

CHARACTERISTICS AND PROBLEMS OF ONLINE FIDUCIARY IN THE IMPOSITION OF FIDUCIARY GUARANTEE IN INDONESIA

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ABSTRACT

The development of economic activities increases rapidly in every economy sector. For that reason, business units in the society also increase. That development causes healthy competitions, and thus consideration of capitals and good business are importantly needed. To achieve that condition, an alternative way to increase capitals through security agencies is required. One of security agencies in Indonesia is fiduciary guarantee agency. The increasing needs of capitals among business units in Indonesia makes fiduciary guarantee agency plays an important role in giving credits to the banks or other funding institution. Regulations on fiduciary registration can now be done via online. The online fiduciary guarantee registration has been implemented since the issue of Finance Ministry Decree No 130/PMK 010/2012 about Fiduciary Registration, which is valid since August 2012. The Ministry of Law and Human Rights will facilitate the online registration of the fiduciary. To strengthen the provision of the online fiduciary registration, the Directorate General of General Law Administration issued a circular number Ahu.Ot.03.01 Number-01 Year 2013 about the Application of Fiduciary Guarantee at the Regional Office of Ministry of Justice and Human Rights. The circular provides information about fiduciary online registration process. This paper will present the online application of fiduciary in Indonesia, which is a novelty in the world of banking business, especially for the notary who deals in the online registration of fiduciary. The presence of online fiduciary is not without problems. There are many constraints due to its presence.

Keywords: Online fiduciary, fiduciary guarantee.

INTRODUCTION

The need of credits has been escalating nowadays. Businessmen have done many efforts to increase their capital to create more growing businesses. Communities are gradually more aware that at present, capital is an important requirement for doing business development, in addition to other requirements, namely marketing.

The attempts made by many business people and the public in general to obtain additional capital are mainly to make loans. The loan is obtained from a bank or a guarantee agency in Indonesia. Sri Redjeki Hartono¹ sees that the guarantee agency is needed by economic actors and entrepreneurs/business people. Trust becomes the basis of the agreement and the agreement itself is strengthened by concrete guarantees. The guarantee as a legal institution generates legal principles set forth in the civil law that has an important position in the economic law. One of the growing guarantees in Indonesia is fiduciary guarantee.

Literally, fiduciary comes from the word "fides" which means trust. Under these conditions, the legal relationship between the debtor (the party that gives the fiduciary) and the creditor (the party that receives the fiduciary) is a legal relationship based on trust. The principle underlying the relationship between the two is the principle of trust. The debtor believes that the creditor will return items of property that have been given after the debt is paid off, and vice versa, the creditor believes that the debtor will not misuse the collateral that was in his hand. Fiduciary is a form of guarantee that emerges outside the law, to complement the deficiency in pawn system. The deficiency is on the nature of *in bezitstelling* in the pawn system which requires that the power over the collateral must be on the holder of the lien. The development of the community's needs requires a form of collateral in which people can obtain loans with collaterals, but still can use the collaterals for everyday purposes and for the purposes of their businesses. Fiduciary is considered to be more appropriate and in coherent with the development of the era and the needs of the society. The construction of fiduciary is ownership transfers of chattels/moving goods from debtor to the creditor, although the goods remain on the debtor. Furthermore, in fiduciary, it is required that when the debtor is able to repay their debts, the property rights over the collateral return back to the debtor. It is certainly more favorable to debtors than using pawn services.

In general, the development of fiduciary in Indonesia is triggered by the need of the community and also by the enactment of the BAL (Basic Agrarian Law) in Indonesia. According to the perceived needs of the community, the procedure of fiduciary is easier, more flexible, low-cost, faster in completion to both the moving object and the immovable object, and most importantly, the debtor can still utilize the object for everyday use or to work. Law no. 42 Year 1999 on Fiduciary is intended to accommodate the needs of the community regarding Fiduciary arrangements as a means to help the business activities and to provide legal certainty to the parties concerned. Based on the existing principles to provide legal certainty, the Fiduciary Law (UUJF) takes the principle of fiduciary registration. The registration is expected to provide legal certainty to the giver and the recipient of fiduciary or to a third party. Some of the principles adopted in the UUJF are: (1) the principle of legal certainty, (2) the principle of publicity, (3) the principle of equal protection, (4) the principle of accommodating the needs of practices, (5) the principle of authentic writing, (6) the principle of giving a strong position to the creditors.

¹ Sri Redjeki Hartono, *Hukum Ekonomi Indonesia*, Banyumedia Indonesia Publishing, Malang, 2007, p. 163-164.

Fiduciary must be registered, as stipulated in article 11 UUFJ. With the presence of such registration, UUFJ meet the principle of publicity that is one of the main principles of the legal material guarantee. This rule is made to make sure that the object truly belongs to the debtor or the giver of the fiduciary. If there is a third party who wants to claim the object, he/she is able to recognize the object through the publicity. The registration is done on a Fiduciary Registration Office of the Department of Justice and Human Rights of Indonesia, where for the first time, the office was established to cover the whole territory of the Republic of Indonesia. The purpose of the registration of the fiduciary is to meet the principle of publicity so that a third party has the opportunity to learn about the registration of objects, characteristic of the registered objects as well as objects to be used as collaterals for the benefit of the particular creditors, for particular amount of money, and with certain promises. The registration is intended to bring impact to the third party. With the registration, the third party is considered to know the characteristics inherent to the object and the existence of a guarantee bond with the characteristics mentioned there. In case that the third party fails to observe/control register/register, then he/she cannot expect protection based on good intentions and should bear the risk of loss.

Provisions regarding fiduciary registration have now moved towards a more modern system, which is by online registration. Fiduciary online registration has been applied since the existence of Finance Minister Regulation (PMK) 130/PMK No. 010/2012 on the Registration of Fiduciary that has been applied since August 2012. Ministry of Law and Human Rights (HAM Kemkum) will facilitate fiduciary online registration. To strengthen the provision of the online fiduciary registration, Circular from General Directorate of General Law Administration Number Ahu.Ot.03.01-01 of 2013 about the Process of Fiduciary Guarantee Request at the Regional Office of Ministry of Justice and Human Rights was issued. The circular provides information about the online fiduciary registration process.

Registering fiduciary guarantee via online is relatively a new thing in banking, especially for the notaries who handle online fiduciary registration. The existence of online fiduciary registration is not without problems. Many challenges appear in the process of its implementation. Based on the background, there is urgency in this paper, especially in exploring the process of online fiduciary registration, which is considered as a new thing.

Fiduciary Guarantee in General

Fiduciary is a transfer of ownership of an object on the basis of trust with the condition that the transferred objects remain in the control of the object's owner. Fiduciary guarantee is the right of guarantee for moving objects, both tangible and intangible, as well as immovable objects, especially buildings, that cannot be burdened with the bail and remain in the control of the debtor. This guarantee is functioned as collateral for the repayment of certain debt, which gives guarantee to the creditor toward other creditors.

Based on the above definition of fiduciary, Article 1 (1) of the Law No. 42 of 1999 about fiduciary guarantee states that: *Fiduciary is a transfer of ownership of an object on the basis of trust with the condition that the transferred object remains in the control of the object's owner.* From the statement, we can learn about the elements of fiduciary, including: (1) the transfer of ownership of an object; (2) is done on the basis of trust; and (3) the object remains in the hand of its owner.

The background of the formulation of Law No. 42 of 1999 is based on² : (1) increasing needs in the business world for the availability of fund, so that clear and complete law and regulation should be enacted to govern the guarantee agencies; (2) fiduciary guarantee as a form of guarantee institutions was still be based on jurisprudence and had not been regulated in a complete and comprehensive law; and (3) to meet the legal requirements that may be referred to the national development and to ensure legal certainty for stakeholders, so that it is necessary to form a complete regulation regarding fiduciary guarantees, and the guarantee should be registered at the Fiduciary Registration Office.

In fiduciary, the transfer of property right is done base on the *fiduciari* principle, with the requirement that although the ownership of the object has been transferred to the receiver of fiduciary (the creditor), the object is still on the giver of fiduciary/debtor's hand. Therefore, legally, the object belongs to the creditor, but economically, the object still can be utilized by the debtor. By giving the 'ownership' of the object to the creditor, it does not mean that the creditor is the real owner of the object used as collateral in the fiduciary. The creditor has the right to sell the object only if the debtor fails to pay the debt. It means that the object should be returned to the debtor when the debt is paid off.³

The process of fiduciary guarantee is by the imposition of fiduciary guarantee and the registration of fiduciary guarantee. The imposition of fiduciary guarantee should meet the criteria: (1) should be made with a notarial deed; (2) should be in Indonesian; (3) is a fiduciary guarantee deed. Objects used in fiduciary guarantee should be registered in Fiduciary Registration Office. It also has to be done in the area of domicile of the debtor. The application of fiduciary registration is done by the creditor or the appointed party by attaching a fiduciary guarantee registration statement. The purpose of the registration is as a fiduciary guarantee for the creditor, provide certainty to other creditors on the object given as a collateral in fiduciary, prioritizing the rights of the creditor, as well as to meet the publicity principle since the registration office is open for public.

² HS, Salim, *Perkembangan Hukum Jaminan di Indonesia*, Jakarta, PT. RajaGrafindo Persada, 2004, p 3.

³ Racmadi Usman, *Hukum Jaminan Keperdataan*, Sinar Grafika, Jakarta, 2008, p. 153

Online Fiduciary

General Directorate of General Law in the Ministry of Law and Human Rights apply online fiduciary in giving services to the public with the reason that this online fiduciary is a new system in the law services, which is faster, accurate, free from illegal levy, and able to stimulate economic growth in Indonesia for the prosperity of the citizen. Online fiduciary is a breakthrough form the General Directorate of General Law to give service to the community now and then for a better Indonesia. By applying online fiduciary, it is expected that this law services are able to increase the national income from non-tax revenue (PNBP/Penerimaan Negara Bukan Pajak). The application of fiduciary guarantee is supported by more than 1900 BNI (Bank Negara Indonesia) offices all over Indonesia.

The provision concerning the registration of online fiduciary is stated in the Finance Minister Regulation No. 130/Pmk.010/2012 about Fiduciary Guarantee for the Financial Institution which Provides Fund for the Consumers to Buy Motor vehicles through Fiduciary Guarantee. This provision states that the financial institution that provide funds for the customers to buy motor vehicles by fiduciary guaranty must register the intended fiduciary guarantee in the Fiduciary Registration Office. Registration is done no later than 30 (thirty) days from the date of consumer financing agreement.

Article 3 and Article 4 of the Finance Minister Regulation No. 130/Pmk.010/2012 give a warning/ban for financial institution to withdraw the object such as motor vehicles before the Fiduciary Registration Office issue a fiduciary guarantee certificate and submit it to the Financial Institution. Withdrawal of a fiduciary objects such as motor vehicles can be done when financing company comply the provisions and requirements as stipulated in the laws of fiduciary and consumer financing agreement. Financial institutions which violate these provisions is subject to administrative sanctions, by following several stages: (1) warning, (2) suspension of business activity, or (3) the revocation of business licenses. Warnings are given in written form at most 3 (three) times in a row with a validity period of each is sixty (60) calendar days. In the case that before the expiration of the warning sanction and the financial institution have complied the regulations, the Minister of Finance lifts the warning sanctions. However, if until the third warning and the financial institution still do not meet the conditions stipulated, the Minister of Finance may impose suspension of business activity. Suspension of business activity is given in writing to the financial institution, which is valid for a period of 30 (thirty) calendar days after the suspension letter is issued. If the last valid day of the letter is a holiday, so the warning/suspension is done in the next working day. However, if the financial institution is able to meet the regulation before the valid day is over, the suspension sanction is lifted. In the case until the expiration of the suspension of business activity as referred and financial institution do not meet the conditions stipulated, the Minister of Finance revoke the business license finance.

In online fiduciary system, the user should fill in the username and password in the login page as what are given by the General Directorate of General Law Administration. In the Menu bar, there are three choices: (1) Registration Menu, used to fill up the registration form for fiduciary guarantee; (2) Adjustment Menu, used to make some changes in fiduciary guarantee certificate; and (3) Transaction List Menu, used to see the transaction list done.

Fiduciary online registration process begins by filling out the information in the following sequences: (1) The applicant to fill in the identity of the debtor and creditor of the fiduciary. The debtor and creditor can be either corporate or individual, (2) The applicant fill in a notarial deed of the fiduciary guarantee, including the certificate number, the date, the name and address of the notary who made the Fiduciary deed; (3) The applicant fill in the data on principle agreement of guaranteed fiduciary; (4) the applicant fill in a description of the object which is the object of fiduciary; (5) the applicant fill in the value of the guarantee/collateral; (6) The value of the object has already been stated in the fiduciary deed.

At the last part of the registration you need to print the proof of application registration to be used for making payments to the bank. After bank payment is made, you will receive a receipt of fiduciary registration from the bank. Notary will make the process of printing a certificate of fiduciary system online.

Practically, online fiduciary system gives burden the notary, who prepares the device and makes sure the online security system in the office. It is recommended that the notary does not delegate this work to the staff, given that it needs more responsibility which requires caution. Notary carelessness can result in the imposition of civil penalties, administrative, ethical, including criminal sanctions.

Online fiduciary also has some disadvantages⁴. First, database information about the fiduciary objects that have been registered cannot be accessed through this system because as the deed, all are made by the notary. In addition, there is no description about debtor name, only the giver of fiduciary and he/she does not necessarily become the debtor. In this context, the notary must be careful because it is associated with the payable input value, whether it belongs to the giver of the fiduciary or property of the debtor. Second, the special description of the object value of fiduciary is not available. In the form you can only find a statement "as stated in the notarial deed". It does not accommodate if the value of the object is smaller than the value of the guarantee. It may happen when it comes to working capital credit facility or channeling facilities to finance end users which is done on a per batch binding and will not appear in the certificate of fiduciary guarantee. In such conditions, the notary needs to prepare a special note related to fiduciary binding system. Third, associated to a working capital credit facility (WCL) in a revolving basis, the filling of the new principal agreement can accommodate after being amended for many times. That is why, the acceptability

⁴ Suara Merdeka, 16 Maret 2013, DiahSulistiyaniMuladi, *Fidusia "Online" dan Posisi Notaris*.

of the fiduciary online need carefulness of the notary since it brings a greater responsibility. In addition, it is needed to prepare the input space and storage area for supporting documents, such as invoices document engine, vehicle ownership document and so on. Notary must keep away from things that contain fraud, subterfuge, concealment of fact, breach of trust, deception or circumvention of the rules, as well as other illegal things that lead to white collar crime or corporate crime.

Conclusion

Fiduciary is a guarantee prevails in Indonesia apart from pawn and bail. Fiduciary is a transfer of ownership of an object on the basis of trust with the condition that the transferred objects remain in the control of the object's owner. The unique characteristic of fiduciary is the object ownership is transferred to the creditor but the object remains in the hand of the debtor. The most recent development of fiduciary in Indonesia is the new regulation to register the fiduciary through online mechanism, which is regulated in the Regulation of the Minister of Finance Number 130/Pmk.010/2012 on the Registration of Fiduciary Guarantee for the Financial Institution which Provides Fund for the Consumers to Buy Vehicles through Fiduciary Guarantee. The General Directorate of General Law Administration applied online fiduciary which became a new thing in banking and notary. The system has some advantages and disadvantages. The advantages of this system are the quick transaction time, adding PNPB to the state, and preventing illegal toll in the imposition of fiduciary guarantee. However, as a new system, the online registration causes some difficulties for its users, including the notaries. The notaries should be really careful in performing the system since all responsibilities are in their hands. Control to the notaries is also low since the government put a very high level of trust to the notaries so that the possibility of the notaries to perform illegal action may happen. Notaries' responsibilities bring certain burden since criminal as well as civil pursuits can be the consequences that the notaries should face in doing online fiduciary registration.

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