Debtor's Legal Standing in the Possession of Fiduciary Collateral in Indonesia

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Abstract: *The forms of collateral in Burgerlijk Wetboek (pawn and mortgages) are apparently less able to facilitate the needs of Micro, Small, Medium Enterpreneurs (MSMEs) who need capital but also still need to utilize the collateral objects. Fiduciary was created to accommodate the needs of the community to be able to obtain additional funds while still controlling collateral objects. These objects are still used in managing business activities and increase the chances of success of debt repayment so that this method is considered to be equally beneficial for debtors and creditors. The research that applies the normative juridical method will examine in depth about how the legal standing of fiduciary debtors and their correlation with the status of property rights, property rights, material security rights and rights and obligations of both the debtor and creditor, their existence in The Fiduciary Act (TFA) and their compatibility with this era.*

Keywords: *legal standing, debtor, fiduciary collateral*

1. Introduction

The development of a variety of community activities in business sector, requires the fulfillment of supporting factors in addition to education, expertise, facilities and infrastructure. The government, in this case, was actively helping to improve the welfare of MSMEs (Micro, Small, Medium, Enterpreneurs) through diverse access to capital from bank loans, grants from the central government and regional governments, competitions for start-up and MSME entrepreneurs, etc. This is in accordance with "*Nawa Cita*" programs, especially points 2, 7 and 9 that is building Indonesia by strengthening regions and villages, achieve economic independence by moving the strategic sectors of the domestic economy, also increase productivity and competitiveness.

National economic growth is a benchmark for the progress of the nation. Countries that have strong economic conditions and increase positively will be able to compete in global competition. Indicators determining the strength of

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the country's economy are the level of reserves of fuel oil, commodities and minerals. Entrepreneurs have a role in increasing national economic growth while regional economic growth is supported by business activities carried out by MSMEs. The most common method of increasing capital for MSME entrepreneurs is bank credits. Fiduciary is one of guarantee for collateral in form of movable object. Initially, fiduciary was only regulated based on jurisprudence before it has been regulated at TFA. Legal actions are bound by the agreement between 2 (two) or more parties where the parties intentionally commit themselves or bind themselves to one another. One party has rights while the other has obligation and the agreement must applied the principle of *pacta sunt servanda* and good faith. Legal agreements regarding business activities must involve legal objects in the form of goods. The meaning of objects according to article 499 BW. The definition of goods (*zaak*) includes tangible and intangible objects, also movable and immovable objects.

The legal relationship in fiduciary happens between debtor (fiduciary giver) and creditor (fiduciary recipient) based on trust. The debtor believes that fiduciary recipient or creditor is willing to return the ownership rights to the goods he has handovered after paying off the debt. On the other hand, the creditor believes that the debtor will not abuse the collateral that is in his hand as long as the debt is not paid off. The problem that arises here is about the philosophical basis of fiduciary guarantees and the legal standing of debtors when controlling fiduciary security objects.

2. Theoretical Framework and Hypotesis Development

Agreements can be born from legal relationship of the parties regarding assets where one party promises to do something, give something or not to do something. Agreement always starts with a process of negotiation between parties. People are bound to their own promises, the promise is binding and that promise must be fulfilled (Satrio, 1995). Agreement should be distinguished from a promise, even though promise is difference with agreement, promise

must not have legal consequences, so that if it was broken then there was no legal consequence or sanctions (Mertokusumo, 1999). These defaults can be filed in court (Guest, 1979). Agreement as a bond implied in Article 1313 BW but the explanation is incomplete because it only refers to one-sided agreement. The formulation of this article was considering over extensive because phrase "a legal act" can include *zaakwaarneming* and *onrechtmatigedaad*. In order to fix the ambiguity, Article 6.213.I NBW states that : "*A contract in this sense of this title is a multilateral juridical act whereby one or more parties assume an obligation toward one or more other parties*" (Hartkamp, Tillema, 1995).

The most important particularity of the contract is the mutual agreement of the parties. This collective agreement must be disclosed to the opposing party in the contract. It is worth remembering that without interdependence there is no agreement, for example in the General Meeting of Shareholders (GMC) regarding the selection of the company's board of directors, this election was chosen with general agreement so that it is not a contract because there is no element of mutual consent and interdependence. The intention of the parties to the contract must aim to create legal consequences. There are many agreements that give rise to social obligations or moral obligations, but have no legal consequences. For example, promises to go to the cinema do not cause legal consequences.

In the common law system, all contracts are agreements, but not all agreements are contracts (Woon, 1995). American Restatement of Contract (second) defines contract as a promise or set of promises which the law give a remedy in some way recognized as a duty (Anderson, 1987). In the 2nd American Restatement of Contract there is no bargaining element in that definition. A contract is simply considered a series of promises. In fact, there are also some cases where a promise is treated as contractual thought without real agreement. Pollock tries to summarize and simplify by defining contracts as a promises enforced by law (Atiyah, 1981). There are several types of agreements and credit agreement is only one of them. The word credit comes

from the Roman "Credere" meaning “to believe”. It was regulated in Act No. 10 of 1998. The term "guarantee" comes from the translation of *Zakerheidessteling*. Guarantee according to J. Satrio is a legal regulation governing collateral receivables of a creditor to the debtor (Satrio, 1995).

3. Research Methods

The research method used in this study is normative juridical with the concept approach and legislation approach. The concept approach is carried out by analyzing problems using applicable legal principles, theories and doctrines from legal experts. The legislative approach is carried out by analyzing problems using regulations relating to fiduciary issues, especially Act No. 42 of 1999 on Fiduciary (TFA) also its implementing regulations.

4. Discussion

A. Existence of Fiduciary Guarantee Institutions in Business Activities

Guarantees as legal instruments create legal principles in the field of civil law (Hartono, 2007). In addition to fiduciary, pawn was already exists but it gradually no longer be able to meet all aspects of the community's needs, especially MSMEs because pawn was required to be held by creditors (*inbezit stelling*). Meanwhile, fiduciary is the transfer of ownership rights of an object on the basis of trust that the ownership rights still remains in owner’s possession. In fiduciary, creditors do not always have to be known. Creditor replacement can also occur unilaterally without debtor’s approval. A creditor can transfer his rights to a new creditor. The opposite applies to Debtors. In an engagement there must be at least a debtor and he must be known. Debtor replacement can only occur if the creditor has given approval, e.g in the case of a debt takeover. Since the beginning of the fiduciary agreement, the creditor can give approval for debtor replacement, e.g. in a sale and purchase agreement for himself and for subsequent buyers. If in this buy-sell agreement the debtor has not paid off all debts then the object is transferred to buyer and the

obligation to pay the debt automatically goes to the new buyer. Debtor position can change or switch to subrogation (Badrulzaman, 2000). The legal relationship between debtor and creditor was happened before the TFA. This need is based on the following facts there are movable property as collateral, specific debt collateral objects, development of the concept of property rights and the movable property cannot be handed over to other parties.

The debtor's collateral items that have been registered at AHU do not cause the debtor to lose his ability to carry out legal actions but only lose their power to manage and transfer assets with fiduciary guarantees. Thus the debtor can still do legal actions such as making agreement, receiving a grant, receive procuration, etc. Debtors are not being under control after registration of fiduciary objects. Meanwhile, the management and transfer of the debtor's assets can still be done if it concerns the acquired assets, the debtor can still carry out legal actions to receive the assets. Fiduciary comes from the word "Fides" which means trust. Fiduciary is the delegation of the authority of processing money from the owner of the money to the party receiving the delegation. Dr. A. Veenhoven called it "Transfer of Property Rights as Collateral" (Hamzah, 1987). In practice, the term fiduciary was chosen because it is shorter and easier to pronounce. Fiduciary is the transfer of ownership rights of an object on the basis of trust provided that the object whose ownership rights are transferred remains in the possession of the owner.

Fiduciary regulations will relate to the global competitiveness index (World Competitiveness Index, World Economic Forum). Unfortunately, the implementation of Fiduciary with the principle of *constitutum possesorium* (transfer of ownership of objects without giving up physical objects at all) is currently still based on jurisprudence and does not guarantee strong legal certainty. Fiduciary in practice, still raises various legal issues, including the inconsistency of the substance that are impartiality with MSMEs, the unfairness of judges in deciding fiduciary guarantee cases lead to the ineffectiveness of this regulation. Nowadays, the issue of legal certainty is one of the core values

in legal framework which includes 3 principles i.e. the law-abiding state, independence of judiciary, and access to justice. Justice and legal certainty must be able to reach whole society, especially for "maladministration", the law must be unforced fairly and equally (just, equal) along with legl certainty. The renewal of the fiduciary legal system requires a foundation of values or ideas as guidelines in accordance with the ideology of the nation (Yusriyadi, 2009).

Regulation about legal relationship between parties in TFA based on Robert B. Seidman's theory (Seidman, 1972) was being analyzed from these aspects; regulation, opportunity, capacity, communication, interest, process and ideology aspect. TFA when analyzed based on ethical flow has fulfilled formal elements, substance and legal justice, although its implementation was not easy to determine the guidelines of justice especially when a default occurs. Furthermore, if the TFA is analyzed based on the utility flow, the TFA provides hope for the debtor and the creditor to benefit because the debtor can utilize the funds that have been given by the creditor to keep running his business. Creditors will also get credit payments on time so that the receivables return for the benefit of other debtors. The TFA can formally guarantee legal certainty in accordance with the consideration of TFA in letter C, namely that it is necessary to form comprehensive provisions regarding fiduciary so that it can further spur national development and provide legal certainty for interested parties. This rules does not conflict with the principle of *droit de suite*.

B. Legal Standing Debtor in Fiduciary Guarantee

The legal relationship in an agreement must be carried out in good faith in fulfilling the rights and obligations of each party. The party that has right to sue for something is called a creditor while the party who is required to fulfill the demand is called a debtor (Muhammad, 1992).. In fiduciary, creditors do not always have to be known. Creditor replacement can also occur unilaterally without debtor’s approval. It can occur by certain formalities, for example by revising an old deed or making a new deed. A creditor can transfer his rights to

a new creditor. The opposite applies to Debtors. In an engagement there must be at least a debtor. The debtor must be known, because a creditor cannot charge a debtor he does not know yet. Debtor replacement can only occur if the creditor has given approval, e.g in the case of a debt takeover. Debtor replacement can occur because of a qualitative engagement, so the obligation to meet the achievements of the debtor is called a qualitative obligation.

Article 1 Number 2 TFA can be applied to both tangible and intangible also movable and immovable objects, especially buildings that cannot be encumbered as mortgage rights as referred to in the Mortgage Act which remain under the control of the fiduciary giver as collateral for debt repayment, it could give a priority over other creditors. It seems more appropriate if the rule states : "Fiduciary rights is a material security right on capital goods used to guarantee the repayment of a certain amount of debt, while the agreement of the capital object still in fiduciary giver (debtor) possession" so that a difference between the editorials of article 1 number 1 with article 1 number 2 can be more understandable, because in practice people was often trapped in the ambiguity of the two rules as if there had been a transfer of property rights. In fact, there is a statement that the handover of collateral rights is a pattern of *constitutum possessorium* or abstract submission. If the abstract handover is juxtaposed with the pattern of transfer of ownership of similar objects, namely *traditio brevi manu* and *traditio longa manu*. Unfortunately, TFA never provided a clear explanation regarding the legal position of the debtor while holding collateral. If it is associated with a fiduciary agreement accordance with Article 5 TFA then it is usually stated that the legal position of the debtor is also the borrower (lend-use). The debtor's position as a lend-use creates a conflict with Article 29, 30, 33 and 34 of TFA (Wijaya, 2016).

Fiduciary agreement must be registered. The registration was recorded in the Fiduciary Registration Office register book and binding on third parties. Fiduciary registration can now be made online to the AHU Directorate General. Objects are including goods that can be owned and transferred, whether

tangible or intangible, movable or immovable. These items cannot be mortgaged or pawn. Furthermore, it can be observed in Article 3 of TFA about restrictions on objects that cannot be subject for mortgage or hipotek. The shares of a trading company are considered as movable goods, as well as if the companies have immovable property (Article 511 sub 4 BW). In practice, fiduciary deed requires details such as size, quality, condition, time, serial number, vehicle number, order number, machine number, police number, a Letter of Proof of Ownership of Motor Vehicles (BPKB) especially for vehicles whose owner's name is different from the name listed on the BPKB, so it is required to attach a receipt or purchase invoice to preventing future disputes. Therefore, bank provided a form blank filled with detailed mention of objects if it is already done by underhand before.

The issuance of TFA is an official acknowledgment from government about the existence of fiduciary subject. TFA clearly states that fiduciary are collateral for the material which gives priority to the recipient where the precedent rights do not nullify the bankruptcy of the fiduciary guarantee. A fiduciary guarantee is an accessor agreement, therefore the fiduciary guarantee is null and void by law if the debt guaranteed by the fiduciary is written off. The debt is not limited to the definition of debt, but this debt also includes any *verbintenis* referred to Article 1234 BW. The form of the fiduciary agreement must be written in a notarial deed in Indonesian according to 1870 BW. This regulation can support the implementation in practice. Fiduciary guarantees born on the date of fiduciary guarantee are recorded in the Fiduciary Guarantee Certificate which is issued on the same date as the date of receipt of the application for registration of fiduciary. Considering that the debtor retains possession of the object and gains economic benefits from it, then he is responsible for all consequences and must bear all risks. Fiduciary adheres to "*droit de suite*" principle, an exception to this principle is if the object is in inventory while still complying with certain requirements as referred to in Article 21 of the TFA. The creditor’s position is separatist creditor thus even if

the debtor is bankrupt, the right to the creditor is not void because of collateral objects not included in the bankrupt assets of fiduciary guarantors.

5. Conclusion, Implication, Limitation

5.1 Conclusion

The existence of a fiduciary in Indonesia was born to accommodate the needs of society who needs additional funds to their activities in economic field while still be able to controlling the assets, so that it is no longer possible to be pledged as mortgages. The legal standing of the debtor in controlling the fiduciary object was as long as it is used as a collateral. The ownership of the object is remain with the debtor, whereas the creditor only has the material security rights and not the ownership rights over the object. It can even be stated from the beginning process of guarantee agreement that when the debtor defaults then the collateral must not automatically belong to the creditor. This rule is strictly prohibited. It is important to be applied in order to provide legal protection to debtors who have a weaker position.

5.2 Implication

Regarding the issue of legal authority in TFA, it needs to be revised through the ambiguity between Article 1 number 1 and Article 1 number 2 of the UUJF. It must be clarified again because it relates to the principle of the handover of objects and the principle of fiduciary security which is very important things in fiduciary agreement.

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