

# EXECUTION OF FIDUCIARY GUARANTEE UNDER LAW NO. 42 OF 1999 ON FIDUCIARY GUARANTEE (A SOCIO-JURIDICAL ANALYSIS TO ANTICIPATE ITS EFFECTIVENESS) \*

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## *Abstract*

Fiduciary Guarantee (Fiduciary Law) which approved by the House of Representatives of the Republic of Indonesia (DPR RI) on September 9, 1999 has accommodate the public needs to help business activities and to provide legal certainty to the interested parties. With the increase in the development activities and the needs for funding, a majority of funds are needed to meet the lending and borrowing activities that require protection for the lender and the borrower through a guarantee institution that can provide legal certainty and protection to the lender or the borrower. Viewed from the current lending practices, there is a difficulty on the part of the Fiduciary Guarantee to conduct the fiduciary execution if the Fiduciary Grantor defaults since in fact the goods being a fiduciary object are still in the possession of the Fiduciary Grantor or Debtor, then in line with the provisions of article 1977 of the Indonesian Civil Code, known as the principle of *bezit geldt als volkomen titel*.

**Keywords:** *Fiduciary Law, Creditor, Debtor, Guarantee Provider*

## I. Introduction

On September 30, 1999, in the framework of legal reform the Government has promulgated, among other things, Law Number 42 of 1999 on Fiduciary Guarantee (Fiduciary Law) whose bill was approved by the House of Representatives of the Republic of Indonesia (DPR RI) on September 9, 1999.

According to the general description, several matters that form the background of the formulation of the Law are:

1. The fulfillment of economic requirements in which along with an increase in the development activities and the needs for funding a majority of funds are needed to meet the lending and borrowing activities that require protection for the lender and the borrower through a guarantee institution that can provide legal certainty and protection to the lender or the borrower.
2. Accommodating of the public needs as a means to help the business activities and to provide legal certainty to the interested parties.

Based on this, the provisions on fiduciary guarantee institutions as an ideal

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guarantee having the following characteristics are stipulated:

- a. Granting preference rights to the Creditor as a Fiduciary Grantee (***Droit de Preference***)
- b. Always following the pledged object, in the hands of anyone where the object is (*Droit de Suite*)
- c. Meeting the principles of specialty and publicity that bind third parties and provide legal certainty assurance to the interested parties.
- d. Easy and sure execution.

As its title suggests, this paper will further limit the description of the regulation of the execution of fiduciary guarantee under the Fiduciary Law and see things that should be anticipated within the framework of fiduciary execution.

## II. Regulation of Fiduciary Execution

The Fiduciary execution is set out in article 29 through article 34 of the Fiduciary Law.

1. If the debtor or the Fiduciary Grantor defaults, the execution of the fiduciary guarantee object may be done in the following method:
  - a. The exercise of the executorial title as referred to in Article 15 (2) by the Fiduciary Grantee;
  - b. The sale of the goods being the Fiduciary guarantee object at the Fiduciary Grantee's own discretion through public auction and taking the proceeds of the sale in settlement of debts;
  - c. The private sale made under an agreement between the Fiduciary Grantor and the Fiduciary Grantee if in such a method the highest price beneficial to the parties may be obtained.
2. The sale as referred to in paragraph 1 letter c shall be made after the expiration of 1 (one) month after having been notified in writing by the Fiduciary Grantor and/or the Fiduciary Grantee to the interested parties and announced in at least 2 (two) newspapers circulating in the relevant area.

Furthermore, starting from article 30 to article 34 of the Fiduciary Law, the following matters are set out:

1. The Fiduciary Grantor shall provide the goods being the Fiduciary Guarantee object in the framework of Fiduciary Execution.
2. In the event that the goods being a Fiduciary Guarantee object are made up of trading objects or securities that may be sold at the market or on the stock exchange, its sale may be made at such places in accordance with applicable laws and regulations.
3. Any undertaking to conduct the execution of the goods being a Fiduciary Guarantee in a manner contrary to the provisions as referred to in articles 29 and 31 shall be null and void.
4. Any covenant that authorizes the Fiduciary Grantee to possess the goods being a Fiduciary Guarantee object in the event the Debtor defaults shall be null and void.
5. In the event the proceeds of the execution exceed the value of the guarantee, the Fiduciary Grantee shall return the excess to the Fiduciary Grantor.

6. If the proceeds of the execution is insufficient for debt settlement, the Debtor shall remain responsible for unpaid debts.

From the contents of the articles it can be concluded that as stipulated in Law No. 4 of 1996 on Mortgage (UUHT), the Fiduciary Guarantee Certificate has the same executorial power as a final and binding court decision (see article 23 paragraph 3 of UUHT).

The easy execution of Fiduciary Guarantee is also seen in the case of lien as provided for in article 1155 of the Indonesian Civil Code and Article 6 and Mortgage in article 6 jo article 20 paragraph 1a of UUHT and Mortgage as referred to in article 1178 paragraph 2 of the Indonesian Civil Code.

This Parate Execution should be conducted through Public Auction, but if it is not profitable then a private sale is possible provided that there is an agreement between the Fiduciary Grantor and the Fiduciary Grantee and sale execution period requirements are met.

### **III. Practical Juridical Analysis**

If we examine the regulation of the Fiduciary execution under the Fiduciary Law, then in accordance with considerations in point c the legislators want to provide legal protection to the interested parties. The question is that who are the interested parties in this case that should be protected by Law No. 42/1999? In accordance with the principle of the guarantee law, the legal protection should be equal for all the interested parties, namely:

- 1) Creditor
- 2) Debtor
- 3) Guarantee Provider
- 4) Third Party

However, if we observe the provisions of article 20 of Law No. 42/1999 we find legislators' partiality for the Creditor as if they want to give a fresh air to the Creditor whose legal interests have in practice been less protected so far from this Fiduciary institution introduced in our legal system until the birth of this Law.

Legislators' tendency to prioritize the interests of the Creditor in the Fiduciary execution when the Debtor defaults is seen from the following provisions:

1. The inclusion of the executorial title in the Fiduciary Guarantee Certificate which means that the Fiduciary certificate has the executorial power or is treated the same as a final and binding court decision for the parties to be implemented.
2. In particular Law No. 42/1999 wants to institutionalize the parate execution provided to the Fiduciary Grantee as the Creditor.
3. Entitling the Fiduciary Grantee to control the Fiduciary Guarantee object in the event the Fiduciary Grantor is not willing to voluntarily surrender the guarantee object controlled by it or known as the Right to Repossess (see article 30 and elucidation on article 30 of the Fiduciary Law) and, if necessary, in the exercise of this Right to Repossess, the Fiduciary Grantee may request assistance from the competent agencies such as the Indonesian National Police and the Court but without using the services of debt collectors who often use illegal means, both rough and smooth.

Viewed from the current lending practices, there is a difficulty on the part of the Fiduciary Grantee to conduct the fiduciary execution if the Fiduciary Grantor defaults since in fact the goods being a fiduciary object are still in the possession of the Fiduciary Grantor or Debtor, then in line with the provisions of article 1977 of the Indonesian Civil Code, known as the principle of *bezit geldt als volkomen titel* in accordance with Prof. Paul Scholten's theory, anyone who controls movable goods is regarded as the owner, this is strong legal protection for the Fiduciary Grantor but, on the contrary, becomes a wedge for the Fiduciary Grantee since there is no certainty for Creditors that the goods being the Fiduciary object are still in the possession of the Debtor without being transferred to another party.

One thing that highly disturbs legal certainty in practice is that very often the goods being the Fiduciary object to be executed directly (parate execution) have been in the possession of third parties that are not related to the agreement, such as the cars guaranteed by the Fiduciary object placed in the KOSTRAD complex, or those borrowed by KOPASSUS members, so that the Creditors asking the POLRI for help to attract the guarantee object are powerless to conduct the parate execution.

In addition, until now the general public has not known that the goods controlled by the Fiduciary Grantor have been used as a guarantee being the Fiduciary object since there is no registration system as introduced by this Law that enforces the registration of a Fiduciary guarantee object with the Fiduciary Registration Office so that the movable goods controlled by the Debtor are regarded as the absolute property of the Debtor. Clearly any attempt to withdraw the movable goods being the Fiduciary object with violence may not be made although the following clause has been included in the basic agreement:

*"Should the debtor fail to fulfill its obligations, the creditor shall be entitled to forcibly take the pledged car, if necessary, with the assistance of the competent party."*

Even, in addition to that clause, sometimes for its benefit the Creditor is authorized to withdraw and sell the Fiduciary object made separately from the basic agreement but in reality the Bank generally being the Fiduciary Grantee may not take the guarantee objects with violence from the possession of the Debtor, for instance, by visiting the Debtor's house to take the car from the Fiduciary Grantor's garage or to forcibly take the car when it is parked in a supermarket or to forcibly stop the car when it is on the way and tow the car by virtue of a power of attorney that has been granted. Clearly such practices are not legally justifiable since they may cause new legal issues such as criminal charges from the Fiduciary Grantor for entering a house and yard, committing objectionable actions, and therefore a lawsuit for activities against the law (*onrechtmatige daads*) may also be filed.

To avoid such risks, the efforts taken by the Debtor are to softly urge the Debtor to be willing to amicably surrender the collateral goods being the Fiduciary object to be jointly sold at a ceiling price determined by the Debtor with the Creditor. If this attempt fails, then the debt collection and the withdrawal of collateral goods from the possession of the Debtor are forced to pass through a civil claim through the District Court by requesting that the goods being the Fiduciary object be confiscated first. Often in the petition of his statement of claim, the Creditor also requests the Head of the District Court

for a decision which is provisionally executable despite any remedy in terms of protest, appeal, cassation or other remedy (*uitvoerbaar byvoorraad*) but in practice this provisionally executable (*uitvoerbaar byvoorraad*) decision is still difficult to implement since it requires the permission of the Head of the High Court and of the District Court in accordance with the circular letters of the Supreme Court of the Republic of Indonesia (MARI) in which they are required to be careful to grant a provisionally executable decision.

From Fiduciary execution practices occurring so far, the Creditor as a Fiduciary Grantee often faced with ambivalence since on the one hand he is entitled to conduct the parate execution using little violent means but on the other hand, if he exercises his right to withdraw the goods being a Fiduciary object through parate execution then he should be prepared to accept the risk of being sued by the Debtor for arbitrary actions (*eigen richting*) and unlawful actions pursuant to article 1365 of the Indonesian Civil Code and should also be ready to accept criminal charges for committing an objectionable action or forcibly entering the house of the Debtor as a Fiduciary Grantor.

As an illustration, we can give two examples of cases which have once been experienced by a government-owned bank when it would conduct the Fiduciary execution, as follows:

1. **Civil Case No. 33/Pdt/G/77** with the following issues:

- a. The Bank provided investment credit for the purchase of several trucks.
- b. The Debtor did not settle the credit in accordance with the credit agreement.
- c. The Bank made a physical inspection of the trucks that had been bound by a Notarial FEO.
- d. The court examining the Debtor's claim acknowledged the FEO but did not recognize the Bank as the owner that could physically control the FEO collateral goods.
- e. The action of the Bank physically controlling the trucks was classified as an unlawful action (article 1365 of the Indonesian Civil Code).

The Court decision as mentioned above is most likely not to occur if the Fiduciary Grantor has been granted the right to take the goods being the Fiduciary object as stipulated in the elucidation on article 30 of the Fiduciary Law and such article was used by the Panel of Judges as its legal considerations.

2. **The Civil Case at the Pangkal Pinang District Court**, as follows:

- a. A branch of a government-owned bank in Pangkal Pinang provided credit facilities to exporter customers.
- b. Export objects being the main collateral in the form of pepper stocks were fiduciarily bound.
- c. The Debtor failed to settle its obligations under the credit agreement.
- d. The Bank took safeguard measures for the pepper stocks by double locking the warehouse.
- e. The warehouse locking was conducted since the Debtor defaulted, for the purpose of supervising it when the customer would sell the pepper.
- f. The Bank's supervision and permission when the Debtor intended to sell the pepper to secure the proceeds of the sale to be used to settle the obligations of the customer.

- g. The action of the Bank was sued by the Debtor through the Pangkal Pinang District Court.
- h. The Judge gave a decision that the Bank had committed an unlawful action and ordered the Bank to pay compensation for a reason that the customer would be disturbed in conducting its exports if it should ask the Bank for permission to open the warehouse.

The pepper stocks can be classified as inventory objects and since the Debtor has defaulted, if the Judge used article 21 of the Fiduciary Law and its elucidation as legal considerations, then his decision would be different because the Bank was basically entitled to limit the sales process by enforcing the permission of the Bank there for.

#### **IV. Anticipation of Effectiveness of Regulation of Fiduciary Execution**

##### **Parate Execution Institution**

Observing the contents of the regulations on Fiduciary execution we can conclude that the provisions on Fiduciary execution receive the provisions on the execution of Mortgage (HT) in Law No. 4 of 1996 on Mortgage on Land And Related Objects (UUHT). Only in the UUHT it is explicitly explained that the execution of HT by virtue of the executorial power of the Mortgage Certificate uses the provisions set forth in article 224 of the updated Indonesian Reglement (RIB/HIR) and article 258 of Legal Proceedings Reglement for regions outside Java and Madura (RBG).

So pursuant to the UUHT, the HT holder may conduct parate execution without the court's fiat execution (see article 6 of UUHT) and execution with the Court's fiat execution (see article 14 jo article 20 jo elucidation on article 26 of UUHT). However, in practice the implementation of article 6 of UUHT still requires fiat execution from the District Court due to the following matters:

- a. To protect the HT holder from the Debtor's and/or the HT Grantor's claims for a reason that the HT holder has committed an unlawful action (see article 1365 of the Indonesian Civil Code) or is also prosecuted for committing objectionable actions or illegally entering the Debtor's premises.
- b. To maintain the authority of the court as a civil executor in accordance with article 33 of the Law on the Principles of Justice Number 14 of 1970, since the parate execution is considered to "undermine" the authority of the Head of the District Court.

The matter of which could be reflected in an auction that had been conducted without using the court's fiat execution; the petition for the execution of the vacation of collateral goods as a follow-up to the auction was rejected by the Head of the District Court for a reason that the auction was conducted without fiat execution, so the auction winner should file a claim again until a final and binding decision is obtained.

The Auction Office's and the Creditor's hesitancy to conduct execution is also based on the Decision of the Supreme Court of the Republic of Indonesia (MARI) dated January 30, 1986 number 3210K/Pdt/84 annulling the decision of the High Court and stating that the auction sale by parate execution that has been made without involving the Head of the District Court is an unlawful action and the auction is null and void.

In anticipation of parate execution of the Fiduciary Guarantee it is very ideal if there are further provisions on the execution of the Fiduciary Certificate, for instance, by stating that the execution is an exception to Article 33 of the Law on the Principles of Justice that has not been replaced so far; or in order to revise the Law on the Principles of Justice the makers of the Fiduciary Law ask the MARI to include certain provisions that may strengthen the parate execution of the Fiduciary Guarantee and HT without fiat execution. In addition, the legal politics of the MARI stating that the executorial characteristic is **exceptional** in order to provide justice to the Debtors should be changed by asking the Judges to observe it case by case.

#### 1. Sale of Goods Being a Fiduciary Object

The sale of goods being a Fiduciary Guarantee object under an agreement privately executed between the Fiduciary Grantor and the Fiduciary Grantee shall be made within 1 (one) month after written notice by the Fiduciary Grantor and the Fiduciary Grantee to the interested parties and announced in at least 2 (two) daily newspapers circulating in the relevant area.

The regulation that has been quite good by relying on an agreement between the Fiduciary Grantor and the Fiduciary Grantee to sell Fiduciary goods may be hampered by unclear regulation of the interested parties whether they by knowing the sale plan may make an objection (claim, verzet, etc).

Up to the present a verzet/claim has been filed by a third party against executions that have mostly been conducted through an auction. To prevent the recurrence of execution bottlenecks, this provision should more confirm who are the interested parties and what rights are possessed by them.

#### 2. Right to Repossess

Another thing necessary to consider in the framework of conducting the execution of Fiduciary guarantee, the Fiduciary Grantor should provide the goods being a Fiduciary guarantee object to the Fiduciary Grantee.

In case the Fiduciary Grantor refuses to hand over the goods being a Fiduciary guarantee object, the Fiduciary Grantee is entitled to take the goods being a Fiduciary guarantee object and if necessary, may request the assistance of the competent authority, but who the competent authority is, whether the Court, the Police, the bank's security guard or the Auction Office, is not explained.

In general, if the credit is not settled, the cooperation between the Debtor and the Bank is very difficult to do; thus, the obligation should be followed by sanctions so that the Debtor can be expected to voluntarily surrender the collateral goods to the Bank.

If there are no sanctions against the Debtor, the Bank is most likely to be forced to take the collateral goods from the possession of the Debtor. Therefore, the meaning of the competent authority to be asked for assistance by the Fiduciary Grantee should be applied more flexibly, not limited to the Indonesian National Police (POLRI) or the District Court through Article 200 (II) of RIB; so that it is possible to ask the officials of the State Auction Office for assistance in taking the Fiduciary goods since this process is related to the execution of fiduciary guarantee by the State Auction Office.

To support the implementation of the Right to Repossess, socialization and cooperation between the Police and the Court need to exist in such a way, so that for the purpose of this Right to Repossess the Fiduciary Grantee is not required to sue first.

## V. Conclusion

Viewed from the aspect of development of Guarantee Law especially the Fiduciary institution, it should be noted that it has experienced a rapid growth and even a revolutionary progress although it is the guarantee law since initially the Fiduciary institution was recognized only in the Dutch jurisprudence, and then recognized in the jurisprudence of the MARI and then mentioned in Law No. 16/1985 on Flats and finally recognized in Law No. 42/1999 on Fiduciary Guarantee.

This proves that the guarantee institution is really needed by the public as a living institution in our society. However, with the enactment of Law No. 42/1999 we are faced with new challenges in socializing Law No. 42/1999 that still requires a follow-up and needs the attention of all the related parties, namely:

1. For law enforcers, especially Judicial agencies, to what extent they are able to participate in socializing this Law and no longer consider that the right of the Creditor as the Fiduciary Grantee to conduct parate execution does not mean taking over or undermining the authority of the Head of the District Court as a civil execution Leader governed by Article 33 of Law No. 14/1970, but the parate execution should be considered exceptional granted by the Law to the Creditor to ensure the implementation of its rights with the Fiduciary registration with the Fiduciary Registration Office.
2. For Debtors, they should act in good faith to surrender a guarantee to the Creditor as the Fiduciary Grantee when they have defaulted since they are unable to pay back the loan, and not to make efforts that hinder the execution by filing criminal charges, civil claims solely intended to buy time to meet its obligations to the Creditor.
3. For third parties, they should not be hasty in buying movable goods or buildings and should check first at the Fiduciary Registration Office in order for a dispute not to arise in the future.
4. For legislators, they should observe that the law newly made meets juridical, philosophical and sociological requirements in order for them not to get caught up in the target system in the formation of a Law since the Law made should be equal legal protection for all the related parties in accordance with the nature of the Law constituting the "general norms" and not a sponsor message or a struggle of interests of certain groups on behalf of the Law.
5. There are inputs for legislators in the future that execution issues (the substance of the Civil Procedural Law) should not be confused with the substance of the Material Law as in this Law No. 42/1999.

As a final note we can say that how good a law is made, it is still only a human work which is not free from deficiencies, but in the implementation of this Law all the related parties should support it in good faith in order for the



Law not to be simply a “**BLACK LETTER LAW**” not embodied in the life of the community governed by the Law, the matter of which mostly depends on the law enforcers.

## **Bibliography**

### **Books**

- Ahlan, Irsjan Sjarif. *Efektivitas Eksekusi Fidusia Menurut Undang-Undang Nomor 42 Tahun 1999, Suatu Antisipasi*, A paper presented in a Scientific Discussion Circle event, organized by the Faculty of Law, University of Indonesia, Jakarta, November 22, 1999.
- Hutagalung, Arie. S, SH, MLI. *Jaminan-jaminan Kredit*, A paper presented at a Seminar on PPIH for Accountant Class Bankruptcy Curator Affairs, organized by the Faculty of Law, University of Indonesia, Jakarta, August 2 - 19, 1999.
- J. Satrio, SH. *Parate Eksekusi Sebagai Sarana Mengatasi Kredit Macet*, PT. Citra Aditya Bakti, Bandung 1993.
- J. Satrio, SH. *Hukum Jaminan, Hak-hak Jaminan Kebendaan*, PT. Citra Aditya Bakti, Bandung 1993.
- M. Karjadi, *Reglemen Indonesia Jang Dibaharui* (RIB), POLITEIA, Bogor, 1972.
- Harahap, M. Yahya, SH. *Ruang Lingkup Permasalahan Eksekusi Bidang Perdata*, PT. Gramedia, Jakarta, 1988.
- The Supreme Court of the Republic of Indonesia, *Pedoman Pelaksanaan Tugas dan Administrasi Pengadilan, Buku II, Edisi Revisi*, Judicial Technician Development Project of the Supreme Court of the Republic of Indonesia, 1977.
- Sutantio, Retnowulan, SH. *Upaya Hukum Dalam Penagihan Kredit Macet dan Eksekusi Jaminan*, A paper presented at the Conference on Legal Actions of Receivables Collection & Guarantee Execution in Indonesia, organized by the Centre for Management Technology, Jakarta, July 19, 1993.

### **Regulation**

- State Gazette of the Republic of Indonesia Republic of Indonesia Number 4 of 1996 on Mortgage on Land and Related Objects.
- Law of the Republic of Indonesia Number 42 Year 1999 on Fiduciary Guarantee, September 1999.