarding debts guaranteed by fiduciaries;
c. A description of the object that is the object of the fiduciary guarantee accompanied by a letter of proof of ownership;
d. Guarantee value;
e. The value of objects that are the object of fiduciary guarantees.

After the fiduciary guarantee deed is completed by a notary, to provide legal certainty, objects burdened with fiduciary guarantees must be registered at the Fiduciary Registration Office. Registration of objects burdened with a fiduciary guarantee is carried out at the domicile of the fiduciary giver, and registration includes objects both inside and outside the territory of the Republic of Indonesia. This is to fulfill the principle of publicity, as well as a guarantee of certainty to other creditors regarding objects that have been burdened with fiduciary guarantees.

In registering a fiduciary guarantee, a fiduciary guarantee certificate will be issued which contains an award "For the sake of Justice Based on Belief in the One and Only God". The fiduciary guarantee deed has executive power which is equivalent to a court

[15] R. Soeparmono, *Masalah Sita Jaminan (Conservatoir Beslag) dalam Hukum Acara Perdata,* (Bandung: Mandar Maju, 1997), p. 22.

decision that has obtained permanent legal force. This means that this fiduciary guarantee certificate can be directly executed without going through a trial and examination process through a court, and is final and binding on the parties to implement the decision.

Guarantees that have been agreed to be guaranteed as fiduciary guarantees in consumer financing agreements can be carried out by making a Fiduciary Guarantee Deed as authentic evidence for related parties, namely financing institutions as creditors or known as fiduciary providers and consumers as debtors or known as fiduciary providers. According to Article 1 number (7) of Law Number 30 of 2004 concerning the Office of a Notary Public, a Notary Deed is an authentic deed drawn up by or before a Notary in the form and procedure stipulated in this Law.

Debtor/Power of Attorney Agreement to Place a Fiduciary Guarantee

In financing agreements not all agreements made by finance companies (creditors) with consumers (debtors) are always attached to fiduciary agreements or at least there is a clause that gives the power of attorney from the debtor to the creditor to place fiduciary guarantees, meaning that in practice in the field creditors with the debtor does not use a fiduciary guarantee institution or in other words there is no agreement regarding binding guarantees. In the financing agreement there is only one agreement, namely only the financing agreement without any additional agreements (*accessoirs*) such as binding guarantees.

Finance companies have the view that as long as the fiduciary guarantee has not been signed and registered, the debtor must acknowledge that the ownership rights to the financing object have been handed over by the debtor to the creditor, even though the object

is registered in the name of the debtor or a third party, therefore the debtor does not have any rights or interests in objects except as borrowers use.

The borrower here means that the debtor only borrows the item from the creditor, because even though the item is registered in the name of the debtor, the debtor has voluntarily surrendered its ownership to the creditor. This is because the purchase of these goods has been paid off by the creditor to the dealer/vehicle showroom, then there is a legal relationship of accounts payable based on a financing agreement between the financing institution and the debtor.

The position of a creditor based solely on a financing agreement without any fiduciary attachment to the collateral object will make the creditor a creditor in general (*concruent*), that is, a creditor entitled to an equal distribution of the bankrupt debtor's assets after deducting priority rights (preference). This is very different, if the creditor has installed a fiduciary over the object of financing. With this fiduciary installation, it will make the creditor a preferred creditor who has special rights. As a preferred creditor, the creditor has special rights over the goods that are guaranteed to him, so that if at any time the debtor defaults/defaults, the creditor has the right to execute the object that is guaranteed to him.

In the financing agreement, the main agreement is an agreement that can stand alone and indeed usually stands alone, although it is possible that there are other agreements attached to the main agreement. This is where the main contents of the agreement are located, in buying and selling for example, where the main rights and obligations between the seller and the buyer are regulated. Accessoir engagement is an engagement that is attached to a principal engagement and which without the principal engagement cannot

stand alone. The occurrence and loss depend on the existence and elimination of the main engagement.[16]

Transfer of property rights to creditors in fiduciary *eigendoms overdracht* is not a transfer of property rights in the true sense as is the case in buying and selling and part of it, so that the creditor will not become the full owner (*volle eigendom*), he is only a *bezitloos eigenaar* of collateral, and because according to the intent and purpose of the agreement regarding the agreement itself, the creditor's authority is only equivalent to the authority possessed by a person entitled to collateral items. Whereas the position of the creditor receiving the fiduciary is as the holder of the guarantee, while his authority is still related to the guarantee itself, therefore, it is also said that his authority as the owner is limited.[17]

That the delivery of movable property by the non-owner to a beneficiary in good faith is valid. However, an unreal surrender (*constitutum possessorium*) can be justified if the person who surrenders the item has the power to hand it over on the basis of a legal relationship with another party. Creditors in a debt agreement with fiduciary guarantees can be said to be impossible to investigate in advance whether the debtor is really the owner, meaning a person who can act freely on the collateralized goods, especially because the collateralized goods are movable property. Meanwhile, the creditor can only ask the debtor to promise that he is really the person who has the right to act freely on the collateralized item.[18]

There are several formal stages inherent in Fiduciary Guarantees, including:

a. Stages of imposition by binding in a notarial deed;

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[16] J. Satrio, *Hukum Perikatan,* (Bandung: Alumni, 1993), p. 79

[17] Marulak Pardede, et.al., *Implementasi Jaminan Fidusia dalam Pemberian Kredit di Indonesia* (Jakarta: Badan Pembinaan Hukum Nasional, 2006), p. 31

[18] Pardede, p. 33.

b. The stages of registration of the encumbered object by the Fiduciary Recipient, proxy or representative to the Fiduciary Registration Office, by attaching a registration statement. The registration statement must contain: the identity of the Fiduciary Giver and Recipient; date, deed number, name and domicile of the notary who made the deed; data on the main agreement guaranteed by Fiduciary, description of the object that is the object of the Fiduciary Guarantee; the guarantee value and the object value of the Fiduciary Guarantee.
c. Administrative stages at the Registration Office, namely the recording of the Fiduciary Guarantee in the Fiduciary Register Book on the same date as the date of receipt of the application for registration; issue and submit to the Fiduciary Recipient a Fiduciary Guarantee Certificate.
d. The birth of the Fiduciary Guarantee is on the same date as the date when the Fiduciary Guarantee is recorded in the Fiduciary Register Book. The Fiduciary Guarantee Certificate has the same executorial power as a court decision that has obtained permanent legal force, because of the words "*For the sake of Justice Based on Belief in the One and Only God*". So that if the debtor defaults, the Fiduciary Recipient has the right to sell the object which is the object of the Fiduciary Guarantee on his own power. This implies that the execution can be carried out directly without going through a court and is final and binding on the parties to implement the decision. The existence of this later is one of the characteristics of a Fiduciary Guarantee,[19] where execution can be carried out if the Fiduciary Giver is in default.

[19] J.C.T Simorangkir et.al, *Kamus Hukum,* (Jakarta: Aneka Ilmu, 2000), p. 120. It is further emphasized that a fiduciary guarantee refers to a type of collateral or security provided by a borrower to a lender in a financial agreement. It is a legal arrangement where the borrower pledges certain movable assets, such as vehicles, machinery, or inventory, as collateral for the loan. The purpose of the fiduciary guarantee is to provide assurance to

To guarantee legal certainty for creditors, a deed is drawn up by a notary and registered with the Fiduciary Registration Office. Later the creditor will obtain a fiduciary guarantee certificate "*For the sake of Justice Based on Belief in the One and Only God*". Thus, it has the power of direct executorial rights if the debtor violates the fiduciary agreement with the creditor (*parate execution*), according to UUJF.

Based on data from the Ministry of Law and Human Rights, the number of registrations for fiduciary guarantees from the beginning of the year to August 2018 recorded 5.41 million registrations. In 2017 fiduciary registration registered 8.07 million registrations, an increase of 6.47% compared to 2016 of 7.58 million registrations. In 2015 there were 6.31 million fiduciary registration registrations or a decrease of 19.51% compared to 2014 of 7.83 million registrations. The number of registrations decreased in 2015, but Non-Tax State Revenue (PNBP) amounted to Rp. 558.76 billion, an increase of 16.64% compared to 2014 of Rp. 479.03 billion. The increase in the number of registrations

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the lender that if the borrower defaults on the loan, the lender has the right to seize and sell the pledged assets to recover the outstanding debt. In a fiduciary guarantee, the borrower retains possession and use of the pledged assets during the loan term. However, the borrower is obligated to maintain the assets in good condition and ensure that they remain available for repossession by the lender in the event of default. The specific terms and conditions of a fiduciary guarantee, including the types of assets that can be pledged, their valuation, and the procedures for repossession and sale, are typically governed by applicable laws, regulations, and the loan agreement itself. Fiduciary guarantees are commonly used in various financing arrangements, such as vehicle loans, equipment financing, and inventory financing. They provide a level of security for the lender by reducing the risk of default and offering a means for debt recovery through the liquidation of the pledged assets. *See also* Arie Sukanti Sumantri, "Execution of Fiduciary Guarantee Under Law No. 42 of 1999 on Fiduciary Guarantee (A Socio-Juridical Analysis to Anticipate Its Effectiveness)." *Indonesia Law Review* 3, No. 3 (2013): 204-212; Markus Suryoutomo, "The Implementation of Parate Executie in Fiduciary Security Based on Applicable Indonesian Laws." *International Journal of Humanities Social Sciences and Education* 3, No.12 (2016): 56-64.

in 2016 and 2017 occurred in line with the rise of online transportation facilities so that many people apply for motor vehicle loans.[20]

If the debtor (fiduciary giver) defaults or does not fulfill the achievements on time even though a subpoena has been given, then the fiduciary recipient can confiscate or sell objects that are the object of fiduciary guarantees. Fiduciary recipients can carry out executions because according to the Fiduciary Guarantee Law, the execution process can be carried out without a court decision by showing a fiduciary guarantee certificate. Article 15 paragraph (2) states that a fiduciary guarantee certificate has the same executorial power as a court decision that has been *inkracht*. This shows how important the imposition of fiduciary guarantees is. Fiduciary guarantees are included in the agreement clause, the burden of which is paid by the fiduciary recipient. Although execution can be carried out if the debtor does not fulfill the achievements on time, but it is also hoped that the execution process can be carried out politely. After the execution process, an auction is then held to restore the rights of the debtor and the finance company. If the results of the auction exceed the guarantee value, then the value that is the right of the debtor must be returned. Conversely, if the results of the auction are less than the value of the guarantee, the debtor must cover the guarantee. So, the community and the company must both benefit.

The Fiduciary Guarantee Law has been in existence for 18 years; however, there is still a lack of understanding among many individuals regarding fiduciary guarantees. In response to this, the

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[20] *See* AHU Kemenkumham, "Eksekusi Jaminan Fidusia Pasca Putusan Mahkamah Konstitusi dan Pengajuan Permohonan Data Jaminan Fidusia Sebagai Asas Publisitas", *Online*, 25 May (2021). Retrieved from https://portal.ahu.go.id/id/detail/75-berita-lainnya/2811-eksekusi-jaminan-fidusia-pasca-putusan-mahkamah-konstitusi-dan-pengajuan-permohonan-data-jaminan-fidusia-sebagai-asas-publisitas. *See also* Wiwin Dwi Ratna Febriyanti, "Eksekusi Objek Jaminan Fidusia Pasca Putusan Mahkamah Konstitusi Nomor 18/PUU-XVII/2019." *ADHAPER: Jurnal Hukum Acara Perdata* 6, No. 2 (2021): 39-52. https://doi.org/10.36913/jhaper.v6i2.128

Sub-Directorate of Fiduciary Guarantees, which operates under the Directorate General of General Law Administration, Ministry of Law and Human Rights, has undertaken efforts to disseminate information about fiduciary guarantees to various regions. The aim of these initiatives is to enhance awareness and knowledge about the concept and practical application of fiduciary guarantees.[21]

A fiduciary agreement that is not drawn up by a notarial deed and is not registered at the fiduciary registration office or made privately, namely a deed drawn up between parties where the deed is made not in the presence of a legal deed-making official stipulated by law (notary). Underhand deed is not an authentic deed that has perfect evidentiary value. Conversely, an authentic deed is a deed made by or in front of an official appointed by law (in the case of a fiduciary deed made before a notary) and has perfect evidentiary power. Deeds that are done underhand usually have to be authenticated again by the parties if they are to be used as legal evidence, for example in court. An underhand deed is legal to use as long as the parties acknowledge the existence and contents of the deed. In practice, because certain conditions cause legal relations to be strengthened through private deeds such as in the process of buying and selling and accounts payable. However, in order for the deed to be strong, it still has to be legalized by the parties to the authorized official.

Factors causing finance companies to enter into private fiduciary agreements are:

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[21] AHU Kemenkumham, "Eksekusi Jaminan Fidusia Pasca Putusan Mahkamah Konstitusi dan Pengajuan Permohonan Data Jaminan Fidusia Sebagai Asas Publisitas". *See also* Ari Wirya Dinata, "Lembaga Jaminan Fidusia: Pasca Putusan Mahkamah Konstitusi Nomor 18/PUU-XVII/2019." *Nagari Law Review* 3, No .2 (2020): 84-99; Jeaflin Koraag, "Pengaturan Tentang Jaminan Fidusia Berdasarkan Undang-undang No. 42 Tahun 1999 Tentang Jaminan Fidusia." *Lex Privatum* 4, No. 3 (2016); Lutfi Ulinnuha, "Penggunaan Hak Cipta Sebagai Objek Jaminan Fidusia." *Journal of Private and Commercial Law* 1, No. 1 (2017): 85-110. https://doi.org/10.15294/jpcl.v1i1.12357

1) Reducing customer costs

   Taking credit with a fiduciary guarantee based on the Fiduciary Guarantee Law requires fees, while these costs are borne by the customer himself. Costs that must be incurred by consumers/debtors in taking credit with a fiduciary guarantee include administration costs at the company, fees for making notarized deeds and registration fees at the Fiduciary Registration Office do not include insurance premiums, while for taking credit with an underhand agreement only includes administrative costs and insurance premiums, the cost is cheaper when compared to a fiduciary guarantee agreement, namely there is a fee for making a deed and a Fiduciary Guarantee registration fee. These costs can reduce the amount of loan credit received by prospective borrowers. Therefore, some financial institutions enter into fiduciary agreements made privately with the aim of helping customers reduce costs. Expensive costs can be burdensome for customers so that they can also affect the customer's desire not to take financing/credit again in the future.

2) Business competition

   The application of a credit agreement with a fiduciary guarantee in accordance with the Fiduciary Guarantee Law, apart from the cost of making a deed and registering a fiduciary guarantee, also requires complicated requirements and a long time. Most customers want a fast time for the administrative process so that financing/credit can be disbursed immediately, so that with an easy process and low costs, financial institutions do not lose their customers, because customers will choose financing institutions with easier processes and lower costs.

3) Small credit and relatively short term

   In general, financing institutions channel financing/credit with the intention of the consumer/debtor to buy a motorized vehicle

and the debtor agrees to enter into a financing agreement in which the motorized vehicle is used as fiduciary collateral with a relatively small amount of financing. If the loan value is small and the financing period is relatively short, for example a one-year period, so that with the terms and mechanism of the fiduciary guarantee agreement according to the provisions of the Fiduciary Guarantee Act, a fiduciary deed must be drawn up and registered to obtain a fiduciary certificate at the fiduciary registration office, it is deemed ineffective , because the possibility of risk of breach of contract is small, so it is not comparable to the costs of making notarial deeds and the cost of registering the fiduciary.

Based on Article 18 of Government Regulation Number 21 of 2015 concerning Procedures for Registration of Fiduciary Guarantees and Costs for Making Fiduciary Guarantee Deeds, it is stated that making Fiduciary Guarantee deeds is subject to a fee, the amount of which is determined based on the value of the guarantee, with the following provisions: costs for making a Fiduciary deed with a maximum value of 2.5 % of the guarantee value is less than Rp. 100,000,000.00, the guarantee value is Rp. 100,000,000.00 up to Rp. 1,000,000,000.00 the cost of making a deed is a maximum of 1.5% of the guarantee value, and for a guarantee value of more than Rp. 1,000,000,000.00 in accordance with the agreement of the parties but not exceeding 1% of the guarantee object.

Furthermore, the amount of the fiduciary guarantee registration fee is as specified in Article I paragraph (1E) of Government Regulation Number 10 of 2015 concerning Amendments to Government Regulation Number 45 of 2014 concerning Types and Tariffs of Non-Tax State Revenues Applicable to the Ministry of Law and Human Rights, namely Fiduciary registration fees vary according to the guarantee value of the object financed by the finance company.

The cheapest registration fee is around IDR 50,000.00 while the highest is IDR 12,800,000.00.

Fiduciary guarantees are only made privately for reasons of not wanting to incur costs borne by the customer. This should be avoided because one of the objectives of the Fiduciary Guarantee Act is for legal certainty, so by making a notarial deed and registering a fiduciary guarantee has legal force and guarantees legal certainty. Alone.

Fiduciary guarantees that do not produce fiduciary guarantee certificates cause complex and risky legal consequences. Creditors can exercise their execution rights because they are considered unilateral and can lead to arbitrariness on the part of creditors. It could also be because considering that the financing of fiduciary object goods is usually not in full according to the value of the goods. Or, the debtor has carried out the obligations of part of the agreement made, so that it can be said that the rights of part of the debtor and part of the creditor stand on the item. Especially if the execution is not through an official price appraisal agency or a public auction body. This action can be categorized as an unlawful act according to Article 1365 of the Civil Code and can be sued for compensation.

In the conception of criminal law, the execution of a fiduciary object under the hands is included in the crime of Article 368 of the Criminal Code if the creditor commits coercion and threats of confiscation. Article 368 of the Civil Code states:

> 1. Whoever, with the intent to unlawfully benefit himself or another person, forces a person by force or threat of violence to give something, which wholly or partly belongs to that person or another person, or to make a debt or write off a debt, is threatened with extortion with a maximum imprisonment of nine months.

2. The provisions of article 365 paragraphs two, three and four apply to this crime.

This situation can occur if the creditor in execution is forced and takes the goods unilaterally, even though it is known that the goods partially or wholly belong to someone else. Although it is also known that some of the goods belong to creditors who want to execute them but are not registered in the fiduciary office. In fact, the imposition of other articles can occur bearing in mind that executions are not an easy thing everywhere, for this you need legal guarantees and legal support from law enforcement agencies. This is the urgency of balanced legal protection between creditors and debtors.

Even if the debtor transfers fiduciary objects under the hand to another party, he cannot be charged with Law Number 42 of 1999 concerning Fiduciary Guarantees, because the fiduciary guarantee agreement made is invalid. It is possible that the debtor who transfers the objects of fiduciary guarantees is reported on charges of embezzlement in accordance with Article 372 of the Criminal Code which states: "*Anyone who intentionally and unlawfully owns goods which are wholly or partly owned by another person, but those who are in his power not because of a crime are threatened with embezzlement, by a maximum imprisonment of four years or a maximum fine of nine hundred rupiahs*."

By the creditor, but this can also be a blunder because they can report to each other because some of the goods belong to both the creditor and the debtor, a civil decision is required by the local district court to assign the portion of each owner of the goods to both parties. If this is taken, there will be a legal process that is long, tiring and costs a lot of money. As a result, the margin that the company wants to achieve is not realized and may even make a loss, including loss of time and thought.

Financing institutions that do not register fiduciary guarantees actually lose themselves because they do not have legal executorial rights. Business problems that require speed and excellent customer service are always inconsistent with existing legal logic. Maybe because of a legal vacuum or laws that are not always as fast as the times. Imagine, fiduciary guarantees must be made in front of a notary while financing institutions carry out fiduciary agreements and transactions in the field in a relatively short time.

Currently, many financial institutions carry out executions on goods objects burdened with fiduciary guarantees that are not registered. Can be named remedial or remove. So far, finance companies feel that their actions are safe and smooth. This occurs because the bargaining power of customers is still weak against creditors as owners of funds. In addition, the legal knowledge of the community is still low. This weakness is exploited by business players in the financial industry, especially the financial institution sector which practices fiduciary guarantees with underhanded deed.

4. Conclusion

This study concluded that the implementation of the fiduciary guarantee agreement requires certain legal procedures to ensure its enforceability. However, in practice, some finance companies neglect the registration of the fiduciary guarantee deed, leading to potential issues. Factors such as cost reduction, business competition, small loans, and short financing periods contribute to the use of unofficial deeds. This undermines the customers' bargaining power and highlights their limited legal knowledge. The execution of financing with fiduciary guarantees in finance companies involves self-selling objects or public auctions, depending on whether the objects have been registered and hold a fiduciary certificate.

On the other hand, executing financing agreements without a fiduciary agreement requires court intervention and the initiation of legal proceedings. Problems arise when debtors contest the execution of collateral objects, as creditors lack coercive power without assistance from legal officials. Unauthorized sales of collateral objects without public auctions or agreements with fiduciary givers are also prevalent, which violates the legal provisions. While the Fiduciary Law provides legal certainty for fiduciary guarantee holders, there are still weaknesses in its application. The registration of fiduciary guarantee deeds lacks defined time boundaries and strict sanctions for non-registration.

5. Declaration of Conflicting Interests

The authors state that there is no conflict of interest in the publication of this article.

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Poverty is the worst kind of violence.

Gandhi

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